IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

WILLIAM BOWEN	)	**CASE NO. CV 09 688770**
	)	
Plaintiff,	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs	)	
	)	
FARMERS INS. CO., *et al.*	)	**JOURNAL ENTRY**
	)	
Defendants.	)	

John P. O'Donnell, J.:

STATEMENT OF THE CASE

The plaintiff filed this lawsuit on March 31, 2009. A second amended complaint, which is the current operative pleading, was filed on January 8, 2010. The defendant's[1] subsequent motion to dismiss was granted in part on May 14, 2010, leaving only one cause of action: fraud. Because the second amended complaint claims that the fraud occurred no later than 1997 and the answer to the second amended complaint included the affirmative defense of statute of limitations, the court, by an entry on May 17, 2010, ordered discovery to proceed only on limited issues, including the statute of limitations defense, and gave the defendant leave to file a motion for summary judgment on that affirmative defense. The defendant filed a motion for summary judgment on February 16, 2011. The motion is now fully briefed and this entry follows.

[1] References in this entry to "the defendant" or "Farmers" are to Farmers Insurance of Columbus, Inc. only. There is no such entity known as Farmers Insurance Company.

STATEMENT OF THE FACTS[2]

Plaintiff William Bowen was a party to a contract of automobile insurance issued or renewed by defendant Farmers between October 5, 1994 and September 2, 1997. The insurance policy included uninsured motorist (UM) coverage. The policy listed more than one vehicle and included a separate UM premium for each vehicle.

Bowen's policy also had a coverage exclusion for "other owned vehicles." This contract provision purports to exclude UM coverage where it is sought for bodily injury sustained by a named insured while occupying a motor vehicle owned by the policyholder or a resident relative but not listed as an insured vehicle.

The other owned vehicle exclusion in the context of UM coverage was declared unenforceable by The Ohio Supreme Court on October 5, 1994, in its decision in *Martin v. Midwestern Group Ins.*, 70 Ohio St.3d 478 (1994). The court held, at syllabus 3:

> An automobile liability insurance policy provision which eliminates uninsured motorist coverage for persons insured thereunder who are injured while occupying a motor vehicle owned by an insured, but not specifically listed in the policy, violates R.C. 3937.18 and is therefore invalid.

To reach this holding, the court reasoned that the purpose of the UM statute is "to protect persons, not vehicles" so that language excluding a covered person because of an injury sustained in a vehicle for which a separate UM premium wasn't paid contravenes the intent of the legislature that UM coverage should follow people, not cars.

The practical effect of this ruling was to allow a named insured or his resident relative to access UM coverage for an occurrence in any owned vehicle if a UM premium was paid on

[2] The plaintiff has been unable in discovery to produce copies of the insurance policy, declarations pages, invoices or any other document containing the alleged misrepresentations. For that and other reasons, the defendant has suggested that summary judgment on the fraud claim itself is appropriate. (See the defendant's motion for summary judgment, pages 3 through 6, and footnote 2 on page 3.) However, since the motion under consideration is on the affirmative defense of statute of limitations, the court, while acknowledging Bowen's eventual obligation to prove his case, will assume that the plaintiff 's affirmative claim can survive summary judgment and will include some of the allegations in the second amended complaint as part of the statement of facts here.

just one of several owned vehicles. After the *Martin* decision, some insurers – including Farmers, according to Bowen's second amended complaint here – continued to charge and collect separate UM premiums on each owned vehicle despite the fact that a named insured and his resident relatives were eligible for UM coverage as to all vehicles if a premium was paid for only one. This practice – which Bowen alleges Farmers continued until September 3, 1997, when section 3937.18 of the Ohio Revised Code was amended to permit the other owned vehicle exclusion – generated a number of lawsuits against insurance carriers, including this case.

By his cause of action for fraud, Bowen claims that the Farmers "contract documents"[3] included a misrepresentation that the UM premium charged on each additional listed vehicle after the first "was for UM coverage for the named insured and resident relatives."[4] He claims that this was a misrepresentation because "coverage was not UM for the named insured and resident relatives, but was for guest coverage."[5] Alternatively, he alleged that Farmers misrepresented to him, contrary to the *Martin* holding, that he would have no UM coverage, even for himself and resident relatives, for accidents in a vehicle for which no separate premium was paid.

Because the other owned vehicle exclusion was, in essence, reinstated by statute on September 3, 1997, the claimed misrepresentations could not have been made after that date. R.C. 2305.09 provides that a claim for fraud must be brought within four years of the date the cause of action accrued. Bowen did not bring his claim until, at the earliest, almost 12 years after the last possible misrepresentation. He excuses this failure by testifying that he never

[3] Second amended complaint, ¶31.
[4] Id.
[5] Id.

discovered the insurance company's fraud until March, 2009, when his attorney described how he had been defrauded.[6]

LAW AND ANALYSIS

A statute of limitation is an affirmative defense. Rule 8(C) of the Ohio Rules of Civil Procedure. An affirmative defense is a proper subject of a Civil Rule 56 motion for summary judgment. *Petsch v. Hampton Inn*, 8th Dist. No. 95039, 2011-Ohio-838, ¶24. Summary judgment is appropriate only if, construing all of the evidence in favor of the party opposing summary judgment, reasonable minds "can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made." Civ. R. 56(C).

As mentioned above, R.C. 2305.09 provides a four-year statute of limitations for fraud. However, that period does not begin to run until the cause of action accrues, and under R.C. 2305.09(E) the cause of action does not accrue until the fraud is discovered. This statutory discovery rule has been judicially interpreted to mean actual discovery or when, through the exercise of reasonable diligence, a plaintiff should have discovered the complained of injury. *Marks v. KeyBank N.A.*, 8th Dist. No. 84691, 2005-Ohio-769, ¶24.

Since there is no question that Bowen did not actually discover the fraud until only about a month before the lawsuit was filed, the issue here is whether he should have discovered the fraud more than four years before first filing on March 31, 2009. When determining whether, through the exercise of reasonable diligence, a party should have discovered a case of fraud, the relevant inquiry is whether the facts known would lead a fair and prudent man, using ordinary care and thoughtfulness, to make further inquiry. *Id.*

[6] Plaintiff William Bowen's deposition, exhibit A to the motion for summary judgment, p. 36, l. 19-22, p. 66, l. 5-11, p. 67, l. 21-23, p. 69, l. 12-14, p. 87, l. 17-20, and p. 96, l. 17-20.

Farmers argues that summary judgment in its favor is justified because Bowen has produced no evidence that reasonable diligence could not have discovered the fraud before March 31, 2005.[7] In support of its position, Farmers notes that Bowen's claim is that his policy's terms were contrary to Ohio law and that a policy provision saying its terms would be modified where they conflict with Ohio law put him on notice to "inquire how the terms are altered by Ohio law."[8] This presupposes a level of sophistication and vigilance that simply does not exist in the personal insurance business, much less for commercial transactions generally. The defendant is suggesting that one sentence in the policy saying that "terms which conflict with Ohio laws are hereby amended to conform to such laws" created an obligation for Bowen to monitor common law and statutory changes to Ohio's body of insurance law, determine whether any of those changes were relevant to his contract with Farmers, and then raise an objection if Farmers didn't amend the policy to "conform to such laws." That argument twists the purpose of the provision, which is to ensure that none of its terms – whether they inure to the benefit of the policyholder or the company – are contrary to law. Here Farmers did not amend the policy to conform to *Martin* – they continued to charge a premium for named insured and resident relative UM coverage on the second and subsequent vehicles even after the Ohio Supreme Court held that a single premium on the first vehicle gave that coverage – and now says that Bowen should have known enough to complain about it, presumably within four years of the *Martin* decision. Farmers's proposition in this regard is not persuasive.

[7] Motion for summary judgment, p. 13: Plaintiff's ability to avoid summary judgment on limitations grounds depends upon his ability to establish . . . that he could not [discover the claim before March 31, 2005] with the exercise of reasonable diligence.
[8] Id., p. 17.

Farmers additionally argues that Bowen would have discovered his cause of action with due diligence because the *Martin* decision and subsequent lawsuits with claims just like his were widely publicized, and that other plaintiffs in his position discovered well before 2005 that they may have been wronged. But discovery has shown that Bowen was not aware of *Martin* or its significance, much less the prior lawsuits similar to his, and the "relevant inquiry is whether the *facts known* would lead a fair and prudent man, using ordinary care and thoughtfulness, to make further inquiry." *Marks*, supra. The evidence in this case is that the only things the plaintiff knew were that he bought insurance with an other owned vehicle exclusion for UM coverage and was charged, and paid, a premium for UM coverage on all listed vehicles. Although there were facts available to the public – the reporting about *Martin* and the other lawsuits – that might have put him on notice to inquire about whether he was being fraudulently charged extra premiums, there is no evidence that he knew those facts. As to whether he should have known to inquire, considering all of the publicity and that many other plaintiffs who brought lawsuits before his somehow found out about the frauds perpetrated on them, that is a question of fact to be decided by a jury. Even still, a jury that finds he should have known to inquire must then decide whether a reasonable inquiry would have revealed the fraud.

That leaves what seems to be the defendant's most deeply felt objection: that the limitations period cannot be tolled until Bowen's attorney informs him of the possibility that he was defrauded. In support of this argument Farmers cites to cases holding that discovery occurs when a plaintiff knows the facts, not when he discovers their legal significance.[9] These cases are worth comparing to Bowen's situation.

[9] See, generally, motion for summary judgment, p. 21-23.

Farmers uses *Lynch v. Dial Finance Co. of Ohio No. 1*, 101 Ohio App. 3d 742 (8th Dist. 1995) and *Conrad v. Fifth Third Bank*, 6th Dist. No. S-92-27, 1993 WL 235794 (June 30, 1993) for the proposition that "ignorance of the law does not toll the statute of limitations period" but that "ignorance of the facts may provide relief."[10] But the first quote, from *Lynch*, came in the context of a statutory claim (a violation of R.C. 1321.51 *et seq*) that had a one-year statute of limitations *to which the discovery rule did not apply*. As for *Conrad*, the plaintiffs there claimed a bank had converted their property. The plaintiffs knew of the alleged misappropriation of the property for many years and "had contacted numerous lawyers over the years but none would take their case." Thinking they had been wronged, but not being sure because they didn't know the law, the plaintiffs finally filed suit beyond four years from the date they knew of facts causing them to suspect the bank had wronged them. The court noted that "ignorance of the facts may provide relief" but that the Conrads were well aware of the facts and so could not rely on their ignorance of the legal significance of those facts to toll the statute of limitations. Unlike that case, there is no evidence that Bowen was ever aware of any facts that would lead him to believe he had been defrauded, thereby triggering a duty of inquiry as to whether a fraud or other legal wrong was perpetrated on him.

The defendant continues by noting that "constructive knowledge of the facts rather than actual knowledge of their legal significance is enough to start the statute of limitations running." That proposition of law is correct as far as it goes, but it applies in cases where the facts give a reason to think something is amiss. *Casey v. Casey*, 109 Ohio App. 3d 830 (8th Dist. 1996), involved a victim of sex abuse who knew about the abuse as early as 1988 but didn't file suit until 1993; in *Cicchini v. Streza*, 160 Ohio App. 3d 189, 2005-Ohio-1492 (5th Dist.), the plaintiff's claim that he did not discover alleged attorney malpractice until 2002 was

[10] Id., p. 21.

undercut by his deposition testimony that he knew of the malpractice as early as 2000; in *Palm Beach Co. v. Dun & Bradstreet*, 106 Ohio App. 3d 167 (1st Dist. 1995), the court relied on evidence that the plaintiff possessed in July 1989 an expert's report referring to potential fraud and wrongdoing by Dun & Bradstreet to defeat a claim that discovery didn't occur until a few months later when the expert submitted a second report to the plaintiff; and in *Norris v. Yamaha Motor Corp. USA*, 5th Dist. No. CA 2008 0096, 2009-Ohio-4158, the court found that the date the plaintiff was physically injured in a roll-over accident triggered the beginning of the statute of limitations period.

All of these cases involved plaintiffs who admitted to knowledge of something out of the ordinary that triggered a duty to inquire into the legal significance of the facts known to them. In other words, the "cognizable" or "noteworthy" event that raises a suspicion of wrongdoing. *Zimmie v. Calfee, Halter & Griswold*, 43 Ohio St. 3d 54, 58 (1989). The *Palm Beach Co.* court put it succinctly: the discovery rule requires facts sufficient to alert a reasonable person to the possibility of fraud. *Palm Beach Co.*, supra, at 171. Such facts have not been shown in this case.

Underlying the defendant's motion is the assertion that it is unjust for Farmers to have to defend a "stale claim" about "practices that ended over thirteen years ago."[11] Unexpressed, but implicit in the argument, is that if Bowen's claim can go forward then mid-'90s policyholders of every UM carrier will be recruited by plaintiffs' lawyers to bring even later claims. But that concern is undercut by two considerations. First, if the plaintiff's claim here is meritorious, then Farmers should not benefit by so successfully defrauding policyholders that they couldn't detect the wrongdoing other than by a chance discussion many years later with a lawyer. Second, the late filing of the claim presents obstacles to the plaintiff too. It is Bowen's

[11] Id., p. 12.

burden to prove the elements of his fraud claim and, if his deposition testimony that he has thrown out any documentary evidence he had is any guide, the passage of time might have obviated his ability to prove fraud. If that turns out to be the situation here, and again assuming the claim is meritorious, then Bowen's late filing will allow Farmers to escape liability for its fraud.

CONCLUSION

Because the plaintiff did not actually discover the claimed fraud more than four years before first filing this lawsuit and because there is a genuine question of material fact about whether he should have, in the exercise of reasonable diligence, discovered the claimed fraud more than four years before filing the lawsuit, the defendant's February 16, 2011 motion for summary judgment in its favor on the affirmative defense of statute of limitations is denied.

IT IS SO ORDERED:

_____ Date: _____
Judge John P. O'Donnell

SERVICE

A copy of this journal entry was sent by email, this _____ day of January, 2013, to the following:

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Judge John P. O'Donnell