COURT OF APPEALS
DECISION
DATED AND FILED

May 11, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. ***See*** **WIS. STAT. § 808.10 and RULE 809.62.**

Appeal No. 2006AP8-FT **Cir. Ct. No. 2005CV21**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

JERIJO BOWMAN AND HENRY CRANKSHAW,

PLAINTIFFS-APPELLANTS,

V.

FIRE INSURANCE EXCHANGE,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for La Crosse County: MICHAEL J. MULROY, Judge. *Affirmed*.

Before Dykman, Deininger and Higginbotham, JJ.

¶1 PER CURIAM. Jerijo Bowman and Henry Crankshaw appeal an order dismissing their complaint against Fire Insurance Exchange. Bowman and Crankshaw were victims of an act of vandalism that extensively damaged their property. They received reimbursement from Fire Insurance under a renters’

insurance policy. However, Bowman and Crankshaw claimed substantially more reimbursement than Fire Insurance was willing to pay, resulting in this action for breach of the insurance contract. The appeal results from the trial court's order dismissing the action on Fire Insurance's motion for summary judgment. We affirm.

¶2 The vandalism damage occurred on July 26, 2003. Shortly thereafter Bowman and Crankshaw retained counsel, who conducted negotiations with Craig Bell, a representative of Fire Insurance, for several months. In February 2004, by letter to Bell, counsel asked whether settlement was still a possibility, or if litigation was necessary to resolve the matter.

¶3 Three weeks later Bell responded that Fire Insurance would pay no more unless Bowman and Crankshaw allowed Bell to inspect the damaged property, adding that Bowman had previously refused to allow inspection. He noted that he looked forward to resolving the dispute, and asked counsel to call him.

¶4 The next communication of record is a letter from plaintiff's counsel to Bell in November 2004. After further negotiations, Fire Insurance made a small additional payment in January 2005. Bowman and Crankshaw then commenced this action.

¶5 WISCONSIN STAT. § 631.83(1)(a) provides a one-year statute of limitations for an action on a fire insurance policy. The party's insurance contract also contained a one-year limitation for commencing a court action. Fire Insurance brought its summary judgment motion on the basis of these statutory and policy limitations, under which the plaintiff's time to file their suit had expired eight months before they commenced it.

¶6 Bowman and Crankshaw responded to the summary judgment motion by contending that the facts gave them an estoppel defense to the policy deadline. The issue on appeal is whether the trial court should have either estopped Fire Insurance from invoking the one-year limitation, or concluded that the estoppel defense was a subject of material factual disputes.

¶7 On review of a summary judgment we apply the same method as the trial court. ***Leverence v. United States Fid. & Guaranty***, 158 Wis. 2d 64, 73, 462 N.W.2d 218 (Ct. App. 1990). If, as here, the material facts are not in dispute, and if competing inferences cannot be drawn from those facts, summary judgment is appropriate. *See* ***id.***

¶8 The test of whether a party should be estopped from asserting the statute of limitations is whether the conduct and representations of the party against whom estoppel is sought were so unfair and misleading as to overcome the public's interest in setting a limitation on bringing actions. ***Johnson v. Johnson***, 179 Wis. 2d 574, 582, 508 N.W.2d 19 (Ct. App. 1993). Additionally, equitable estoppel requires a showing that the party asserting the statute of limitations engaged in fraud or inequitable conduct, and that the aggrieved party failed to commence a timely action because it relied on the wrongful conduct. ***Id.***

¶9 The evidence on summary judgment contains no facts, nor allows any inferences, that would support an estoppel defense to the one-year limitation. Bell's letter of March 2004 informed Bowman and Crankshaw that Fire Insurance was not going to pay more on their claim without access to the allegedly damaged property. The record shows no response to that letter until November 2004, well after the one-year limitation passed. Nothing of record allows an inference that Fire Insurance made unfair or misleading representations in the March letter or

any prior communication, or that it engaged in fraud or other wrongful conduct. Nor does evidence of record show any representations that Bowman and Crankshaw could have reasonably relied on to delay bringing their suit. Without such evidence, there is no case for estoppel.

¶10 Bowman and Crankshaw's proofs include their counsel's averment that "negotiations and attempts to settle the above matters continued throughout 2004." They contend that this statement creates an inference that negotiations continued between the parties between March 2004 and July 2004, which in turn would allow an inference that Fire Insurance did, in fact, induce their delay in filing suit. However, counsel's statement is not sufficient to create a material dispute of fact. Evidence submitted on summary judgment must set forth specific facts. WIS. STAT. § 802.08(3). Mere conclusory assertions are not enough. *See* ***ECT Int'l, Inc. v. Zwerlein***, 228 Wis. 2d 343, 349, 597 N.W.2d 479 (Ct. App. 1999). Counsel's statement was conclusory and non-specific. It does not constitute evidence that negotiations occurred between March 2004 and the July 2004 filing deadline.

¶11 Bowman and Crankshaw also contend that public policy requires an action on the merits of their claim. They cite no authority for the proposition that public policy should bar enforcement of a statute of limitations. We deem the issue waived, in any event, because Bowman and Crankshaw did not raise it in the trial court. *See* ***Evjen v. Evjen***, 171 Wis. 2d 677, 688, 492 N.W.2d 361 (Ct. App. 1992) (we generally do not review an issue raised for the first time on appeal).

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.