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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

CHRIS PELONIS et al., Plaintiffs and Appellants, v. AMERICAN GENERAL LIFE INSURANCE COMPANY, Defendant and Respondent.	B237098 (Los Angeles County Super. Ct. No. VC054979)

APPEAL from judgment of the Superior Court of Los Angeles County, Yvonne T. Sanchez, Judge. Affirmed.

Yale & Baumgarten, David W. Baumgarten, for Plaintiffs and Appellants.

Wilson, Elser, Moskowitz, Edelman & Dicker, Michael K. Brisbin and Dennis J. Rhodes, for Defendants and Respondents.

Chris Pelonis and his daughter, Debra Berry, appeal from a summary judgment in favor of respondent American General Life Insurance Company (American). Pelonis bought what he thought was a "vanishing premium" life insurance policy. He believed no premium payments would be due after the policy's seventh year. This lawsuit was brought after premiums on the policy had been paid for 11 years. The trial court found it was time barred.

We conclude that all causes of action accrued at the latest in 2005, when American demanded payment past the seventh year. Appellants cannot rely on the delayed discovery rule because they were not entirely blameless. Assuming the continuing accrual rule may save their breach of contract claim as to premiums paid within four years of filing the complaint, the breach of contract claim is not viable because American is not bound by the vanishing premium term its agent promised Pelonis.

The judgment is affirmed.

FACTUAL AND PROCEDURAL SUMMARY

American's motion for summary judgment was based on the policy issued to Pelonis on January 1, 1998. At the time, he was 76 years old. The first page of the policy, typed in capital letters, included a table of contents and a statement that read in part: "FLEXIBLE PREMIUM ADJUSTIBLE LIFE INSURANCE POLICY WITH FLEXIBLE DEATH BENEFIT AND CASH VALUE CASH VALUE, IF ANY, PAYABLE ON MATURITY DATE . . . PREMIUMS PAYABLE FOR LIFE OF INSURED UNTIL MATURITY DATE DEATH BENEFIT PAYABLE AT DEATH OF INSURED PRIOR TO MATURITY DATE." The statement was repeated verbatim on the policy's last page. The second page of the policy indicated a planned quarterly premium of $8,500 and a maturity date on January 1, 2022. The policy could be returned

within 30 days of receipt.[1] In February 1998, Pelonis transferred ownership of the policy to his children and named them as beneficiaries.

In opposition to American's motion, appellants presented the following evidence:[2] William H. Tuft was a general agent for American. In 1997, he solicited Pelonis to buy a life insurance policy. Pelonis declined to purchase the products Tuft originally offered. On January 17, 1998, Pelonis's accountant, Gerald Block, received a fax from Tuft, stating: "Original proposal 9/16/97. Issued as proposed. . . . [¶] Premium will be reduced in future depending on proceeds from 1035 Exchange. . . . [¶] At our Wednesday, January 21 4 pm meeting, I will have original forms for 1035 Exchange as well as ownership and beneficiary papers."

On January 22, 1998, Block received another fax from Tuft that stated: "As a result of our meeting yesterday . . . , it was decided to pay a quarterly premium of $8,500 instead of the billed $7,731.93. . . . [¶] Premium payments will start immediately. . . . For the next 26 premiums (6 ½ years), you will send [American] $8,500. They will continue notices of $7,731.93. [¶] At the conclusion of seven complete years, you will cease premium payments and will utilize your cash value without making a loan against the policy. The death benefit will remain $500,000."

Tuft provided Pelonis and Block with a letter from Michael R. Lorz, Assistant Vice President for Marketing. The letter, dated January 21, 1998, advised Tuft that should Pelonis "wish to increase the annual premium from approximately $28,000 to $34,000 additional net cash value will be created. This available value can be used to pay the policy's 'costs' at any time. A key advantage of Universal Life is this flexibility. There would be no need to effect a policy loan."

In 2001, Tuft sent an update, which said in part: "When Gerald Block, you, and I met to purchase your policy in late 1997, it gives me great satisfaction to report that

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[1] It is unclear when the policy was received, but whether it was received was not disputed below.

[2] American's objections to this evidence and the court's ruling on the objections are discussed below.

you're on target to achieving all objectives outlined on my original proposal." In 2003, Tuft sent another update that stated in part: "The plan is to pay premiums of $8,500 per quarter for the next two years. At that time you would discontinue paying premiums and utilize your cash value without making a loan against the policy."

By 2005, Berry had taken over the payment of her father's bills, including the premiums on the policy. American continued to send quarterly premium notices past the policy's seventh year. Berry, unaware of the representations made by Tuft, continued to make premium payments.

In 2009, American sent a premium notice for $10,328.75. Berry talked to Pelonis, who told her that premium payments should have stopped in 2005. She also reviewed her father's files and talked to Block about the arrangement with Tuft. American next notified Berry of an increase in the quarterly cost of insurance, advising her that premium payments must cover that increase to keep the policy alive. Berry paid subsequent premiums under protest.

In November 2009, appellants sued American for breach of insurance contract, bad faith, conversion, claim and delivery, declaratory relief, reformation, fraud in the inducement, negligent representation, and rescission based on fraud and mistake.[3]

In 2011, American filed a motion for summary judgment, or in the alternative summary adjudication, on the ground that all claims were time barred. Additionally, it challenged the conversion claim on the merits because American collected payments according to the policy's express terms. Its challenge to the negligent misrepresentation claim was based on its argument that Tuft's promises referred to future events, and appellants could not justifiably rely on them in light of the policy's express terms.

American also objected to parts of the declarations of Pelonis, Block, and Berry, and to several exhibits. The court sustained some of these objections, overruled others, and granted the motion. It ruled that all causes of action were time barred and made several additional rulings: appellants had a duty to read the policy; Tuft's representations

[3] Appellants represent they dismissed Tuft from the lawsuit after learning he was deceased.

could not have been an inducement to buy the policy as all appellants' exhibits were dated after the policy issued; any representation by Tuft was not binding on American since the policy states that it could not be changed except in writing by an authorized officer; and Berry could not have relied on Tuft's representations since she was unaware of them.

This timely appeal followed the entry of judgment for American.

DISCUSSION

I

A motion for summary judgment "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) A moving defendant meets its burden by showing that an essential element of a cause of action cannot be established, or by establishing a complete defense to the cause of action. (*Id*., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 849.) The burden then shifts to the plaintiff to show that a triable issue of material fact exists as to the cause of action or defense. (*Ibid*.; Code Civ. Proc., § 437c, subd. (p)(2).)

We independently review the trial court's decision on a summary judgment motion, viewing the evidence in the light most favorable to the nonmoving party. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) We consider all evidence the parties offered in connection with the motion, except that which the court properly excluded. (Code Civ. Proc., § 437c, subd. (c); *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.)

The weight of authority is that the trial court's evidentiary rulings on summary judgment are reviewed for abuse of discretion. (*Kincaid v. Kincaid* (2011) 197 Cal.App.4th 75, 82–83.) But a trial court abuses its discretion when it rests its decision on an error of law. (See *Shuts v. Covenant Holdco LLC* (2012) 208 Cal.App.4th 609, 617.)

II

The trial court sustained seven of American's evidentiary objections. We find that it did so in error.

One objection was to the portion of Block's declaration which recounted Tuft's proposal that Pelonis pay premiums for only seven years. The objection was on the grounds of lack of foundation and hearsay. The statement was based on Block's personal knowledge since he attended the meeting where the statement was made. American does not argue otherwise. As to the hearsay objection, it is inconsistent with American's own characterization of this statement as a "promise." In that sense, it is an operative fact and therefore not hearsay. Operative facts are words offered as original evidence, such as words forming an agreement or giving rise to a cause of action for deceit. (*Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 316.) Tuft's statement is an operative fact for appellants' breach of contract, fraud, and misrepresentation claims. The court erred in sustaining this objection.

Appellants also objected to the 1998 letters by Tuft, attached to Block's declaration, on grounds of hearsay and lack of authentication. Block authenticated the letters as faxes he received from Tuft. The handwritten letters are on American office stationery that bears Tuft's printed name. One letter predates the January 21 meeting that Tuft and Block both attended and the other follows it. Both reference the meeting. Block saw Tuft's letter, which referred to the future meeting. Tuft then attended the meeting. Block thus had sufficient personal knowledge to authenticate Tuft's handwriting. (See Evid. Code, § 1416, subd. (b) [witness has personal knowledge of writer's handwriting and may state opinion about it "[h]aving seen a writing purporting to be in the handwriting of the supposed writer and upon which the supposed writer has acted"].)

To the extent the letters contain promises and opinions by Tuft, upon which appellants rely to establish operative facts or the effect on Pelonis's decision to retain the policy, they too are not hearsay. (See *Jazayeri v. Mao, supra,* 174 Cal.App.4th at p. 316; *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 591–592.) The trial court erred in sustaining American's blanket objections to these letters.

Tuft's 2001 letter referred to a meeting about the policy in late 2007 and expressed his "satisfaction" that Pelonis was "on target to achieving all objectives outlined on [Tuft's] original proposal." The reference to this letter in Block's declaration is as follows: "At that time, Mr. Tuft indicated that the original deal which was struck in late 1997 was in force as described in his previous letter." Appellants objected on grounds of hearsay, relevance, and lack of authentication. We have addressed the issue of authentication. The letter is relevant only to Pelonis's state of mind as a result of Tuft's continued assurances, and as such is not hearsay. The court erred in sustaining American's blanket objections to this evidence as well.

In his declaration, Pelonis stated: "[M]y understanding from speaking to Mr. Tuft was that he had obtained approval for the proposal he had made to us from the Vice-President of Marketing at American General, Michael Lorz." American objected to this statement as speculative, lacking foundation, and hearsay. It also objected to Lorz's letter, referenced and appended to Pelonis's declaration, on grounds of hearsay, lack of foundation, and lack of authentication.

As worded, Pelonis's statement can be used only to establish his own belief regarding any approval Tuft obtained from Lorz. Pelonis does not recount what Tuft actually said, and later in the declaration, he maintains that Lorz's letter confirmed the terms of Tuft's proposal. Thus, appellants seek to use Lorz's letter to raise an issue of material fact as to whether Tuft's vanishing premium proposal was approved by American.

The references in Lorz's letter to Pelonis's rights under the policy are operative facts and not hearsay. (*Jazayeri v. Mao, supra,* 174 Cal.App.4th at p. 316.) The letter states it is a response to a request by Tuft regarding Pelonis's policy. The cover sheet lists Tuft's fax number and Lorz's extension. Thus, Tuft was qualified to authenticate it. (See *id*.; see also Evid. Code, § 1420 ["writing may be authenticated by evidence that the writing was received in response to a communication sent to the person who is claimed by the proponent of the evidence to be the author of the writing"].) Any statement Tuft made to Pelonis and Block regarding the authenticity of this letter is a party admission

since Tuft was American's general agent and was authorized to speak about a letter he received from a company officer. (See Evid. Code, § 1222.)

The court erred in sustaining American's objections to Lorz's letter. Whether the letter raises a triable issue of material fact is a separate question we discuss below.

III

The trial court ruled that appellants' claims accrued at the latest in 2005 and were barred by the applicable statutes of limitations. Summary resolution of the statute of limitations issue is proper where the uncontradicted facts are susceptible of only one legitimate inference. (*Romano v. Rockwell Internat., Inc*. (1996) 14 Cal.4th 479, 487.)

Generally, a cause of action accrues for purposes of the statute of limitations when the plaintiff has suffered damages from a wrongful act. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397.) The discovery rule "delays accrual until the plaintiff has, or should have, inquiry notice of the cause of action. The discovery rule does not encourage dilatory tactics because plaintiffs are charged with presumptive knowledge of an injury if they have ""'information of circumstances to put [them] on inquiry'"" or if they have ""'the opportunity to obtain knowledge from sources open to [their] investigation.'"" [Citations.]" (*Fox v. Ethicon Endo–Surgery, Inc.* (2005) 35 Cal.4th 797, 807–808, italics and fn. omitted.) Appellants must show they were not at fault for failing to discover their causes of action and had no actual or presumptive knowledge of facts sufficient to put them on inquiry. (*Snyder v. Boy Scouts of America, Inc.* (1988) 205 Cal.App.3d 1318, 1323, superseded by statute on other grounds as recognized in *Tietge v. Western Province of the Servites, Inc.* (1997) 55 Cal.App.4th 382, 385.)

A. Accrual

In *Broberg v. The Guardian Life Ins. Co. of America* (2009) 171 Cal.App.4th 912 (*Broberg*), a vanishing premium case, the court rejected the argument that the terms of the policy itself gave notice as a matter of law. (*Id*. at pp. 921–923.) The court explained that to be enforceable, insurance policy disclaimers must be "'conspicuous, plain and clear.'" (*Id*. at p. 922.) They must be placed and printed so as to attract the reader's

attention. (*Ibid*.; see also Cal. U. Com. Code § 1201.) The terms of the policy which American identifies as inconsistent with Tuft's proposal are all undifferentiated, untitled, unpunctuated statements in all caps. They do not give notice as a matter of law.

Appellants contend their causes of action accrued only in 2009, when American advised that the policy would lapse if they did not make the increased premium payments. For the first time on appeal, they argue the policy was an investment device and their payments after the seventh year were investments rather than actual monetary losses. This argument is contrary to appellants' allegation that they made payments after 2004 in the mistaken belief that such payments were due under the policy.

In *Gaidon v. Guardian Life Ins. Co. of Am*. (2001) 96 N.Y.2d 201, 211, on which appellants rely, the plaintiffs in another vanishing premium case were held to have sustained injuries "when they were first called upon to pay additional premiums beyond the date by which they were led to believe that policy dividends would be sufficient to cover all premium costs." Tuft's proposal in this case did not reference dividends or premium costs. What he promised was that, after the seventh year, Pelonis would be able to use his cash value without making any additional premium payments or making a loan against the policy. The first premium demand American made in 2005 contradicted this promise, causing appellants an actual monetary loss in the amount of the premium they paid. Their causes of action accrued then.

B. Delayed Discovery

American argues, and we agree, that agency law governs appellants' relationship with respect to bills Berry paid on Pelonis's behalf. Under Civil Code section 2332, "[a]s against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other." We do not agree that a jury should decide whether Pelonis remembered that premiums were to vanish in 2005. Except for his age, appellants have offered no evidence about Pelonis's physical health or mental abilities. His own declaration states that, in 2009, Pelonis knew that premiums on the policy should have ceased in 2005 and had no problem communicating his knowledge to Berry. It is

unreasonable to conclude that he lacked this knowledge in earlier years, especially since Tuft's 2003 letter reminded him that premiums would cease in 2005.

As his agent, Berry had a duty to keep Pelonis informed about what bills she paid on his behalf. (Civ. Code, § 2020 ["agent must use ordinary diligence to keep his principal informed of his acts in the course of the agency"].) Pelonis can be charged with constructive knowledge of Berry's continued payment of insurance premiums after 2004. Thus, by 2005 he knew all facts necessary to his causes of action.

Appellants point out that Pelonis's knowledge of the premiums' vanishing point cannot be imputed to Berry since Civil Code section 2332 applies only against the principal. (See *Godwin v. City of Bellflower* (1992) 5 Cal.App.4th 1625, 1631 ["no principle in the law of agency to support a holding that an agent must be charged with knowledge of facts given to a principal business entity"].) Berry's interest in this case is derivative of Pelonis's since, as the trial court correctly ruled and as appellants concede, Pelonis was the only person who relied on Tuft's promise. Thus, Berry cannot proceed on claims barred as to Pelonis. Additionally, Berry's declaration establishes she easily could have obtained knowledge about the policy from Pelonis's accountant and his files. She could have done so when she assumed the responsibility for paying premiums on his behalf.

We conclude that the delayed discovery rule has no application under these circumstances.

C. Continuing Accrual

1. Statute of Limitations

Appellants alternatively argue that they may proceed with their breach of contract claim under the continuing accrual rule to recover premiums paid within four years of filing the complaint. (See Code Civ. Proc., § 337, subd. (1) [action on written contract subject to four-year statute of limitations].)

The continuing accrual rule has been applied to installment or other periodic-payment contracts. (*See* cases cited in *Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co.* (2004) 116 Cal.App.4th 1375, 1388 (*Armstrong*).) In that context, it allows

successive actions to collect unpaid installments on the ground that they are severable, separately arising obligations. (See, e.g., *Tsemetzin v. Coast Federal Savings & Loan Assn.* (1997) 57 Cal.App.4th 1334, 1344 [action to collect unpaid rent] (*Tsemetzin*).)

In *Armstrong*, the court explained that, in contract cases, the continuing accrual rule is an application of the doctrine of severability. (*Armstrong*, *supra*, 116 Cal.App.4th at pp. 1388–1389 [‘“Where a contract is divisible . . . , breaches of its severable parts give rise to separate causes of action”’].) The court acknowledged that periodic payments alone do not determine whether a contract is divisible, and it looked at the parties’ intent, their subsequent conduct, and the nature of the contract. (*Id*. at p. 1389.)

American argues that appellants have presented no evidence that the insurance policy in this case is severable. Indeed, “[t]he great weight of authority holds that a contract of life insurance is a single, indivisible agreement of the company for the agreed period of time, subject to ‘lapse’ by the occurrence of the condition subsequent, the insured’s failure to pay a premium when due.” (16 Williston on Contracts (4th ed. 2000) § 49:72, pp. 549–550, fns. omitted.) Appellants analogize periodic premium payments to periodic rental payments, citing *Tsemetzin*, *supra*, 57 Cal.App.4th 1334. This analogy is flawed. It does not account for the nature of the life insurance contract or the fact this is not an action to collect unpaid installments.

According to Witkin, “[o]ne method of avoiding the harsh general rule of accrual on breach . . . is to construe a promise as continuing, so that each failure to perform results in a new breach, giving rise to a new cause of action.” (3 Witkin, Cal. Proc. (5th ed. 2008) Actions, § 522, p. 667, citing, e.g., *McGrath v. Butte* (1939) 30 Cal.App.2d 734, 736 [county’s contractual obligation to levy tax to pay for lands it purchased at delinquent sale for nonpayment of assessments on public bonds].) A similar continuing right or obligation has been recognized in cases where successive causes of action accrue to enforce it. (3 Witkin, Cal. Proc. 5th (2008) Actions, § 669, p. 886, citing, e.g., *Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 821 [action to stop collection of illegal city utility tax].)

Assuming that American's continued collection of premium payments may be characterized as a repeated breach of its continuing promise to stop collecting premiums after the policy's seventh year, appellants have not raised an issue of material fact that Tuft's promise of a vanishing premium bound American in contract. American's summary judgment motion did not challenge the breach of contract claim on this ground, but the trial court ruled that American was not bound by Tuft's promise. Since the parties have briefed the issue on appeal, we will consider it.

2. The Breach of Contract Claim

The integration and modification clauses of the policy state: "This policy, including any riders and endorsements, the original application, and any supplemental applications and declarations, is the entire contract. . . . [¶] This policy may not be changed, nor may any of our rights or requirements be waived, except in writing by one of our authorized officers." American argues that this language precludes appellants from arguing that Tuft's promise of a vanishing premium was binding as to American. We agree.

Appellants rely on a line of cases holding an agent negligent in failing to obtain agreed-upon coverage, and the insurer vicariously liable for the agent's negligence. (See, e.g., *Butcher v. Truck Ins. Exchange* (2000) 77 Cal.App.4th 1442, 1461–1463 and cases cited in that case.) But appellant's case does not involve an agent's failure to obtain requested coverage, and, as we explained above, appellants' negligent representation claim itself, along with their other claims, is time barred. The only question is whether appellants may proceed as to premiums paid within the four-year statutory period for breach of a written contract.

Appellants have presented no evidence that Tuft was an officer of American. In light of the integration and authorized officer modification clauses, Tuft's misrepresentations of the policy terms, without more, cannot establish that American authorized or ratified these misrepresentations. (See *Everett v. State Farm General Ins. Co.* (2008) 162 Cal.App.4th 649, 662–663.)

Lorz's letter does not create an issue of material fact regarding an officer-authorized modification. The subject of his letter is the proposed increase in premium, not the vanishing of the premium. All the letter says is that cash value can be used to cover costs at any time without making a policy loan. It says nothing about premiums ceasing at any time. The policy included in the record on appeal contains the increased premium amount referenced in Lorz's letter. That this increase found its way into the policy undercuts the argument that other modifications, not reflected in the policy, also were authorized by Lorz.

Lorz's letter does not authorize Tuft to promise a vanishing premium, and it does not evidence American's knowledge that Tuft made such a promise. Thus, there also is no issue of material fact that Lorz's letter conferred on Tuft actual or ostensible authority to modify the policy. (Cf. *Preis v. American Indemnity Co.* (1990) 220 Cal.App.3d 752, 761 [insurer who intentionally or negligently confers ostensible authority on agent to modify policy is bound by agent's acts].)

We conclude that appellants' causes of action are precluded for two reasons: first, they are time barred; second, even were the breach of contract claim partially saved by the continuing accrual rule, appellants cannot establish that American is liable on the policy in light of its integration and modification clauses.

DISPOSITION

The judgment is affirmed. American is entitled to its costs on appeal.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.