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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

JANICE SAMS CESPEDES, Plaintiff and Appellant, v. METROPOLITAN LIFE INSURANCE COMPANY et al., Defendants and Respondents.	B234461 (Los Angeles County Super. Ct. No. BC412536)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Yvette M. Palazuelos, Judge. Affirmed.

Shernoff Bidart Echeverria Bentley, Michael J. Bidart, Richard Echeverria, and Steven Schuetze for Plaintiff and Appellant.

Sedgwick LLP, Curtis D. Parvin, and Douglas J. Collodel for Defendant and Respondent.

INTRODUCTION

Plaintiff and appellant Janice Cespedes (plaintiff) appeals from a judgment entered against her following the granting of defendant and respondent Metropolitan Life Insurance Company's (MetLife) motion for summary judgment. According to plaintiff, the trial court erred when it ruled as a matter of law that her claims against MetLife were barred by the one-year statute of limitations set forth in Code of Civil Procedure section 340, subdivision (c) (section 340(c)). Plaintiff contends that she raised triable issues of fact concerning the accrual of the period of limitations and whether MetLife was estopped from asserting the section 340(c) limitations period. She also contends for the first time on appeal that section 340(c) is not applicable to her claims in any event because that section, by its terms, applies only to depositor claims against banks, not insurance companies like MetLife.

We hold that plaintiff failed to demonstrate that there was a triable issue of fact as to the accrual of the period of limitations or on her estoppel claim, and that she forfeited on appeal her contention that section 340(c) did not apply to her claims as they were asserted against an insurance company instead of a bank. We therefore affirm the judgment.

FACTUAL BACKGROUND

Plaintiff was the sole beneficiary of her husband's life insurance policy with MetLife. On March 28, 2007, following the death of her husband, plaintiff made a claim for the benefits of her husband's life insurance policy. In April 2007, pursuant to plaintiff's election, MetLife paid the policy benefits of $337,000 into a MetLife Total

Control Account (Total Control Account) opened in plaintiff's name. MetLife contracted with PNC Bank[1] to process checks drawn on the Total Control Account.

Plaintiff provided all of her Total Control Account documentation to her financial planner. Plaintiff regularly received monthly account statements for her Total Control Account, including monthly statements for the two forged checks at issue in this action. Plaintiff did not review the monthly statements, but instead provided them directly to her financial planner in their sealed envelopes. The first time plaintiff looked at the monthly account statements for the Total Control Account was in February 2008.

On May 4, 2007, a check bearing plaintiff's purported signature forged by plaintiff's financial planner in the amount of $237,000 was cashed against the Total Control Account. On July 18, 2007, a second check similarly forged by plaintiff's financial planner in the amount of $5,000 was cashed against the Total Control Account. Plaintiff did not receive any of the proceeds from the two forged checks.

Plaintiff did not discover the check forgeries until February 19, 2008. On March 3, 2008, the forgeries were reported to MetLife, and a fraud incident report was taken. In an August 11, 2008, letter, plaintiff asked MetLife to reimburse her for the unauthorized distributions from the Total Control Account. MetLife rejected plaintiff's demand for the return of unauthorized payments in a letter dated August 28, 2008. MetLife's August 28, 2008, letter stated, inter alia, that plaintiff's claim for reimbursement was covered by ERISA, that under ERISA plaintiff had 60 days from the date of the letter to appeal MetLife's decision, and that, in the event plaintiff's appeal was denied, she had a right to bring a civil action under ERISA.

PROCEDURAL BACKGROUND

Plaintiff filed her original complaint against MetLife on April 24, 2009, asserting against MetLife causes of action for breach of the implied covenant of good faith and fair

[1] In a related appeal, plaintiff challenges the trial court's dismissal of her claims against PNC Bank following the sustaining of a demurrer without leave to amend.

dealing, breach of contract, negligence, and violation of Commercial Code section 4401.[2] MetLife filed a motion for summary judgment or, in the alternative, summary adjudication, on the ground, inter alia, that each of plaintiff's causes of action against MetLife was barred by the one-year statute of limitations set forth in section 340(c). Plaintiff opposed the motion, arguing, inter alia, that plaintiff's claims against MetLife accrued within the one-year time period set forth in section 340(c) and that MetLife was estopped to assert otherwise. As discussed below, however, plaintiff's opposition did not assert that section 340(c) was inapplicable to her claims or that some other period of limitations applied.

After hearing oral argument on the motion, the trial court issued an order granting it and entering judgment in favor of MetLife. Plaintiff timely appealed from the judgment.

DISCUSSION

A. Standard of Review

"A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports. (*Artiglio v. Corning Inc*. (1998) 18 Cal.4th 604, 612 [76 Cal.Rptr.2d 479, 957 P.2d 1313].) In the trial court, once a moving defendant has 'shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established,' the burden shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff ' may not rely upon the mere allegations or denials of its pleadings . . . but, instead, shall set forth the specific facts showing that a triable issue of

[2] The complaint asserted fraud and conversion claims against plaintiff's financial planner only in the fifth and sixth causes of action.

material fact exists as to that cause of action . . . .' Code Civ. Proc., § 437c, subd. (*o*)(2); see *Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 854-855 [107 Cal.Rptr.2d 841, 24 P.3d 493].)" (*Merrill v. Navegar, Inc*. (2001) 26 Cal.4th 465, 476-477.)

B. Analysis

1. Accrual Under Section 340(c)

Plaintiff contends that based on MetLife's representations about ERISA, the one-year limitations period in section 340(c) did not accrue until MetLife denied her demand for reimbursement in August 2008. Because she filed suit within a year of that denial, plaintiff maintains that her claims are not time-barred.

"Enacted in 1905, section 340(c) (formerly section 340(3)) imposes a one-year statute of limitations on certain actions, including actions '"by a depositor against a bank for the payment of a forged or raised check."' (*Roy Supply, Inc. v. Wells Fargo Bank* (1995) 39 Cal.App.4th 1051, 1065 [46 Cal.Rptr.2d 309] (*Roy*), quoting Stats. 1905, ch. 258, § 2, pp. 231-232.) In 1929, the Legislature amended the statute to include actions by a depositor against a bank for the payment of checks bearing '". . . a forged or unauthorized indorsement."' (*Roy, supra*, 39 Cal.App.4th at p. 1065, quoting Stats. 1929, ch. 518, § 1, p. 896.) The one-year limitations period applies independently with respect to each forged check and *begins to run when the charge is reported to the depositor in a regular monthly account statement*. (*Roy*, *supra*, 39 Cal.App.4th at p. 1074.)" (*Chatsky & Associates v. Superior Court* (2004) 117 Cal.App.4th 873, 877, italics added.)

Section 340(c) bars recovery regardless of whether the bank is negligent, and it cannot be defeated by artfully framing the pleadings. (*Roy*, *supra*, 39 Cal.App.4th at p. 1065, citing *Union Tool Co. v. Farmers etc. Nat. Bk.* (1923) 192 Cal. 40, 50-52.) Thus, it is the gravamen of the cause of action, not the form of action or relief demanded, that

determines which claims are subject to the limitations period in section 340(c). (*See Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 22-23.)

Each of plaintiff's causes of action is predicated on PNC Bank's processing and clearing of the two check's forged by plaintiff's financial planner. Therefore, notwithstanding the titles of those claims against MetLife, they each appear to be based on alleged wrongful conduct by PNC, a bank, in connection with the two forged checks, conduct for which plaintiff seeks to hold MetLife liable.[3] As such, the "gravamen" of each of plaintiff's claims falls within the language of section 340(c), so that each of those claims is subject to the 12-month limitations period in section 340(c).

Based on the foregoing authorities, we conclude that the section 340(c) 12-month limitations period began to run from the date plaintiff first received the monthly statements for the Total Control Account showing the payment on the two forged checks. In doing so, and as discussed in detail below, we reject plaintiff's assertion that MetLife was estopped from claiming an accrual date earlier than the date MetLife denied plaintiff's request for reimbursement of the amount of the forged checks.

Because plaintiff admitted that she regularly received monthly account statements for her Total Control Account, including the monthly statements for the two forged checks in issue, the 12-month time limitation began to run from the respective dates of the two monthly statements. The first forged check was cashed on May 3, 2007, and the second was cashed on July 17, 2007. Therefore, the limitations period began to run on the claim involving the first check when she received her account statement in June 2007 and on the claim involving the second check when she received her account statement in August 2007. Accordingly, the respective 12-month time periods expired in June 2008 and August 2008, respectively, unless, as the trial court found, that period was equitably tolled.

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[3] As discussed below, plaintiff did not contend in the trial court that MetLife, as an insurance company, was not subject to section 340(c). To the contrary, she seemed to concede that section 340(c) governed her claims, but argued that she timely filed suit under that section.

2. Equitable Tolling

Based on the evidence concerning MetLife's investigation of plaintiff's request for reimbursement, the trial court concluded that there was a triable issue of fact concerning whether the section 340(c) statute of limitations was tolled while that investigation was pending, i.e., from March 3, 2008, to August 28, 2008. Nevertheless, because plaintiff did not file suit until April 24, 2009, the trial court concluded that plaintiff's claims were time-barred under section 340(c).

Assuming without deciding that the trial court was correct that the section 340(c) statute of limitations was equitably tolled during MetLife's investigation, we agree with the trial court that the statute nevertheless ran prior to the filing of plaintiff's complaint. As discussed, the statute would have run as to the first check in June 2008 and as to the second check in August 2008. Assuming that the statute was tolled for a period of six months during MetLife's investigation—March 3, 2008, through August 28, 2008—that six-month period would be tacked onto the end of the 12-month limitations period. (See *Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 370-371 (*Lantzy*) ["the effect of equitable tolling is that the limitations period *stops running* during the tolling event, and begins to run again only when the tolling event has concluded. As a consequence, the tolled interval, no matter when it took place, is tacked onto the end of the limitations period, thus extending the deadline for suit by the entire length of time during which the tolling event previously occurred"].) Six months from June 2008 would extend the statute through December 2008 and six months from August 2008 would extend the statute through February 2009. Because plaintiff did not file her complaint until April 24, 2009, the trial court correctly concluded that her claims were time-barred as a matter of law.

3. Equitable Estoppel[4]

Plaintiff argues that even if her claims accrued on the dates she received the respective monthly statements showing the payment of the two forged checks, MetLife is equitably estopped from asserting the statute of limitations due to MetLife's misrepresentations about (i) plaintiff's claims being governed by ERISA; (ii) plaintiff having 60 days to appeal MetLife's decision under ERISA; and (iii) plaintiff being required to file a civil lawsuit under ERISA. According to plaintiff, those misrepresentations suggested to plaintiff that her claim would be governed by ERISA and would not accrue until her appeal was denied by MetLife.

In making her estoppel argument, plaintiff invokes "the venerable principle that '"[o]ne cannot justly or equitably lull his adversary into a false sense of security, and thereby cause his adversary to subject his claim to the bar of the statute of limitations, and then be permitted to plead the very delay caused by his course of conduct as a defense to the action when brought."' (*Carruth v. Fritch* (1950) 36 Cal.2d 426, 433 [224 P.2d 702], quoting *Howard v. West Jersey & S. S. R. Co.* (N.J. Ch. 1928) 102 N.J. Eq. 517 [141 A. 755, 757-758].)" (*Lantzy, supra,* 31 Cal.4th at p. 383.) "Our decision in *Lantzy*[, *supra*,] 31 Cal.4th 363 . . . provides guidance. There, we explained, '"'Equitable estoppel . . . comes into play only after the limitations period has run and addresses . . . the circumstances in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit within the applicable limitations period. [Equitable estoppel] is wholly independent of the limitations period itself and takes its life . . . from the equitable principle that no man [may] profit from his own wrongdoing in

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[4] Plaintiff's opening brief contains a point heading that refers to both the doctrines of equitable estoppel and waiver. But in the text of her argument, she discusses only equitable estoppel. Her discussion of the doctrine of waiver and how it applies to her contentions on appeal is made for the first time in her reply brief. Because we do not consider contentions raised for the first time in a reply brief (*Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 761, fn. 4), we address here only the issue raised by plaintiff's opening brief—equitable estoppel.

a court of justice.'" [Citations.]' (*Lantzy*, *supra*, at p. 383.) . . . 'To create an equitable estoppel, 'it is enough if the party has been induced to refrain from using such means or taking such action as lay in his power, by which he might have retrieved his position and saved himself from loss." . . . "Where the delay in commencing action is induced by the conduct of the defendant it cannot be availed of by him as a defense."' (*Benner v. Industrial Acc. Com.* (1945) 26 Cal.2d 346, 349-350 [159 P.2d 24], italics & citation omitted.)" (*Atwater Elementary School Dist. v. California Dept. of General Services* (2007) 41 Cal.4th 227, 232-233.)

For a defendant to be equitably estopped from asserting a statute of limitations defense, the plaintiff must be "directly prevented . . . from filing [a] suit on time." (*Lantzy*, *supra*, 31 Cal.4th at p. 385.) "The defendant's statement or conduct must amount to a misrepresentation bearing on the *necessity* of bringing a timely suit; the defendant's mere denial of *legal liability* does not set up an estoppel. (*Vu* [*v. Prudential Property & Casualty Ins. Co.* (2001)] 26 Cal.4th 1142, 1149-1153; *Neff v. New York Life Ins. Co.* (1947) 30 Cal.2d 165, 174-175 [180 P.2d 900].)" (*Id.* at p. 384, fn. 18.) "An estoppel 'arises as a result of some conduct by the defendant, *relied on by the plaintiff*, which induces the belated filing of the action.' (3 Witkin, Cal. Procedure (3d ed. 1985) Actions, § 523, p. 550.) According to Witkin, '[t]he estoppel cases appear to fall roughly into three classes: (1) Where the plaintiff is aware of his cause of action and the identity of the wrongdoer, but the latter by affirmative acts induces the plaintiff to refrain from suit. (2) Where the plaintiff is unaware of his cause of action and his ignorance is due to false representations by the defendant. (3) Where the plaintiff is unaware of the identity of the wrongdoer and this is due to fraudulent concealment by the defendant.' (*Ibid*.)" (*Prudential-LMI Com. Insurance v. Superior Court* (1990) 51 Cal.3d 674, 689-690, italics added.) "'As with other general equitable principles, application of the equitable tolling doctrine requires a balancing of the injustice to the plaintiff occasioned by the bar of his claim against the effect upon the important public interest or policy expressed by the . . . limitations statute.' (*Addison* [*v. State of California* (1978)] 21 Cal.3d 313, 321.)" (*Id*. at p. 372.)

Although plaintiff submitted evidence of the alleged ERISA misrepresentations as a basis for her estoppel claim, she provided no evidence which would suggest or imply that she *relied* on those representations to her detriment. For example, there is no deposition or declaration testimony from plaintiff in the record on this motion in which she states, in effect, that upon receiving the letter from MetLife containing the alleged ERISA misrepresentations, she understood that a longer limitations period applied to her claims and based thereon, she refrained from taking any further action during the limitations period to pursue or file suit on her claims. Similarly, there is no evidence that plaintiff filed an ERISA action in reliance on the representations concerning ERISA. The record on the motion is also silent on the issue of when plaintiff retained legal counsel concerning her claims against MetLife or why her lawsuit was not filed earlier. Absent some evidence on the detrimental reliance element of her estoppel claim, plaintiff failed to raise a triable issue of fact concerning that defense to the statute of limitations.

3. Forfeiture

Plaintiff contends on appeal that section 340(c) does not apply to her claims against MetLife because that statute, by its express terms, applies to claims by a depositor against a bank, and MetLife is an insurance company, not a bank. MetLife counters that plaintiff, by not raising the issue in the trial court, "waived"[5] any contention on appeal

[5] "As the United States Supreme Court has clarified, the correct term is 'forfeiture' rather than 'waiver,' because the former term refers to a failure to object or to invoke a right, whereas the latter term conveys an express relinquishment of a right or privilege. (See, e.g., *United States v. Olano* (1993) 507 U.S. 725, 733 [123 L.Ed.2d 508, 113 S.Ct. 1770]; *In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. 2 [13 Cal.Rptr.3d 786, 90 P.3d 746] (*S.B.*); *People v. Simon* (2001) 25 Cal.4th 1082, 1097, fn. 9 [108 Cal.Rptr.2d 385, 25 P.3d 598] (*Simon*).) As a practical matter, the two terms on occasion have been used interchangeably. (*Simon*, at p. 1097, fn. 9; *People v. Saunders* (1993) 5 Cal.4th 580, 590, fn. 6 [20 Cal.Rptr.2d 638, 853 P.2d 1093] (*Saunders*).)" (*In re Sheena K.* (2007) 40 Cal.4th 875, 880, fn.1.) Because the issue is whether plaintiff's failure to raise a contention in the trial court precludes her from raising it for the first time on appeal, we will use the term forfeiture in analyzing the issue.

that MetLife, as an insurance carrier and not a bank, is not entitled to assert the 12-month limitations period in section 340(c).

"The forfeiture rule generally applies in all civil and criminal proceedings. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 400, pp. 458-459; 6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Reversible Error, § 37, pp. 497-500.) The rule is designed to advance efficiency and deter gamesmanship. As we explained in *People v. Simon*, [*supra*], 25 Cal.4th 1082 . . . : '"'"The purpose of the general doctrine of waiver [or forfeiture] is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had . . . ."' [Citation.] '"No procedural principle is more familiar to this Court than that a *constitutional* right," or a right of any other sort, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." . . .' [Citation.] [¶] 'The rationale for this rule was aptly explained in *Sommer v. Martin* (1921) 55 Cal.App. 603 at page 610 [204 P. 33] . . . : "'In the hurry of the trial many things may be, and are, overlooked which would readily have been rectified had attention been called to them. The law casts upon the party the duty of looking after his legal rights and of calling the judge's attention to any infringement of them. If any other rule were to obtain, the party would in most cases be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal.'"' [Citation.]" (Fn. omitted; [citations].)' (*Simon, supra*, 25 Cal.4th at p. 1103, italics added.)" (*Keener v. Jeld-Wen, Inc*. (2009) 46 Cal.4th 247, 264-265.)

In opposition to MetLife's summary judgment motion, plaintiff did not contend that section 340(c) was inapplicable to her claims because MetLife was not a bank. To the contrary, plaintiff in her opposition assumed that section 340(c) applied to her claims by arguing, inter alia, that MetLife was subject to certain Commercial Code sections applicable only to banks, including sections 4401, subdivision (a) and 4406, subdivision (c). Plaintiff also submitted the declaration of a banking expert who opined that the processing of the two forged checks fell below banking industry standards. And

plaintiff's insurance industry expert opined that MetLife had certain obligations under the Commercial Code applicable only to banks.

Because plaintiff did not assert the position concerning the inapplicability of section 340(c) in the trial court, neither the trial court nor MetLife had the opportunity to address it factually or legally. For example, MetLife was prevented from explaining to the trial court the evidence that showed it met the statutory definition of a bank with respect to the Total Control Account. The respective functions of and the relationship between MetLife and PNC Bank, and the manner in which the Total Control Account operated, would have been relevant considerations.[6] Because of plaintiff's failure to raise the issue, there was no record made below as to the parties' respective evidence and legal positions relevant to that issue, or the trial court's determination based on such evidence and law. Fundamental fairness required that both MetLife and the trial court be afforded the opportunity to confront the issue during the summary judgment proceedings. Plaintiff's failure to afford either of them that opportunity results in a forfeiture by plaintiff of that issue on appeal.

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[6] There are cases concerning MetLife's Total Control Account, but none of them concerns the precise issue in this case. (See, e.g., *Faber v. Metropolitan Life Insurance Company* (2d Cir. 2011) 648 F.3d 98; *Keife v. Metropolitan Life Insurance Company* (D. Nev. 2011) 797 F.Supp.2d 1072; *Herrera v. Metropolitan Life Insurance Company* (Dec. 19, 2011, 11 Civ. 1901) [2011 WL 6415058]; *Williams v. Metropolitan Life Insurance Company* (M.D.N.C. 2005) 367 F.Supp.2d 844; *Noeller v. Metropolitan Life Insurance Company* (E.D.TX. 1999) 190 F.R.D. 202.)

DISPOSITION

The judgment of the trial court is affirmed. Each party is to bear her or its own costs on appeal.

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MOSK, J.

We concur:

ARMSTRONG, Acting P. J.

KRIEGLER, J.