Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-513

APRIL TERM, 2002

Douglas and Stacia Senecal v. George Mills, Andrew Brooks, and Metropolitan Property and Casualty Insurance Company	}	APPEALED FROM: Rutland Superior Court DOCKET NO. 95-2-01 Rdcv Trial Judge: William D. Cohen

In the above-entitled cause, the Clerk will enter:

Plaintiffs Douglas and Stacia Senecal appeal from a summary judgment of the Rutland Superior Court in favor of defendants George Mills, Andrew Brooks, and Metropolitan Property and Casualty Insurance Company. Plaintiffs contend the court erred in: (1) granting a motion for summary judgment after another judge had denied a similar motion to dismiss; and (2) ruling that defendants were not estopped as a matter of law from asserting the statute of limitations. We affirm.

This case arose out of an automobile accident that occurred on February 8, 1998. Plaintiffs filed their complaint for damages resulting from the accident on February 12, 2001, four days after the statute of limitations had expired. Defendants moved to dismiss the complaint on the basis that it was untimely. Plaintiffs opposed the motion on the ground that defendants were equitably estopped from asserting the statute; they alleged that statements by defendants' claims adjuster indicating that a settlement offer was imminent had misled them into delaying the filing of their complaint. The court denied the motion to dismiss, observing that issues of fact concerning the conduct of defendants' insurance adjuster may prevent defendants from invoking the statute.

About two months later, defendants moved for summary judgment, asserting that there was insufficient evidence to support the estoppel claim, and that the action was therefore time barred. The motion was supported by an affidavit of defendants' claims adjuster stating that during the course of his communications with plaintiffs' attorney, he had requested certain information and had indicated that Metropolitan was evaluating the claim, but had not admitted liability or promised that a settlement offer was imminent, and had not discussed or agreed to extend the statute of limitations. Plaintiffs argued, in opposition to the motion, that the court's earlier ruling had conclusively resolved the estoppel issue under the law of the case doctrine, and that genuine issues of material fact regarding the claims adjuster's conduct precluded summary judgment. By this time, a different judge was sitting in the superior court and he granted the motion, ruling that it was not precluded from reconsidering the estoppel issue, and that the adjuster's statements were insufficient as a matter of law to estop defendants from invoking the statute of limitations. Accordingly, the court entered judgment for defendants. This appeal followed.

Plaintiffs renew their claim that the court was precluded from reconsidering the estoppel issue. We have rejected the proposition, however, "that a second judge may not grant a motion for summary judgment or judgment on the pleadings after denial of a similar motion by another judge." Morrisseau v. Fayette, 164 Vt. 358, 364 (1995). Furthermore, unlike

their motion to dismiss, defendants' motion for summary judgment was accompanied by the claims adjuster's affidavit stating plainly that he had not communicated a settlement offer to plaintiffs or agreed to extend the statute of limitations, representations that are undisputed by plaintiffs. Accordingly, we discern no error in the court's decision to grant summary judgment following the earlier ruling on the motion to dismiss.

Nor do we discern any error on the merits. In reviewing a summary judgment, we apply the same standard as the trial court, determining whether there are any genuine issues of material fact and whether the movant is entitled to judgment as a matter of law. Richart v. Jackson, 171 Vt. 94, 97 (2000). In Beecher v. Stratton Corp., 170 Vt. 137 (1999), we considered whether the defendant could be estopped from asserting the statute of limitations based on a similar claim that the defendant's insurance adjuster had induced the plaintiff to refrain from filing a timely complaint. We held that a request by the adjuster to the plaintiff's attorney to refrain from filing suit until settlement negotiations were completed was insufficient as a matter of law. Id. at 140. In so holding, we noted that there was no express or implied agreement to waive the statute, and that, "[g]iven the adversarial nature of the relationship between plaintiff's attorney and the adjuster . . . the attorney acted unreasonably in allowing the limitations period to expire without confirming that defendant was willing to waive or extend the period while the parties continued settlement negotiations." Id.

Here, as in Beecher, there was no evidence of an express or implied waiver of the statute and no issue of unequal knowledge or bargaining power. As we observed in Beecher, "plaintiff's attorney was or should have been aware of the applicable limitations period." Id. at 142; cf. McLaughlin v. Blake, 120 Vt. 174, 179 (1957) (estoppel might apply where claims adjuster was in superior position to plaintiff's attorney with respect to foreign statute of limitations). Nor was the adjuster's alleged representation here that a settlement offer was imminent sufficient to induce a reasonable attorney - with no settlement in hand or knowledge of the actual terms of the offer - to refrain from filing a timely complaint. See Caledonia Sand & Gravel Co. v. Campell, 128 Vt. 182, 186 (1969) ("To discuss settlement is one thing and an agreement to settle is quite another."). Whether the adjuster received plaintiffs' documentation of lost wages in a timely manner, or engaged in bad faith in delaying a settlement offer, as plaintiffs contend, are not material issues of fact that would alter the conclusion that the adjuster's conduct was insufficient to induce a reasonable attorney to forebear from pursuing a timely claim. Therefore, we conclude that summary judgment was properly granted.

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

_____
James L. Morse, Associate Justice

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Denise R. Johnson, Associate Justice