

UNITED STATES COURT OF APPEALS  
for the Fifth Circuit

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No. 94-30592  
Summary Calendar

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DESPINA COSMAS YEMELOS,

Plaintiff-Appellant,

VERSUS

PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Defendant-Appellee.

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Appeal from the United States District Court  
for the Eastern District of Louisiana  
(CA 93 3837 E (4))

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March 21, 1995

Before DUHÉ, WIENER, and STEWART, Circuit Judges.

PER CURIAM:<sup>1</sup>

Despina Cosmas Yemelos appeals the district court's grant of summary judgment to Defendant Prudential Insurance Co. of America (Prudential). Yemelos had asserted breach of contract and negligent misrepresentation claims based on a Prudential life insurance policy that she had purchased. We affirm.

BACKGROUND

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<sup>1</sup> Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

On November 28, 1989, Yemelos instructed an attorney, Robert G. Jackson, to purchase a variable appreciable life insurance policy from Prudential on her husband's life. Jackson purchased the policy through Mutual of New York, an insurance broker. A month later, Yemelos gave Jackson a \$333,468.73 check as a further premium payment on the policy. Jackson deposited the check into his fiduciary account, diverted the funds for his personal use, and wrote a check from his fiduciary account for the same amount to Prudential. Jackson's check bounced on January 8, 1990. As a result, Prudential reversed the credit to Yemelos's policy on March 7, 1990. Prudential's reversal of credit is the basis of Plaintiff's breach of contract claim.

Between the time Jackson's check was dishonored and the reversal of credit, Yemelos pledged the policy to allow Jackson to obtain a \$450,000 bank loan. On January 30, 1990, Prudential, at Yemelos's request, issued a contract values quotation to her showing that the policy's cash value was \$311,261.67. The bank purportedly relied on Prudential's quotation in determining that sufficient collateral existed for the loan to Jackson. Prudential's quotation is the basis of Plaintiff's misrepresentation claim.

The Yemeloses defaulted on over \$4 million in loans and guarantees to a bank of which the FDIC was appointed receiver. The FDIC and the Yemeloses agreed to a settlement in 1989 whereby the Yemeloses would make \$1.5 million in annual payments to the FDIC. The Yemeloses notified the FDIC in 1990 that they could not make

their annual payment. In March 1991, Yemelos submitted a financial statement to the FDIC. The statement showed that the policy's cash value was then only \$2596.18. The FDIC grew suspicious of the Yemeloses' financial condition allegedly because of this notation. In June 1991, the FDIC sued the Yemeloses alleging that they had engaged in transactions to obscure their financial condition.

Yemelos then sued Prudential. The court granted Prudential's motion for summary judgment. The court held that Louisiana's one year tort limitations period barred Plaintiff's misrepresentation claim. On the breach of contract claim, the court required Yemelos to prove that Jackson was an agent of Prudential. Because Yemelos offered insufficient proof of Jackson's agency, the court granted summary judgment on the contract claim as well. Yemelos appeals.

#### DISCUSSION

Summary judgment is appropriate if the record discloses "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). We review a district court's grant of summary judgment de novo. Weyant v. Acceptance Ins. Co., 917 F.2d 209, 212 (5th Cir. 1990). We consider all the facts contained in the record and the inferences to be drawn therefrom in the light most favorable to the non-moving party. Id.

On the misrepresentation claim, Yemelos first contends that the claim arises from contract, not tort. The Louisiana limitations period for contract actions is ten years, but the limitations period for tort actions is only one year. See La. Civ.

**Code Ann.** arts. 3492, 3499 (West 1994). A misrepresentation claim is subject to the one year limitations period unless the representation was contractually or statutorily required and the claim seeks contractual or quasi-contractual damages. Doucet v. LaFourche Parish Fire Protection Dist. No. 3, 589 So. 2d 517, 519 (La. Ct. App. 1st Cir. 1991). Yemelos asked Prudential for the quotation so that she could give it to the bank. Prudential was under no contractual or statutory requirement to make the quotation. We conclude that the one year period applies to Plaintiff's misrepresentation claim.

Yemelos next contends that, even if the one year period applies, her misrepresentation claim has not prescribed. The one year period begins to run from the day damage is sustained. **La. Civ. Code Ann.** art. 3492. The damage alleged by Yemelos in her Complaint is the lawsuit brought by the FDIC against Yemelos in June 1991. Because Yemelos filed suit against Prudential over two years later, the district court correctly held that her claim had prescribed.

Yemelos seeks to invoke the exception of contra non valentum agere non currit prescriptio to suspend the beginning of the prescription period. The burden is on the plaintiff to prove a suspension of the prescription period. Doucet, 589 So. 2d at 519. Contra non valentum suspends the beginning of a prescription period when a cause of action is not known or reasonably knowable by the plaintiff at the time it sustains damage. Owens v. Martin, 449 So. 2d 448, 451 n.4 (La. 1984). Yemelos cannot invoke contra non

valentum because she knew the facts surrounding her misrepresentation claim in June 1991 when the FDIC filed its complaint against her. Yemelos received Prudential's notice of reversal of credit in March 1990. The effect of the reversal was apparent in the financial statement that she filed with the FDIC in March 1991. The FDIC's complaint specifically addressed this life insurance policy among others. Because Yemelos was aware of her claim at the time that the FDIC filed its complaint, her tort claim has prescribed.

On the breach of contract claim, Yemelos contends that summary judgment was inappropriate because existence of an agency relationship is an issue of fact. She offers the affidavits of her husband and herself, which state their beliefs that Jackson was an agent of Prudential. The subjective beliefs of a third party, however, are irrelevant in determining whether an agency relationship exists between two parties. Smason v. Celtic Life Ins. Co., 615 So. 2d 1079, 1085 (La. Ct. App. 4th Cir.), writ denied, 618 So. 2d 416 (La. 1993). The subjective beliefs of the Yemeloses are irrelevant to the existence of an agency relationship between Jackson and Prudential.

Yemelos also contends that Prudential's issuance of the policy to her as a result of her directions to Jackson constitutes evidence of Jackson's apparent authority. "Apparent authority exists when a principal does some act to manifest the alleged agent's authority to an innocent third party and the third party reasonably relies on the agent's manifested authority." Spurrell

v. Ivey, 630 So. 2d 1378, 1383-84 (La. Ct. App. 2d Cir. 1994). Yemelos's relationship with Jackson, however, shows that Yemelos was not an innocent third party. Jackson's check to Prudential that bounced had the notation "Clients Fiduciary Account." The record confirms that the business dealings between Jackson and Yemelos were quite involved.<sup>2</sup> In contrast, Jackson had no relationship with Prudential. When Yemelos asked Jackson to obtain the insurance policy, Jackson went to an insurance broker, not to Prudential. We conclude that the district court properly granted summary judgment on Yemelos's breach of contract claim.

#### CONCLUSION

For the foregoing reasons, the district court's grant of summary judgment is

AFFIRMED.

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<sup>2</sup> Yemelos pledged the policy so that Jackson could obtain a loan. According to her financial statement, she secured a \$200,000 loan from Jackson with her personal belongings.