

TEXAS INSURANCE LAW NEWSBRIEF

DECEMBER 14, 2015

EASTERN DISTRICT OF TEXAS DISMISSES PROPERTY OWNER'S BAD FAITH CLAIMS

In a brief order, Judge Clark for the United States District Court for the Eastern District of Texas adopted the Magistrate Judge's report granting State Farm Lloyds' Motion for Partial Summary Judgment. In *Paz v. State Farm Lloyds*, 4:14CV693, 2015 WL 8329895, at *1 (E.D. Tex. Dec. 9, 2015), the Court determined that the plaintiff take nothing by his extra-contractual claims, breach of fiduciary duty, common-law fraud by negligent misrepresentation, DTPA and Texas Insurance Code causes of action under a property insurance policy.

After dismissing Plaintiff's extra-contractual claims, the District Court noted that Plaintiff's breach of contract claim is the only remaining claim to proceed to trial.

OLD REPUBLIC INSURANCE COMPANY'S SUIT ON DEFAULTED NOTE IS NOT BARRED BY THE AFFIRMATIVE DEFENSE OF STATUTE OF LIMITATIONS

This week the Dallas Court of Appeals reversed a trial court's adverse motion for summary judgment order in favor of John K. Cross ("Cross") on his affirmative defense of limitations and remanded the case back to the trial court for further proceedings consistent with their opinion. In *Old Republic Ins. Co. v. Cross*, 05-14-01204-CV, 2015 WL 8014402, at *1 (Tex. App.—Dallas Dec. 7, 2015, no. pet. h.), Old Republic Insurance Company filed a suit against Cross alleging he defaulted on a note in connection with a home equity line of credit that was secured by a lien on real property owned and held by Old Republic.

Cross filed a motion for summary judgment asserting that a two-year statute of limitations barred Old Republic's action. Cross argued that his property was sold on July 14, 2010 pursuant a foreclosure sale held by the primary mortgage holder and Old Republic's lawsuit was time-barred. Old Republic argued that Cross did not provide competent summary judgment evidence. The trial court ruled in favor of Cross dismissing Old Republic's cause of action.

Old Republic appealed. Old Republic contended that the trial court erred because the evidence Cross attached to his summary judgment was unauthenticated and the affidavit in support of Cross's defense was conclusory and not based on personal knowledge. Although Old Republic did not object to the authentication of evidence at the trial court, the Dallas Court of Appeals noted a defect in the form of authentication of a document can be waived, but the "complete absence of authentication is a defect of substance that is not waived by a party failing to object and may be urged for the first time on appeal."

The Dallas Court of Appeals reviewed Cross's evidence and agreed with Old Republic that Cross's affidavit was conclusory and his summary judgment evidence was completely unauthenticated. The Court noted that the affidavit in support of Cross affirmatively demonstrates the affiant's lack of personal knowledge on its face with respect to the date of the foreclosure sale. Moreover, the letter on which Cross relies does not state that the foreclosure sale actually occurred. Because the affidavit was not probative summary judgment evidence as to when Old Republic's cause of action accrued, and there was no probative evidence to support Cross's motion for summary judgment based on limitations, the trial court erred in granting the motion.