IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA.

APPELLATE DIVISION (CIVIL): "AY"
Case No.: 502009AP000028XXXXMB
L.T. No.: 502008CC012994XXXXSB

STATE NATIONAL INSURANCE COMPANY,
a/s/o Jorge Anaya,

Appellant,

v.

VICTOR MICHAEL,

Appellee.

_____/

Opinion filed: October 21, 2010

Appeal from the County Court, in and for Palm Beach County, Florida;
Judge James Martz.

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PER CURIAM.

REVERSED and REMANDED.

State National Insurance Company, a/s/o Jorge Anaya, ("State National") seeks review of the trial court's final judgment entered in favor of Victor Michael (and his insurer, Mercury Insurance) ("Michael") and against State National. The trial court dismissed the action because State National did not plead sufficient facts to support a claim for equitable subrogation;

specifically, facts alleging that the tortfeasor's actions in some way caused or contributed to the action being filed outside the four year statute of limitations. State National argues that the trial court erred in granting Defendant's Motion to Dismiss because State National adequately pled a cause of action for equitable subrogation. We agree and reverse the trial court's entry of final judgment and remand for further proceedings.

"A court may grant a motion to dismiss based on the statute of limitations only in extraordinary circumstances where the facts constituting the defense affirmatively appear on the face of the complaint and establish conclusively that the statute of limitations bars the action as a matter of law." *GLK, L.P. v. Four Seasons Hotel Ltd.*, 22 So. 3d 635, 636-37 (Fla. 3d DCA 2009) (citation omitted). The Fourth District also recognizes that "[o]rdinarily, the statute of limitations should be set out as an affirmative defense, although the defense may be asserted in a motion to dismiss if the facts constituting the defense appear on the face of the complaint." *Lago West 84 v. Homac Barnes*, 486 So. 2d 64, 65 (Fla. 4th DCA 1986); *Gov't Employees Ins. v. Wheelus*, 319 So. 2d 181, 184 (Fla. 4th DCA 1975) ("the trial court was premature in entertaining the defense of statute of limitations on appellees' motion to dismiss. Such a defense is an affirmative one (Rule 1.110(d), RCP) and should be set up by answer.") Additionally, in *Saltponds Condo. Ass'n v. McCoy*, the Third District Court of Appeal states, unambiguously, that:

> the statute of limitations and laches are affirmative defenses which should be raised by answer rather than by a motion to dismiss the complaint; and only in extraordinary circumstances where the facts constituting the defense affirmatively appear on the face of the complaint and establish conclusively that the statute of limitations bars the action as a matter of law, should a motion to dismiss on this ground be granted. Since the statute of limitations, being an affirmative defense, may be avoided by facts alleged in a reply, in order to grant the motion to dismiss the allegations of the complaint must also conclusively negate any ability on the part of the plaintiff to allege facts in avoidance of the applicable statute of limitations by way of the reply.

Saltponds Condo. Ass'n v. McCoy, 972 So. 2d 230, 231 (Fla. 3d DCA 2007), *citing Rigby v. Liles*, 505 So. 2d 598, 601 (Fla. 1st DCA 1987).

We agree that a defense of statute of limitations is more appropriately raised as an affirmative defense and should only be the basis for dismissal in limited circumstances. In order for this Court to conclusively determine whether, from the face of State National's Complaint, the statute of limitations for its subrogation claim has expired, we consider the distinctions between a contractual subrogation claim and an equitable subrogation claim—the essential contention between the parties.

The Florida Supreme Court articulated the differences between equitable/legal subrogation and conventional/contractual subrogation:

> Florida recognizes two types of subrogation: conventional subrogation and equitable or legal subrogation. Conventional subrogation arises or flows from a contract between the parties establishing an agreement that the party paying the debt will have the rights and remedies of the original creditor . . . . The doctrine of equitable subrogation is not created by a contract, but by the legal consequences of the acts and relationships of the parties.

Dade County Sch. Bd. v. Radio Station WQBA, 731 So. 2d 638, 646 (Fla. 1999). The parties disagree as to whether State National's subrogation claim is contractual or equitable because the limitations period for these types of claims begins to run at different times. For the purposes of this case, both causes of action are subject to a four-year statutory period. *See* §95.11(3)(a), Fla. Stat. (2009). However, "[t]he question of when a statute of limitations begins to run depends on whether the subrogation . . . right is equitable or contractual in nature." *Allstate Ins. v. Metro. Dade County*, 436 So. 2d 976, 978 (Fla. 3d DCA 1983).

Michael argues that the statute of limitations period for bringing a claim began to run at the time of the initial automobile accident in 2003. To wit, Michael relies upon several cases, all

of which involve contractual subrogation. *See, e.g., Don Reid Ford v. Feldman*, 421 So. 2d 184, 184 (Fla. 5th DCA 1982) (affirming the holding that "limitations on the subrogation claim began to run at the same time [as a judgment was entered] and not when the judgment was paid"); *see also Villa Maria Nursing and Rehab. Ctr v. South Broward Hosp. Dist.*, 8 So. 3d 1167, 1170 n.1 (Fla. 4th DCA 2009); *and see Allstate Ins. v. Metro. Dade County*, 436 So. 2d 976, 978 (Fla. 3d DCA 1983). In *Allstate*, the court determined that the parties' classification of their claim as a "subrogated claim for indemnity" was not valid, underscoring the fact that the plaintiff cannot bypass the contractual subrogation statute of limitations by arguing "subrogated indemnity." The court explained:

> [a] contractual right to indemnification cannot vest until a payment is made. As a result, the statute of limitation does not begin to run until payment is made. The same is true with equitable subrogation. The court may find that some occurrence has tolled the statute. Contractual subrogation rights, however, by their terms, refer to a transfer or substitution of the rights and liabilities of the injured party to the paying party. In addition, subrogation contracts frequently grant the subrogee the means of insuring that the subrogor will protect the subrogee's rights, even in advance of payment. Not surprisingly, therefore, courts have traditionally held that in contractual subrogation actions, the statute of limitations runs from the date of the injury to the original "rightsholder" and not from the date of payment by the subrogee.

Allstate, 436 So. 2d at 978-79 (citations omitted) (emphasis added).

While Michael argues that State National's claim is and should be considered one of contractual subrogation, it is clear from the Amended Complaint that State National states a claim for equitable subrogation. The limitations period for filing an equitable subrogation action begins at the time the subrogee makes payment to the subrogor. *Dominion of Canada v. State Farm Fire and Casualty*, 754 So. 2d 852, 856 (Fla. 2d DCA 2000) (disapproved on other grounds)); *State Farm Mut. Auto. Ins. v. Johnson*, 18 So. 3d 1099, 1101 (Fla. 2d DCA 2009). On the face of State National's complaint for equitable subrogation, the facts do not conclusively

establish that the statute of limitations bars this action as a matter of law, which is the controlling standard on a motion to dismiss. Therefore, the lower court erred by dismissing State National's claim. Accordingly, the Order Granting Victor Michael's Motion to Dismiss is REVERSED and this cause is REMANDED to the lower court for further proceedings consistent with this opinion.

HAFELE, ROSENBERG, and KELLEY, JJ., concur.