NOT TO BE PUBLISHED WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS

Ace American Insurance Company, Plaintiff(s), v. Old Republic General Insurance Corporation; Everest National Insurance Company; Pennsylvania Mutual Casualty Insurance Company, a/k/a and d/b/a Penn National Insurance; and National Union Fire Insurance Company of Pittsburgh, Pa., Defendant(s).	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO.: BER-L-1801-18 ***CIVIL ACTION***

Defendant Pennsylvania Mutual Casualty Insurance Company's Motion for Summary Judgment

Decided: November 29, 2018

Hon. Robert L. Polifroni, P.J.Cv.

Todd J. Leon, Esq., attorney for plaintiff (Hill Wallack LLP, attorneys).

Kevin E. Wolff, Esq. and Nicholas Gurrino, Esq., attorneys for defendant Pennsylvania Mutual Casualty Insurance Company (Kinney Lisovicz Reilly & Wolff PC).

Gary Kull, Esq., attorney for defendant Everest Reinsurance Company (Kennedys CMK, attorney).

MOTION TO BE CONSIDERED

This matter comes before the court by way of motion for summary judgment filed on behalf of defendant Pennsylvania Mutual Casualty Insurance Company a/k/a and d/b/a Penn National Insurance (hereinafter referred to as Penn National). Co-defendant Everest Reinsurance Company joined in defendant Penn National's motion. Opposition and reply have been received by the court. Oral argument was conducted November 2, 2018.

BACKGROUND

The complaint was filed on March 12, 2018, sounding in insurance coverage. Procedurally, the Penn National motion was initially returnable October 26, 2018. On October

24, 2018, two days before the return date, co-defendant Everest Reinsurance Company joined defendant Penn National's motion for summary judgment by way of letter brief. Plaintiff's counsel did not object to this procedural approach, but requested an adjournment of oral argument in order to properly review, analyze, and reply to co-defendant Everest's late submission. This court granted plaintiff's request, and adjourned oral argument.

By way of a brief background this matter arises out of an insurance coverage dispute wherein plaintiff seeks indemnification and reimbursement from defendant relating to a personal injury action which settled in early 2012. The instant motion states that the complaint in this matter was filed after the statutory six year limitation period expired no later than January 2018. Plaintiff argues that the complaint was timely as the case did not settle until the end of March 2012 or early April 2012, thus, the March 12, 2018 complaint was filed within the six-year statute of limitations.

LEGAL ARGUMENTS

Motion for Summary Judgment

Defendant Penn National moves for summary judgment. According to moving defendant, plaintiff seeks to recover in this action payments that it made on behalf of its insured D'Andrea Construction Company, Inc. to settle an action that had been commenced against D'Andrea in Camden County Superior Court. Plaintiff alleges that defendant Penn National insured D'Andrea at the time of the loss giving rise to that action and that Penn National should have defended and indemnified D'Andrea such that defendant Penn National is responsible to reimburse plaintiff for defense and indemnity costs that plaintiff incurred.

Defendant Penn National represents the undisputed facts are that the action against D'Andrea, Crumley v. D'Andrea Construction Company, Inc. of New Jersey, CAM-L-4391-09, was settled by this plaintiff and other insurers including Certain Underwriters at Lloyds of London subscribing to policy number 576/UH7317100 and Aspen Insurance UK Limited on January 19, 2012. Defendant Penn National acknowledges it issued a business automobile insurance policy to D'Andrea Construction Company, Inc. bearing number AU9 0106151 for the period of July 1, 2008 to July 1, 2009. However, defendant Penn National represents that defendant Penn National had disclaimed a duty to defend or indemnify D'Andrea in the Crumley Action on November 18, 2011, prior to the settlement of that action by plaintiff and the London Insurers.

Defendant Penn National argues that insurance coverage actions, including actions like this in which an insurer seeks to recover sums it paid in settlement from another insurer, are governed by the six-year statute of limitations for contract actions set forth in N.J.S.A. 2A:14-1. Crest-Foam Corp. v. Aetna Ins. Co., 320 N.J. Super. 509, 517 (App. Div. 1999); Breen v. New Jersey Mfrs. Indemn. Ins. Co., 105 N.J. Super. 302, 309 (Law Div. 1969), aff'd., 109 N.J. Super. 473 (App. Div. 1970). A cause of action for breach of an insurance policy accrues, and the statute of limitations begins to run, when the "totality of [the insured's claim] against defendant [insurer] was ascertainable and his right of action complete...." Kielb v. Couch, 149 N.J. Super. 522, 529 (Law Div. 1977).

Defendant Penn National states that it had disclaimed a duty to defend or indemnify D'Andrea in the Crumley Action on November 18, 2011, and never retracted that disclaimer.

Movant further states that plaintiff was aware of defendant Penn National's disclaimer at the time it was issued or shortly thereafter and that the London Insurers were pressing defendant Penn National to retract the disclaimer and provide coverage to D'Andrea prior to the January 19, 2012 settlement of the Crumley Action. Defendant Penn National argues that more than six years elapsed between November 18, 2011, the date when Penn National disclaimed a duty to defend or indemnify D'Andrea in the Crumley Action, and March 12, 2018, the date when ACE filed the complaint in this action. Defendant Penn National further argues that more than six years elapsed between January 19, 2012, the date when the Crumley Action was settled and the claims against D'Andrea resolved by ACE and the London Insurers, and March 12, 2018, the date when ACE filed its complaint in this action.

Defendant Penn National states plaintiff did not commence this action within six years of either the date of defendant Penn National's disclaimer or the date on which plaintiff and the London Insurers settled the Crumley Action on D'Andrea's behalf and fixed its liability in that action. Therefore, defendant Penn National argues plaintiff did not commence this action within the six-year statute of limitations set forth in N.J.S.A. 2A:14-1, thus, the six-year statute of limitations governing plaintiff's claims has elapsed and this action should be dismissed.

Opposition

Plaintiff opposes the instant motion and argues that defendant Penn National does not correctly calculate when the six-year statute of limitations in a case such as this accrues. Plaintiff argues the claim for reimbursement against defendant Penn National did not accrue until the underlying case was terminated via the filing of a stipulation of dismissal, which occurred on April 20, 2012. Accordingly, plaintiff represents that the filing of the complaint on March 12, 2018 was timely. In the alternative, plaintiff's cause of action could have accrued slightly earlier, on March 28, 2012, which is when the underlying plaintiff executed a release of his claims. Either way, plaintiff timely filed the present action. Plaintiff argues that defendant's position that the statute of limitations began to accrue on either November 18, 2011 (when defendant Penn National disclaimed coverage) or January 19, 2012 (the date that defendant Penn National believed the case settled) are both incorrect.

First, plaintiff argues that New Jersey law is well-settled that the six-year statute of limitations for reimbursement claims against an insurer does not accrue when an insurer denies coverage. Rather, the statute of limitations accrues when the underlying action is terminated, and liability is fixed. See Kielb v. Couch, 149 N.J. Super. 522 (Law Div. 1977). Plaintiff contends that the instant motion is analogous to the situation resolved by the Kielb court.

Plaintiff argues that in the instant matter, the Crumley Action was terminated on April 20, 2012, when Crumley voluntarily dismissed his cause of action against D'Andrea with prejudice, and the matter was disposed by the court. Thus, plaintiff's March 12, 2018 complaint, which was filed less than six years after the April 20, 2012 disposition, was timely-filed.

Second, plaintiff notes defendant Penn National alternative position that the Crumley Action was terminated when the matter was "settled" on January 19, 2012. Plaintiff argues that defendant Penn National's argument is flawed for two reasons: (1) well-settled case law in New Jersey holds that a matter is "terminated" when there is either entry of a judgment, or the matter is dismissed; and, significantly, (2) the Crumley Action was not settled until March 28, 2012 –

the date that Crumley executed a written "New Jersey Release," and a "Settlement Agreement and Release." In support, plaintiff cites a decision from the the District Court of New Jersey in Impex Agr. Commodities Div. of Impex Overseas Corp v. Leonard Parness Trucking Corp., 582 F. Supp. 260, 263 (D.N.J. 1984).

Plaintiff argues that as applied to the facts of this case, Crumley's rights and liabilities against D'Andrea were not resolved until a formal agreement was reached with all parties, as set forth in the written release agreements, on March 28, 2012. Thus, even if the statute of limitations began to accrue on the date that the Crumley Action was settled, courts applying New Jersey law routinely require written settlement agreements – spelling out all of the parties' rights and obligations – before a settlement can truly occur. Plaintiff argues that from a practical standpoint, the need for a written settlement agreement was reinforced by our Supreme Court in Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C., 215 N.J. 242, 245 (2013), where the court held that all parties intending to enforce a settlement reached at a mediation must execute a signed written agreement.

Finally, plaintiff argues that defendant Penn National's position that the statute began to accrue when it disclaimed coverage is incorrect. Plaintiff states that this position was rejected by Kielb. Plaintiff states that in Kielb, the court considered the issue of "whether the statute of limitation begins to run as of the date of the refusal or as of the date of the termination of the litigation involving the insured." See Kielb, 149 N.J. at 524. After considering authorities that supported both positions, the court ultimately concluded that "the cause of action for reimbursement . . . did not accrue until the termination of the third-party action." Id. at 529. Therefore, plaintiff argues that contrary to defendant Penn National's arguments, plaintiff's cause of action did not accrue when defendant Penn National disclaimed coverage in November of 2011. Rather, the statute of limitations for plaintiff's claim accrued on either April 20, 2012 – the date that the Crumley Action was terminated, or on March 28, 2012 – the date that Crumley executed multiple Release Agreements that expressly released all claims against D'Andrea and plaintiff.

Reply

Defendant Penn National's reply provides that the issue presented is straightforward: Does the statute of limitations on the reimbursement claims of plaintiff begin to run at the time that plaintiff and other insurers settled Crumley v. D'Andrea Construction Company, Inc. (CAM-L-4391-09), on behalf of D'Andrea Construction Company, Inc., in January of 2012 – more than six years before plaintiff filed its complaint in this action – or when the settlement agreement and release in the Crumley Action was executed on March 28, 2012 – less than six years before plaintiff filed its complaint.

In opposition to defendant Penn National's motion, plaintiff argues that the statute of limitations did not begin to run until the settlement agreement and release in the Crumley Action were executed by all parties on March 28, 2012. Plaintiff argues that the Crumley Action did not settle on January 19, 2012 – however, this position is directly opposed to plaintiff's own complaint.[1]

[1] ACE's complaint unequivocally states that the Crumley Action was "globally resolved" on January 19, 2012.

Defendant Penn National represents that up until the filing of the instant motion, all parties involved in the prior litigation, including plaintiff, were consistent in stating that the action settled in January of 2012, either on January 19, 2012, or January 23, 2012. Counsel for Mr. Crumley, in a motion for enhanced fees filed in Camden County Superior Court after the settlement of the Crumley Action, stated that the action settled in January of 2012, albeit the date he identified as the settlement date was January 23, 2012, as opposed to January 19, 2012—regardless, both dates are more than six years before plaintiff filed its complaint.

The Crumley Action was scheduled for trial on January 23, 2012, in Camden County Superior Court. According to all parties, the case settled either on January 19, 2012, or January 23, 2012. The trial did not proceed on January 23, 2012. The fact that it took two months for a Settlement Agreement and Release to be signed is irrelevant to when the Crumley Action settled.

Next, plaintiff argues that the Crumley Action did not settle until March 28, 2018, when the Settlement Agreement and Release was executed by all parties. Defendant Penn National argues that plaintiff does not offer any explanation of what happened between January of 2012, when all parties to the settlement of the Crumley Action including plaintiff acknowledged that the settlement occurred, and March 28, 2012, when the Settlement Agreement and Release was signed. Plaintiff does not suggest that there was not an enforceable settlement in January of 2012 but, instead, argues that the settlement was not final until there was a written agreement. Defendant contends that this argument is wrong.

New Jersey courts have repeatedly held that a formal written and signed settlement agreement is not necessary for there to be an enforceable settlement. As opposed to recognizing this fundamental principle of New Jersey law, plaintiff relies on the Supreme Court's holding in Willingboro Mall, Ltd., v. 240/242 Franklin Avenue, L.L.C., 215 N.J. 242 (2013), to argue that the Crumley Action was not settled until the final Settlement Agreement and Release was executed. The Supreme Court's decision did not abrogate the long-standing law in New Jersey regarding the enforcement of a settlement discussed above and is not applicable here. The Supreme Court's holding in Willingboro Mall, Ltd., was that, given the confidentiality that surrounds mediations conducted with independent mediators, a settlement reached in a mediation needs to be confirmed by a written term sheet to be enforceable so as to avoid any mediation-communication privilege problems. Id. at 257. The Court never held that a formal signed release and settlement agreement is necessary to create an enforceable settlement when parties to an action negotiate and agree on one.

In Kielb v. Couch, 149 N.J. Super. 522 (Law Div. 1977), and Breen v. N.J. Mfrs. Indem. Ins. Co., 105 N.J. Super. 302 (Law Div. 1969), aff'd., 109 N.J. Super. 473 (App. Div. 1970), the issue was when the statute of limitations began to run in an insurance coverage case. Neither case involved a settlement. The principle that emerged from those decisions was that the statute begins to run when "the damages have been ascertained by final judgment in a third-party proceeding against the insured...." Kielb at 528. See also, Federal Ins. Co. by & Through Associated Aviation Underwriters v. Purex Indus., 972 F. Supp. 872, 879 (D.N.J. 1997) (holding statute begins to run "when the underlying judgment becomes final and the insurer's liability is finally determined.").

Defendant argues it is neither surprising nor material that it took two months for the Settlement Agreement and Release to be fully executed. That fact, however, does not undermine

the enforceable settlement that the parties all acknowledged, in separate pleadings, happened in January of 2012.

Co-Defendant Everest Submission Joining Instant Motion for Summary Judgment

Co-defendant Everest joins in defendant Penn National's motion and contends that both defendants have identical grounds for summary judgment. Co-defendant Everest is the excess insurer to one of the auto insurers, and was sued in this case at the same time as defendant Penn National. Moreover, the underlying claim facts are equally applicable to co-defendant Everest as they are to defendant Penn National.

As to the substance of the relief sought, co-defendant agrees with, and joins in, the factual and legal arguments made by defendant Penn National in support of its motion. It could not be clearer, based on the admissions in pleadings and other documents, that the underlying Crumley matter settled on January 19, 2012.

Co-defense counsel also represents, by way of brief background, he is also counsel for Everest in a somewhat related declaratory judgment action that also is pending in this Court, D' Andrea Construction Company, et al v. Old Republic General Insurance Corp., et al., BER-L-23-13. In that case, plaintiff Underwriters seeks essentially the same relief from Everest as does ACE in this case. Both Underwriters and ACE contributed to the Crumley settlement, and they both seek reimbursement from Everest (and others). In the Underwriters declaratory judgment, co-defendant subpoenaed ACE, the plaintiff in this case, for its claims file related to the Crumley matter. That file, except for privileged documents, was produced.

In the first email, dated January 19, 2012, John Riddle, the Underwriters representative informs Timothy F. Bavuso, who at the time was the ACE representative handling the Crumley matter, that the Crumley case had settled for $5.8 million.

On January 20, 2012, Bavuso wrote to two others involved in the Crumley matter (one with the New Jersey School Development Authority OCIP and one with ESIS), informing them that the case had settled the night before for $5.8 million.

Also on January 20, 2012, Mr. Bavuso created an entry in the ACE internal "Trial Log" notes system indicating that the "case settled for $5.8mm." It also states that "[t]he general liability insurers have preserved their claims against the auto liability insurers."

Again on January 20, 2012, Mr. Bavuso wrote to Robert Romeo and stated:

> Please be advised that the above captioned claim settled late last evening for $5.8mm. This case was scheduled to begin trial Monday 1/23/2012. The general liability insurers have preserved their claims against the auto liability insurers. ACE's exposure will be $1.75mm. I have updated and closed the trial log and have added the payment to the payment log.

The January 20, 2012 entry in the "Cash Log" indicates that the "case settled for $5mm. ACE's exposure is $1.75mm." It also indicates that the payment of the settlement amount is "definite."

Finally, a January 20, 2012 email from defense counsel Benjamin Tartaglia to Mr. Bavuso and Mr. Riddle informs them that he had spoken to Judge Holden and that the settlement would be put on the record on January 24, 2012.

Plaintiff's Reply

Like defendant Penn National, co-defendant Everest contends that the six-year statute of limitations for plaintiff's action began to accrue in January 2012, when the parties to the underlying Crumley litigation initially agreed to a dollar figure to resolve that litigation. Both defendants further contend that, since the January 2012 agreement could be construed as an "enforceable settlement", plaintiff's action is time-barred, since the present complaint was not filed until March 12, 2018. Plaintiff s asserts the defendants' position misses the mark.

Simply put, even if an enforceable settlement was reached in January 2012, that settlement did not trigger the statute of limitations for plaintiff's claim in this matter. To the contrary, New Jersey law is well-settled that the statute of limitations for plaintiff's claim was triggered upon the termination of the underlying Crumley action against plaintiff's insured – D'Andrea Construction. Thus, the question to be resolved by this court is when the underlying Crumley litigation was terminated against D'Andrea so as to commence the six-year statute of limitations.

In Kielb v. Couch, 149 N.J. Super. 522, 524 (Law Div. 1977), the court unmistakably held that the cause of action for reimbursement against St. Paul Fire and Marine Insurance Company "did not accrue until the termination of the third-party action" against the party claiming reimbursement. Id. at 529. Germane to the current dispute is how the court in Kielb determined that the underlying action was in fact terminated. In this regard, the court found as follows: "The litigation was terminated on July 12, 1974 by the voluntary dismissal of the complaint with prejudice." Id. at 525.

By that same logic, the underlying Crumley litigation was terminated on April 20, 2012 by Craig Crumley's voluntary dismissal of his complaint against plaintiff's insured – D'Andrea Construction. Neither co-defendant Everest (nor defendant Penn National) offer any authority to the contrary. Since plaintiff's complaint was filed on March 12, 2018, it was-and is, timely.

DECISION

The court begins its analysis with, R. 4:46-2 which authorizes summary judgment upon a showing that "there is no genuine issue as to any material fact." See Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995). In determining whether a genuine issue of material fact exists, the New Jersey Supreme Court has expounded the following test:

> [T]he motion judge [must] consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . are sufficient to permit a

> rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.
>
> Brill, 142 N.J. at 523.

Bare conclusions in the pleadings without factual support in affidavits will not defeat a motion for summary judgment. Brae Asset Fund, L.P. v. Newman, 327 N.J. Super. 129, 134 (App. Div. 1999). Mere sworn conclusions of ultimate facts, without basis or supporting affidavits by persons having actual knowledge of the facts, are insufficient to withstand the motion for summary judgment. James Talcott, Inc. v. Shufman, 82 N.J. Super. 438, 443 (App. Div. 1964). Therefore, disputes as to immaterial or irrelevant facts will not bar successful summary judgment. Johnson v. City of Hackensack, 200 N.J. Super. 185, 189 (App. Div. 1985).

Summary judgment should be granted when the evidence "is so one-sided that one party must prevail as a matter of law." Brill, supra, 142 N.J. at 540. Further,

> [t]o defeat a motion for summary judgment, the opponent must come forward with evidence that creates a genuine issue of material fact.... An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact. Competent opposition requires "competent evidential material" beyond mere "speculation" and "fanciful arguments."
>
> Cortez v. Gindhart, 435 N.J. Super. 589, 605 (App. Div. 2014) (internal citations omitted).

In New Jersey, causes of action based on contractual claims must be brought within six years after the cause of any such action shall have accrued. N.J.S.A. 2A:14-1. The general rule is that the statute of limitations applicable to contracts governs insurance actions as well. Breen v. New Jersey Mfrs. Indemn. Ins. Co., 105 N.J. Super. 302, 309 (Law Div. 1969), aff'd, 109 N.J. Super. 473 (App. Div. 1970). Thus, "[a]bsent a provision in the insurance policy or an express statute to the contrary, the statute of limitations applicable to a suit on a policy of insurance" is six years. Walkowitz v. Royal Globe Ins. Co., 149 N.J. Super. 442, 448 (App. Div.), certif. dismissed, 75 N.J. 584 (1977).

In this matter, summary judgment is appropriate as the evidence presented is so one sided that one party must prevail as a matter of law. See Brill. It is incontrovertible that on or around January 23, 2012 an enforceable and final settlement was reached in the underlying matter. The evidence presented which inevitably leads to this conclusion includes: (1) plaintiff's own complaint in the instant matter; (2) plaintiff's insured's answers to interrogatories in the closely related matter; (3) Camden County Superior Court actions in acknowledging the settlement, thereby cancelling the January 23, 2012 trial date; and (4) plaintiff's email in January 2012, authored sent by authorized claims personnel.

Count 25 of plaintiff's own complaint states: "On or about January 19, 2012, the underlying case was globally resolved, with ACE American agreeing to fund $1,750,000 of the settlement on behalf of D'Andrea." When plaintiff's counsel was asked about this apparent discrepancy at oral argument, his responses was that the complaint was "inartfully drafted."

Further, plaintiff's insured, (D'Andrea Construction Company) served certified answers to interrogatories in a closely related insurance coverage matter currently pending in Bergen County.[2] According to the certified answers to interrogatories:

> The Crumley Action was scheduled to proceed to trial on January 23, 2012. The Crumley Action Settled on January 19, 2012 for the total sum of $5,800,000.00 well below what was recommended by the mediator.
>
> Underwriters paid their respective several shares of $3,862,879.00 of the total settlement on behalf of D' Andrea subject to their rights to recover all of the settlement monies paid from all automobile liability insurers including, but not limited to, Everest.

When questioned about this at oral argument, plaintiff's counsel argued that the answer to interrogatory was not on behalf of plaintiff, Ace, but on behalf of its insured, D'Andrea Corporation. Nevertheless, this answer to an interrogatory, certified by the insured of the plaintiff, demonstrates the uncontroverted understanding of the tort defendant D'Andrea Corporation that the lawsuit against it in Camden County was terminated by way of settlement effectuated by the insurers, including plaintiff ACE.

It is uncontroverted that this matter was scheduled to proceed to trial in Camden County on January 23, 2012. It is uncontroverted that this matter did not proceed to trial because counsel, on behalf of ACE and its insured, represented to the court, on the record, that the matter had been settled for $5.8 million. This representation was, and remains, binding as to all parties in that litigation, and their respective insurers.

Finally, despite plaintiff's argument challenging the authoritative nature of its insured's answers to interrogatories, and counsel's suggestion that the complaint was poorly drafted, plaintiff fails to challenge the factual statement from its own client, claims professional Timothy Bavuso to Robert Romeo on January 20, 2012 at 7:42 a.m. stating:

> Please be advised that the above captioned claim settled late last evening for $5.8mm. This case was scheduled to begin trial Monday 01/23/2012. The general liability insurers have preserved

---

[2] D'Andrea Construction Company vs Old Republic, BER-L-23-13. That matter is scheduled for trial on January 3, 2019. Additionally, that matter has been the subject of appellate review. The appellate Division adopted Magistrate Judge Dickson's Report and Recommendation, (D.E. No. 38), in full, as the Opinion of this Court; and remanded to Superior Court of New Jersey, Bergen County, Law Division. D'Andrea Constr. Co. v. Old Republic, Civil Action No. 13-997 (ES)(JAD), 2014 U.S. Dist. LEXIS 142205 (D.N.J. Oct. 6, 2014).
It is worth noting that in the report and recommendation adopted, the date of settlement in the underlying personal injury action was listed as January 19, 2012. D'Andrea Constr. Co. v. Old Republic Gen. Ins. Corp., Civil Action No. 2:13-00997 (ES) (JAD), 2014 U.S. Dist. LEXIS 143396 * 2 (D.N.J. Sep. 16, 2014).

> their claims against the auto liability insurers. ACE's exposure will be $1.75mm. I have updated and closed the trial log and have added the payment to the payment log.

Clearly, the consideration of a future insurance contribution lawsuit was contemplated in 2012 in direct conjunction with the ultimate settlement, and final resolution, of the underlying matter.

These facts are so overwhelming this court cannot come to any other conclusion but that the underlying matter settled on or around January 23, 2012. Therefore, the appropriate accrual date for the statute of limitations began to run on January 23, 2012.

Plaintiff's position that the settlement was not effective until the execution of the formal Release, or the filing of the stipulation of dismissal, is contrary to the law of this state. The appreciation of the fact of a settlement based upon an agreement of the material terms compels a brief review of the law on this subject.

Public policy in this state strongly favors settlement of litigation. Nolan v. Lee Ho, 120 N.J. 465, 472 (1990) (citing Jannarone v. W.T. Co., 65 N.J. Super. 472 (App. Div.), certif. denied, 35 N.J. 61 (1961)). Consequently, our courts have refused to vacate final settlements absent compelling circumstances. In general, settlement agreements will be honored "absent a demonstration of fraud or other compelling circumstances." Nolan at 472 (citing Pascarella v. Bruck, 190 N.J. Super. 118, 125 (App. Div.), certif. denied, 94 N.J. 600 (1983)). Before vacating a settlement agreement, our courts require clear and convincing proof that the agreement should be vacated. Nolan at 472 (citing DeCaro v. DeCaro, 13 N.J. 36 (1953)).

In order for a valid settlement contract to exist, a party must show mutual assent, consideration, legality of the object of the contact, capacity of the parties, and formulation of a memorialization. Cohn v. Fischer, 118 N.J. Super. 286, 291 (Law Div. 1972). All of these elements were satisfied when the settlement was placed on the record on January 23, 2012.

In Bistricer v. Bistricer, 231 N.J. Super. 143 (Ch. Div. 1987), the court ordered the enforcement of a settlement agreement reached over the telephone between the parties. The court in its decisions noted that,

> the proposition that case is not settled until the last 'i' is dotted and the last 't' is crossed on a written settlement agreement carries the germ of much mischief.
>
> Id. at 152.

Additionally, the Appellate Division has held that the execution of final written settlement documents is not essential to the formation of the contract of settlement. See Hagrish v. Olson, 254 N.J. Super. 133 (App. Div. 1992). The Appellate Division reversed the trial court where it had denied a motion to enforce a settlement because the attorneys had become involved in a dispute over the wording of the release, causing the trial court to mistakenly conclude there was never a binding agreement. The Appellate Division held:

> Absent unusual circumstances, the courts should enforce executory agreements to settle litigation. Jannarone v. W.T. Co., 65 N.J. Super. 472, 476-77 (App. Div. 1961). Plaintiffs' failure to execute release documents did not void the original agreement, nor did it render it deficient from the outset. Execution of a release was a mere formality, not essential to formation of the contract of settlement. "So long as the basic essentials are sufficiently definite, any gap left by the parties should not frustrate their intention to be bound." Berg Agency v. Sleepworld-Willingboro, Inc., 136 N.J. Super. 369, 377 (App. Div. 1975).
>
> Hagrish v. Olson, 254 N.J. Super. 133, 137-38 (App. Div. 1992).

As indicated in the submissions by counsel, the significant issue before this court is whether the statute of limitations began to run in January 2012 or late March/early April 2012. Simply put, if the former, then defendant's motion is granted, if the latter, plaintiff's complaint survives.[3]

As noted in Hagrish, denial of a settlement based upon technical subsequent proceedings such as the filing of a formal stipulation of dismissal, could dramatically impact on the finality of litigation via settlement. Indeed, as the case law cited above establishes, the courts of this state favor settlement agreements, even those executory in nature. Here, the court need not analyze the definiteness of conversation among counsel with apparent authority from clients, to settle the case, (see United States Plywood Corp. v. Neidlinger, 41 N.J. 66, 73-74 (1963)), or confirmation of precise terms in correspondence exchanged among counsel. Here, the parties expressly confirmed all material terms – **on the record** – before the trial judge who was about to commence trial on January 23, 2012. To suggest to this court that the settlement was somehow tentative, or less than final, pending filing of the formal stipulation of dismissal is contrary to the law and practice in this state. Indeed, the expeditious closure of cases scheduled for trial – and trial certainty – would be sabotaged if said formal filed dismissal is deemed to be necessary to establish the finality of a settlement agreement by the parties.

Further, in addition to the email from ACE claims professional Bavuso to Mr. Romeo of January 20, 2012 cited above, was the factual conclusion contained in the ACE internal Trial Log notes system confirming that the "case settled for $5.8mm" and that the general liability insurers (including ACE) have preserved their claims against the automobile liability insurers (including the movants here). The January 20, 2012 entry in the "Cash Log" of plaintiff ACE states that the "case settled for $5mm". ACE's exposure is $1.75mm," and notes the payment of that settlement amount is "definite." Finally, defense counsel wrote an email to ACE claims and underwriting professionals on January 20, 2012 advising that he spoke to the trial judge and

---

[3] This court is not ruling definitively on the issue of whether or not the six-year statute accrues upon the date of the disclaimer, also argued in movant's brief, since said ruling is not necessary given the concession on both sides that a final settlement is the latest date for accrual, and this court's finding the settlement was final in January 2012. This court is not persuaded the accrual date was not the date of the disclaimer in November 2011, when plaintiff incurred damages, i.e., attorney fees, immediately subsequent thereto. This court does not concur with plaintiff's argument that this issue is "well-settled." Nevertheless, for this decision, this court assumes, arguendo, the accrual date was the date of the settlement.

represented that the settlement would be placed on the record. That representation was appropriate and accurate.

Plaintiff relies on Kielb v. Couch, 149 N.J. Super. 522 (Law Div. 1977), and Breen v. N.J. Mfrs. Indem. Ins. Co., 105 N.J. Super. 302 (Law Div. 1969), aff'd., 109 N.J. Super. 473 (App. Div. 1970), which do discuss the accrual of the statute of limitations in filing insurance coverage actions. However, neither case involved a settlement as the final disposition of the underlying case.

Plaintiff relies heavily on the holding in Kielb to support its contention that the accrual of the statute of limitations did not begin until the filing of the stipulation of dismissal in April 2012. This reliance is misplaced. Initially, this court notes the Kielb case is a Law Division decision and not binding precedent. Further, Kielb is distinguished from the instant case in several ways, including the significant fact that Kielb matter was addressing when the statute of limitations began to accrue for purposes of a plaintiff insured's action against defendant insurer for reimbursement of fees and costs from a medical malpractice suit that defendant insurer refused to defend. The context of that case is important because it sheds light on why the court made the filing of the voluntary dismissal with prejudice the accrual date. It is logical that a plaintiff insured would need the filing of the voluntary dismissal with prejudice to know the final out of pocket costs incurred in defending the case as a result of the defendant insured refusing to defend the lawsuit on his behalf. That is clearly not the situation in the instant matter. This court can extrapolate that the holding in Kielb stands for the proposition that the statute of limitations accrues once the litigation comes to a final end – whether that be via trial, settlement, **or** voluntarily stipulation of dismissal.

Plaintiff also relies on Breen v. N.J. Mfrs. Indem. Ins. Co. which involved an action on an insurance policy by a judgment creditor who stood in the shoes of the insured. The six-year statute of limitations was applied. The court held the plaintiff's cause of action accrued on December 6, 1960 when the judgment was entered against defendant Milton Stern, finding that the complaint filed eight years later was barred. This is consistent with this court's finding that the accrual date is tied to the case's final conclusion. In that matter, a judgment was entered. A settlement agreement on the trial date is equally as definitive an end. Otherwise, the matter would have proceeded to trial, having been adjourned from a prior date and set as a firm date.

Plaintiff further relies on Underwriters v. Purex Indus., 972 F. Supp. 872, 879 (D.N.J. 1997) (holding statute begins to run "when the underlying judgment becomes final and the insurer's liability is finally determined"). This is a federal district court case that is not binding on this court, but nonetheless persuasive in that it supports this court's finding that this matter accrued at the time of settlement – the time that the insurer's liability was finally determined as the matter reached a final global settlement with all defendants for $5.8 million.

Defendant cites Crest-Foam Corp. v. Aetna Ins. Co., 320 N.J. Super. 509, 517 (App. Div. 1999) for the proposition that insurance coverage actions, including actions like this in which an insurer seeks to recover sums it paid in settlement from another insurer, are governed by the six-year statute of limitations for contract actions set forth in N.J.S.A. 2A:14-1.

In Crest-Foam Corp., the six-year statute of limitations did not apply substantially for the reason that the matter arose out of the "no action" clause in the underlying policy. Notably,

Crest-Foam relies on an earlier case Condenser Serv. & Eng'g Co., Inc. v. American Mut. Liab. Ins. Co., wherein Justice Francis described the purpose of the so-called "no action" clause as follows:

> The basic purposes of this language are (1) to avoid joinder of the insurance company by the injured person in the damage action against the insured, and (2) to prevent suit against the carrier by the injured person or the insured until the Damages have been fixed by final judgment after trial of that action **or by proper agreement.**
>
> Condenser Serv. & Eng'g Co., Inc. v. American Mut. Liab. Ins. Co., 45 N.J. Super. 31, 41 (App. Div.), certif. denied, 24 N.J. 547 (1957) (emphasis added).

As noted in Condenser Serv. and as quoted in Crest-Foam, "the [d]amages have [not] been fixed by final judgment after trial . . . or by proper settlement. Crest-Foam," 320 N.J. Super. at 519. In this case, it is this courts view that the matter had been disposed of by means of a proper, enforceable settlement when the damages were clearly fixed by placing the settlement on the record in January 2012.

CONCLUSION

For the reasons set forth above, based upon the papers submitted and oral argument, it is clear the case settled in January 2012 – as evidenced by the fact that the trial did not proceed on January 23, 2018, the settlement was placed on the record; plaintiff's own representation in its complaint filed on March 12, 2018, and the January 2012 electronic data contained within plaintiff's claims file.

For the above reasons, defendant Penn National's motion for summary judgment (and that of co-defendant Everest Reinsurance Company) are GRANTED, and plaintiff's complaint against said defendants is dismissed, with prejudice.