COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-306

LISA M. HINCMAN, personal representative,[1]

vs.

SUZANNE T. IOVANNA, personal representative,[2] & another[3]; UNIVERSAL UNDERWRITERS INSURANCE COMPANY & another,[4] third-party defendants.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

In this insurance settlement dispute, third-party plaintiffs Suzanne T. Iovanna and Pride Chevrolet, Inc. (Pride) (collectively, plaintiffs)[5] appeal from the dismissal pursuant to Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974), of their third amended third-party complaint against their liability

[1] Of the estate of Chester A. Hincman, Jr.

[2] Of the estate of Michael A. Iovanna.

[3] Pride Chevrolet, Inc.

[4] Triple T Cafe, Inc., doing business as Calitri's.

[5] Although Lisa M. Hincman is the plaintiff in the underlying suit, for ease, we refer to Iovanna and Pride collectively as the plaintiffs because the only issues in this appeal arise from the third-party action.

insurer, Universal Underwriters Insurance Company (Universal). The third amended third-party complaint alleged unfair and deceptive business and insurance settlement practices, breach of the implied covenant of good faith and fair dealing, negligent misrepresentation, promissory estoppel, and unjust enrichment. Each of these claims was based on the plaintiffs' theory that Universal caused them harm by depriving them of their right to contribution from a joint tortfeasor. A Superior Court judge dismissed the claims, reasoning that the plaintiffs had no right to contribution and, therefore, could not establish that they were harmed by Universal's conduct. We agree and affirm.

Background. We summarize the relevant facts from the third amended third-party complaint and the attached exhibits. On October 19, 2014, Michael A. Iovanna (Michael)[6] drove a car owned by Pride while under the influence of alcohol, killing himself and his passenger. When the passenger's wife, Lisa M. Hincman, sued the plaintiffs for wrongful death and negligence, the plaintiffs tendered the claim to Universal under the liability policy (policy). Universal filed a third-party action against Calitri's on the plaintiffs' behalf. Calitri's is the restaurant where Michael had consumed alcohol before the

[6] We refer to Michael A. Iovanna by his first name to avoid confusion.

accident.[7] The original third-party complaint alleged that, to the extent the plaintiffs were liable to Hincman, Calitri's was liable to the plaintiffs for contribution because it overserved alcohol to Michael.

The plaintiffs obtained independent counsel, who filed an amended third-party complaint against Calitri's asserting a claim for Michael's wrongful death. Hincman also amended her complaint to state direct claims against Calitri's. At the plaintiffs' request, Universal ceded prosecution of the third-party action against Calitri's to the plaintiffs while it worked to settle Hincman's claims under the policy. All of the claims were set for mediation on December 13, 2017.

Before the mediation, Universal represented to the plaintiffs that it would "use the money afforded by the policy limits applicable to this case to settle the matter on behalf of its insureds." Universal further asserted that, if it settled the case, it would "have Calitri's released by [Hincman] in order to preserve the contribution claim." During the mediation, however, Universal did not offer to pay Calitri's liability to Hincman, and did not obtain a release of Hincman's claims against Calitri's. The mediation failed.

[7] The plaintiffs alleged in the third-party action that Michael was served the equivalent of fourteen vodka drinks at Calitri's over a period of two and three-quarter hours.

In February of 2018, the plaintiffs filed a second amended third-party complaint, asserting claims against Universal for unfair settlement practices in violation of G. L. c. 93A and G. L. c. 176D. That same month, Universal paid Hincman $6.9 million to settle her claims against the plaintiffs. The settlement did not include a release of Hincman's claims against Calitri's, which separately settled with Hincman for $2 million. The plaintiffs filed the operative, third amended third-party complaint after their contribution claim against Calitri's was dismissed pursuant to G. L. c. 231B, § 4.[8]

Discussion. We review the allowance of a motion to dismiss de novo, accepting the allegations in the complaint as true and drawing all reasonable inferences in the plaintiffs' favor. Curtis v. Herb Chambers I-95, Inc., 458 Mass. 674, 676 (2011). To withstand a motion to dismiss, the "[f]actual allegations must be enough to raise a right to relief above the speculative level." Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008), quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). While detailed allegations are not required, sufficient

[8] Pursuant to G. L. c. 231B, § 4 (b), a release given in good faith to one or more persons liable in tort for the same injury "shall discharge the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor." Hincman's settlement with Calitri's therefore extinguished the plaintiffs' direct contribution claim against Calitri's.

facts must be pleaded to plausibly suggest an entitlement to relief. See Iannacchino, supra.

To be entitled to relief under G. L. c. 93A and G. L. c. 176D, the plaintiffs must show that they suffered a loss as a result of Universal's conduct. See Hershenow v. Enterprise Rent-A-Car Co. of Boston, 445 Mass. 790, 798 (2006). An element of loss or injury is also required to prove the plaintiffs' common law claims of breach of the implied covenant of good faith and fair dealing, see A.L. Prime Energy Consultant, Inc. v. Massachusetts Bay Transp. Auth., 479 Mass. 419, 434 (2018), and negligent misrepresentation, see Nota Constr. Corp. v. Keyes Assocs., Inc., 45 Mass. App. Ct. 15, 19-20 (1998). Similarly, recovery under a claim of promissory estoppel requires that the plaintiffs prove that they relied on Universal's promise to their detriment. See Rhode Island Hosp. Trust Nat'l Bank v. Varadian, 419 Mass. 841, 848 (1995). Finally, in order to recover under a theory of unjust enrichment, the plaintiffs must show that their money was retained by Universal "against the fundamental principles of justice or equity and good conscience" (quotation omitted). Santagate v. Tower, 64 Mass. App. Ct. 324, 329 (2005).

Thus the plaintiffs' statutory, common law, and equitable claims all depend on their assertion that, by failing to settle Hincman's claims against Calitri's and failing to include

Calitri's on the release executed with Hincman as it had promised, Universal damaged the plaintiffs by denying them their right to contribution from Calitri's. We agree with the judge's assessment that each of the plaintiffs' claims turn on whether they had, or would have had, a legal right to contribution from Calitri's, because "[i]f they had no viable contribution claim, [the plaintiffs] cannot demonstrate they were damaged or harmed."

"In Massachusetts, claims for contribution are governed by a statutory scheme adapted from the Uniform Contribution Among Joint Tortfeasors Act." Commonwealth v. Tradition (N. Am.) Inc., 91 Mass. App. Ct. 63, 68 (2017). See G. L. c. 231B, §§ 1-4 (statute). The statute provides that "a joint tortfeasor who pays damages, whether under a settlement agreement or a court imposed judgment, is entitled to contribution." Medical Professional Mut. Ins. Co. v. Breon Labs., Inc., 966 F. Supp. 120, 122 (D. Mass. 1997). However, "[t]he right of contribution shall exist only in favor of a joint tortfeasor . . . who has paid more than his pro rata share of the common liability." G. L. c. 231B, § 1 (b). Although the right of contribution comes into being when the underlying incident occurs, the right is inchoate. See Sword & Shield Restaurant, Inc. v. Amoco Oil Co., 11 Mass. App. Ct. 832, 833 (1981). The cause of action does not accrue, and cannot be assigned, until a tortfeasor

actually pays more than its share of the common liability. See Spirito v. Hyster New England, Inc., 70 Mass. App. Ct. 902, 903 (2007). Such payment is a prerequisite to an action for contribution. See Robertson v. McCarte, 13 Mass. App. Ct. 441, 442 n.1 (1982).

Here, it is undisputed that the plaintiffs paid nothing toward the common liability. The third amended third-party complaint alleged that Universal paid $6.9 million to settle Hincman's claims against the plaintiffs, and that Calitri's insurer paid $2 million to settle Hincman's claims against Calitri's.[9] The third amended third-party complaint does not allege that the plaintiffs paid, or even that they would have paid, to settle the common liability with Calitri's. In these circumstances, it was Universal that had the legal right to contribution from Calitri's, because Universal paid to settle the plaintiffs' liability to Hincman. Simply put, the plaintiffs cannot show the requisite harm, because the right of contribution that they claim to have lost did not belong to them. For this reason, we agree with the judge that even if Universal "had preserved the contribution claim, the right to

[9] The plaintiffs acknowledged at oral argument that they settled their own wrongful death claim against Calitri's for $750,000.

contribution would have belonged to [Universal], not to [the plaintiffs]." We discern no error in the judgment of dismissal.[10]

Judgment affirmed.

By the Court (Wolohojian, Blake & Kinder, JJ.[11]),

Joseph F. Stanton

Clerk

Entered: December 22, 2020.

[10] The plaintiffs' argument that the judge erred in denying their request to conduct discovery before the motion to dismiss was decided is cursory and unsupported by citation to legal authority. Accordingly, we decline to address it. See Cameron v. Carelli, 39 Mass. App. Ct. 81, 86 (1995).

[11] The panelists are listed in order of seniority.