2002 WL 1573480
Not Officially Published
(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
Only the Westlaw citation is currently available.

Court of Appeal, Second District,
Division 8.

Daniel T. THOMPSON et al., Plaintiffs and Appellants,
v.
FIREMAN'S FUND INSURANCE COMPANY, Defendant and Respondent.

No. B149380.
|
(Los Angeles County Super. Ct. No. BC215304).
|
July 16, 2002.

Synopsis

Insureds brought action for breach of contract, bad faith, declaratory relief, intentional infliction of emotional distress (IIED), and violation of the Elder Abuse and Dependent Adult Civil Protection Act against homeowner's insurer. The Superior Court, Los Angeles County, Ronald E. Cappai, J., granted summary judgment for insurer, and insureds appealed. The Court of Appeal, Cooper, P.J., held that: (1) fact issue as to what damages were covered by settlement with tortfeasor precluded summary judgment; (2) fact issue as to whether insureds' settlement impaired insurer's subrogation rights precluded summary judgment; (3) fact issue as to whether damage to insureds' home was attributable to noncovered causes precluded summary judgment; (4) insurer's conduct did not rise to level of extreme and outrageous conduct required to support claim for IIED; and (5) inclusion of undocumented facts in separate statement of undisputed and disputed facts did not warrant grant of summary judgment.

Reversed with directions.

APPEAL from a judgment of the Superior Court of Los Angeles County. Ronald E. Cappai, Judge. Reversed with directions.

Attorneys and Law Firms

W. Ruel Walker; Timothy D. McGonigle and George G. Braunstein, for Plaintiffs and Appellants.

Carlson, Calladine & Peterson, Robert M. Peterson, Asim K. Desai and David J. Billings, for Defendant and Respondent.

Opinion

COOPER, P.J.

***1** Plaintiffs, Daniel and Ada Thompson, appeal from summary judgment in favor of defendant Fireman's Fund Insurance Company (FFIC), in an action for breach of contract, bad faith, declaratory relief, intentional infliction of emotional distress (IIED), and violation of the Elder Abuse and Dependent Adult Civil Protection Act (Welf. & Inst.Code, § 15600 et seq.). Although not contesting summary adjudication of the latter cause of action, plaintiffs contend that the summary judgment was otherwise unwarranted. We conclude that the IIED cause of action also was properly adjudicated summarily, but that plaintiffs' other claims were not.

FACTUAL BACKGROUND

Plaintiffs' complaint named as defendants FFIC and an adjusting company, which later settled with plaintiffs for $25,000. FFIC insured plaintiffs' Pacific Palisades home, through policies that were attached to the complaint. The complaint alleged that, commencing in late 1993, the home suffered water damage to the insides of walls, which caused further damage including wall damage, mold, flooding, foundation and carpet damage, and personal property damage. The water incursion created a “sick house” condition, deleterious to plaintiffs' health. Plaintiffs made a claim under their policies, but FFIC failed to handle it reasonably, and made an offer it knew was many times less than the damage. Among FFIC's alleged inadequacies of performance was failure to conduct “destructive testing,” apparently meaning breaking open walls to inspect and test the extent of the damage. FFIC's conduct allegedly caused the elderly plaintiffs not only economic damage but also emotional and physical suffering.

FFIC moved for summary judgment, or alternatively for summary adjudication of each cause of action.[1] The evidence submitted in support of and in opposition to the motion showed the following history. In late 1993, plaintiffs engaged Culver City Roofing (CR) to replace their roof. During the first rain after the replacement, water came through interior walls, causing damage to ceilings, carpet, furniture and walls. Although CR made a series of roof repairs, the "water intrusions" continued after each rain, and persisted through the 1994-1995 season.

1 The motion did not refer to the declaratory relief cause of action, but that claim involved issues embraced in the breach of contract cause.

Plaintiffs hired a contractor, Richard Peardon, to advise them. At his suggestion, they consulted a roofing specialist, who opined that CR's roof should be replaced. That expense would not be covered by FFIC's policy, but it did cover the water damage. Plaintiffs filed a claim for that damage with FFIC on August 1, 1995. FFIC immediately noticed the potential for subrogation against CR, and in 1996 FFIC gave notice to CR of intent to subrogate.

The roof replacement was completed in April 1996, and new water incursions ceased. In the meantime, Peardon furnished estimates for repair of the interior damage, first of $20,510, and later of $24,381. Peardon informed FFIC's representative, however, that destructive testing would be necessary to ascertain the full extent of the damage. FFIC did not perform or authorize such tests. In April and May of 1996, FFIC allowed $20,228.64 compensation, less a $500 deductible. FFIC paid plaintiffs $16,696, the remaining $3,332 being "held back" pending completion of repairs, which plaintiffs had not begun.

***2** In July 1996, Peardon submitted to FFIC a report that asbestos was present in the areas to be repaired, and a revised estimate covering its abatement and other changes. FFIC agreed to and did pay an additional $8,271 on account of these matters. In October 1996, plaintiff Daniel Thompson became ill. Plaintiffs did not proceed with the repairs. FFIC left the claim file open, at least to pay the holdback.

Throughout much of 1997, Mrs. Thompson informed FFIC that Mr. Thompson remained quite ill and the repairs consequently had not been performed. Through its in-house adjuster, Tommy Johnson, FFIC internally continued the matter of the holdback several times, but then informed plaintiffs that if the repairs were not substantially completed the file would be closed, subject to possible payment upon such completion. Plaintiffs' attorney George Braunstein contacted Johnson, but FFIC closed the claim on these terms in December 1997.

In November 1997, plaintiffs filed an action against CR, for breach of contract, breach of warranty, and fraud. FFIC did not join in this suit, although Braunstein declared he had informed Thompson that it would be filed. Partly in preparation of that case, plaintiffs had

additional testing and damage evaluation performed. Thereafter in July 1998, Braunstein submitted to FFIC a revised estimate for repairs, totaling $285,000. This figure included an enlarged estimate for asbestos removal, living expense and moving and storage expenses of about $60,000, and a repair estimate by Peardon's company and a new contractor in the amount of $187,364.[2] FFIC's Johnson agreed to meet with Braunstein, but cautioned that FFIC was proceeding under a reservation of rights with respect to the further demand.

2 This amount included roof replacement, which plaintiffs concede was not covered by the policy.

At the August 1998 meeting with Johnson at plaintiffs' home, plaintiffs' roofing consultant explained that the damage had originated in part from wind-driven rain under the eaves of the CR roof. Peardon stated that the enlarged repair estimate stemmed from a more thorough evaluation, by the new contracting company. That evaluation, which FFIC had been provided, reported microbal and mold contamination. Following the meeting, Braunstein provided Johnson additional documentation he had requested. After failing to return Braunstein's calls for several weeks, Johnson, accompanied by FFIC contractor personnel, met with him again at plaintiffs' home in December 1998. Subsequently, Johnson told Braunstein that FFIC's 1996 scope of repair would cover all the damage identified by the new contractor. Johnson felt that destructive testing, which Peardon still recommended, was not necessary.

Following the December meeting, Johnson communicated a new estimate, from another contractor, totaling $36,000. (FFIC never paid plaintiffs the difference between this amount and those previously allowed.) Plaintiffs proceeded with destructive tests, and in March 1999 they had an environmental specialist assess the presence of fungi and microbes. He reported extensive infestation, including toxic fungi present in several rooms and in opened walls. According to this inspector, the presence of one notably “toxigenic” fungus, stachybotrys, requires and indicates substantial water intrusion. Treatment of occupants exposed to it requires that they leave the structure.

***3** In May 1999, Braunstein sent FFIC a copy of the environmental inspector's report. According to Braunstein, Thompson reacted by stating that plaintiffs were fabricating these new damages, and that he would turn the file over to his superiors at FFIC. Later that month, plaintiffs received from a new contractor a full repair bid, including remediation of the contamination as well as living and moving expenses (but not roof replacement), totaling $472,000.

In their suit against CR, plaintiffs in April 1999 provided new damage estimates which, exclusive of the fungal and microbal damage (which had not yet been quantified) and the cost of roof replacement, came to approximately $285,000. In June 1999, apparently on the eve of trial, plaintiffs and CR reached a settlement by which CR would pay plaintiffs $450,000. The

agreement provided that plaintiffs would indemnify CR regarding any subrogation claims by FFIC for amounts paid to plaintiffs after June 1, 1999. Plaintiff sent a copy of the proposed settlement agreement to FFIC for reaction with respect to FFIC's rights, but FFIC did not respond.

Plaintiffs commenced this action in August 1999, after FFIC had failed to pay any further on their claim. In January 2001, shortly before the scheduled trial date, FFIC moved for summary judgment or summary adjudication, on the following grounds: (1) plaintiffs had suffered no damages for which they had not already been compensated by the settlement with CR; (2) plaintiffs were not entitled to any policy benefits because they had "waived FFIC's subrogation rights"; (3) none of the damages plaintiffs were claiming were covered by FFIC's policy; (4) plaintiffs could not "establish a breach of the covenant of good faith and fair dealing such that punitive damages may be awarded"; (5) plaintiffs could not demonstrate the element of outrageous conduct necessary for an IIED claim; and (6) the elder abuse statutes did not apply to FFIC. The trial court granted FFIC's motion, approving all six grounds.

DISCUSSION

We review the grant of summary judgment or summary adjudication de novo. (*Merrill v. Navagar, Inc.* (2001) 26 Cal.4th 465, 476, 110 Cal.Rptr.2d 370, 28 P.3d 116.) In determining whether plaintiffs' causes of action were properly subject to summary adjudication, we apply the rules articulated in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850-855, 107 Cal.Rptr.2d 841, 24 P.3d 493.

1. Full Compensation.

[1] The first ground for summary judgment FFIC asserted was that plaintiffs had already been compensated, through their settlement with CR, for all the damages they might seek or recover in this action. FFIC essentially based this argument on the similarity of interrogatory answers in which plaintiffs had summarily listed the types of injuries and damages they sought in the two lawsuits. FFIC did not carry its burden of showing that the recovery from CR encompassed all that FFIC could be liable for, under its policy or, further, under its implied covenant of good faith and fair dealing. There was no showing as to what these amounts were, nor of what particular damages the compromise settlement with CR had encompassed .[3] Moreover, that settlement was rendered in the face of demands for elements for which FFIC was not responsible under its policy, such as the cost of replacing CR's roof and personal injury damages.

3 CR's original roofing agreement with plaintiffs had excluded from its warranty leakage damage to the interior of the house.

***4** Plaintiffs acknowledge that "most of their damage claims against [CR] were identical to their claims against FFIC-but not all...." But this convergence of demands does not account for the particulars, and render a settled claim preclusive of one that has not yet been tried. The relationship between plaintiffs' settlement with CR and the damages recoverable in this action presented triable issues.

2. Release of Subrogation Rights.

[2] The second ground for summary judgment offered by FFIC was that plaintiffs' settlement with CR had abrogated FFIC's right of subrogation against that tortfeasor, and therefore plaintiffs were not entitled to claim benefits under the policy. By its terms, this contention was directed at plaintiffs' breach of contract claim, for policy benefits, and it did not call for summary judgment, as opposed to summary adjudication of that cause of action. For several reasons, FFIC did not establish this contention without triable dispute.

The basic authority for the contention was *Liberty Mut. Ins. Co. v. Altfillisch Constr. Co.* (1977) 70 Cal.App.3d 789, 139 Cal.Rptr. 91 (*Liberty*). In that case, an insurer had compensated its insured for equipment damage that the insured's lessee had committed. When the insurer sued the lessee in subrogation to the insured's rights, the lessee successfully defended on the basis that the insured by prior agreement with the lessee had effectively relinquished any right to sue it. The policy contained a provision that "The insured shall do nothing after loss to prejudice [the] righ[t of subrogation]." (*Id.* at p. 796, 139 Cal.Rptr. 91.) Affirming the insurer's recovery of its payment from the insured, the court confronted the fact that the agreement with the lessee had been made before the loss, and thus did not violate this specific provision. However, the court ruled that "it was clearly a breach of the insured's implied covenant of good faith and fair dealing ... to ... contrac[t] away such opportunity [for subrogation] before the loss occurred." (*Id.* at p. 797, 139 Cal.Rptr. 91.)

The present case is distinguishable from *Liberty, supra,* 70 Cal.App.3d 789, 139 Cal.Rptr. 91, in several respects. First, plaintiffs' settlement with CR occurred after the loss, but FFIC's policy does not appear to contain a provision against prejudicing subrogation rights, as in *Liberty.* [4] Having failed to include such a provision, FFIC is in less of a position to complain about plaintiffs' conduct. (See *Allstate Ins. Co. v. Mel Rapton, Inc.* (2000) 77 Cal.App.4th 901, 913, 92 Cal.Rptr.2d 151.)

4 Such a provision appears in an umbrella liability policy, but not the homeowner's policy.

Second, it is not at all clear whether or to what extent plaintiffs' settlement with CR impaired FFIC's rights of subrogation against it. Although an insurer's action against a tortfeasor ordinarily is barred if an action by the insured would be, " 'where the tortfeasor obtains a release from the insured with knowledge that the latter has already been indemnified

by the insurer, such release of the tortfeasor does not bar the right of subrogation of the insurer.' " (*Conservatorship of Edwards* (1988) 198 Cal.App.3d 1176, 1184, 244 Cal.Rptr. 330.) Here, there was evidence-correspondence between plaintiffs' attorney and FFIC's attorney immediately preceding the settlement-strongly indicating that before the settlement CR was aware that FFIC had already paid plaintiffs the amount it had. As to that amount, then, FFIC would have retained its right to subrogation, and plaintiffs would be guilty of no impairment. (*Griffin v. Calistro* (1991) 229 Cal.App.3d 193, 197, 280 Cal.Rptr. 30 .)

***5** As to further amounts not yet paid to plaintiffs (and which FFIC did not pay), a right of subrogation had not yet arisen. Yet with respect to these elements too, the settlement agreement and correspondence indicated that (1) as above, CR was aware of FFIC's potential rights, [5] and (2) plaintiffs intended to protect them. The settlement provided that plaintiffs would defend and indemnify CR for any claims in subrogation on account of CR's roofing, except for FFIC's payments to date. By letter enclosing a draft of the agreement, plaintiffs' attorney informed FFIC's attorney that this provision was responsive to FFIC's concern that its rights be protected. Plaintiffs' counsel inquired of FFIC's position, but received no reply. This evidence presented triable issues, not only of whether plaintiffs actually impaired FFIC's subrogation rights, but also of whether FFIC consented to the settlement agreement's effect (if any) on those rights, or, otherwise put, knowingly waived subrogation in that regard.

5 Indeed, correspondence from FFIC's adjuster to Thompson stated that CR had been notified of FFIC's intent to subrogate more than two years before the settlement.

Finally, to the extent that FFIC did not pursue a claim against CR before the expiration of the statute of limitations for suit by plaintiffs, FFIC itself, not plaintiffs, was responsible for loss of its subrogation rights. (See *Commercial Union Assurance Co. v. City of San Jose* (1982) 127 Cal.App.3d 730, 734-735, 739, 179 Cal.Rptr. 814.) [6]

6 FFIC did not file such a case with respect to the amounts it had plaintiffs in 1996.

For all of these reasons, FFIC was not entitled to summary adjudication on the ground that plaintiffs had extinguished FFIC's subrogation rights so as to be disentitled to further indemnity under the policy.

3. Coverage Exclusions.

[3] In another challenge to liability under the policy, FFIC asserted that all of the losses that plaintiffs claimed fell under one of several policy exclusions. FFIC did not present evidence sufficient to show this was so.

The first exclusion on which FFIC relied concerned defective construction. On this basis, FFIC argued that plaintiffs could not claim indemnity for replacing the roof. Plaintiffs

acknowledge this, and disclaim seeking compensation for that item (albeit it was included in the 1998 estimate).

A second propounded exclusion from coverage was "loss caused by: [¶] ... [¶] (3) rust, mold, wet or dry rot[.]" FFIC's focus here was on mold, which was found within the house upon the later inspections and testing. Plaintiffs acknowledge that loss or damage caused by mold is not covered, but they emphasize that there are numerous other actual and possible causes of the damage to the house. The mold exclusion therefore does not encompass all of plaintiffs' unreimbursed claim. [7]

7 Moreover, certain damage apparently attributable to mold might be covered because a covered cause-e.g., rain intrusion-was the "efficient" proximate cause. (See *Sabella v. Wisler* (1963) 59 Cal.2d 21, 30-33, 27 Cal.Rptr. 689, 377 P.2d 889.)

FFIC responds that it paid for all damage occasioned before the water intrusions ceased in 1996, and any further damage must be attributable to second uninsured cause, namely, "neglect of the insured to use all reasonable means to save and preserve property at and after the time of a loss." As such neglect, FFIC cites plaintiffs' indisposition to make interior repairs until the leaking of the roof was rectified, and their failure to conduct repairs thereafter. The conclusion FFIC draws is that all damage for which plaintiffs now seek compensation is attributable to their neglect, and hence not covered. [8]

8 In this regard, FFIC also cites another exclusion, for loss caused by "Acts or decisions, including the failure to act or decide, of any person, group, organization or government body[.]"

***6** This theory is speculative, and was not suitable for summary adjudication. Whether plaintiffs did or did not use reasonable means that would have avoided the damage in question presents issues of fact. Plaintiffs repeatedly sought to repair the roof, and ultimately replaced it. It was not established that the damage within the walls, the pollution of the house, and other elements perceived by the inspections of 1998 and 1999 and included in plaintiffs' further claim, were known, or fully known of, before then. And there was no proof that such elements could have been prevented once water had intruded. [9] FFIC's theory rests on the unsubstantiated assumption that repairs conducted pursuant to its 1996 payments of approximately $25,000 would have prevented any other damage, which may well have already been done. The supposition that FFIC fully discharged its obligation by paying approximately $25,000 begs the question of this entire lawsuit.

9 *Lumpkin v. Alabama Farm Bureau, etc.* (Ala.Civ.App.1977) 343 So.2d 1238, cited by FFIC, presented an entirely different state of facts: after a hurricane blew several limbs onto the insured's house and left another visibly dangling over it, the insured filed a claim but then failed for seven months to have the hanging limb removed, before it fell on the house.

Whether and to what extent the uncompensated damage to plaintiffs' home was attributable to noncovered causes presented triable issues. There was no basis for summary adjudication that all such damage was not covered.

4. Bad Faith and Punitive Damages.

[4] FFIC sought summary adjudication of plaintiffs' cause of action for tortious breach of the implied covenant of good faith and fair dealing (bad faith), on grounds that (1) FFIC owed plaintiffs no further benefits under the policy (see *Love v. Fire Ins. Exchange* (1990) 221 Cal.App.3d 1136, 1151-1153, 271 Cal.Rptr. 246); (2) FFIC did not handle plaintiffs' claim in a manner FFIC knew to be unreasonable; and (3) FFIC's claim investigation and denial of further benefits were reasonable, in view of (a) the 1996 payment for an agreed scope of damages then perceptible, (b) plaintiffs' subsequent damage estimates' derivation from failure to repair, and (3) plaintiffs' receipt of $450,000 further compensation from CR in mid-1999.

FFIC continues to rely on these grounds. The first two may be summarily dispatched. First, we have already determined that a triable question exists as to whether FFIC breached the policy by not paying additional benefits. Second, although bad faith involves unreasonable conduct by an insurer, it is not an element of the cause of action that the insurer know that its conduct is unreasonable. The authorities FFIC cites for that supposed requirement do not recognize it.

The remaining issue is whether the evidence established without triable dispute that FFIC's refusal to pay more than $25,000 on plaintiffs' claim, and FFIC's investigation and omissions to investigate that claim, were not unreasonable. (see *Opsal v. United Services Auto. Assn.* (1991) 2 Cal.App.4th 1197, 1205, 10 Cal.Rptr.2d 352.) We cannot say so. "[T]he reasonableness of an insurer's claims-handling conduct is ordinarily a question of fact," unless "the evidence is undisputed and only one reasonable inference can be drawn from the evidence." (*Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co.* (2001) 90 Cal.App.4th 335, 346, 108 Cal.Rptr.2d 776.) Here, there is a plain dispute about FFIC's principal justification for rejecting the revised damage reports and estimates, and refusing to pay plaintiffs further, namely that any damage disclosed after the original payment was attributable to plaintiffs themselves, or consisted of damage from mold. Moreover, a quantity of this damage was discovered only after destructive testing in 1999. Plaintiffs urge that FFIC's refusal to make such testing part of its investigation was itself an element of bad faith. In support of this contention, plaintiffs offered the declaration of their environmental inspector, to the effect that in 1997 he was present with FFIC's Thompson, the adjuster on this case, at another home that had suffered water damage, and he discussed with Thompson the importance of destructive and airborne testing-which had been done at those premises-in cases of water intrusion, to identify and remove contaminants which could affect occupants' safety. FFIC's rejoinder, that it was not obligated to conduct repairs, does not meet the issue of its responsibility to provide for this testing.

***7** Plaintiffs do not contend that FFIC was guilty of bad faith with respect to nonpayment before it became apprised of the expansion of plaintiffs' claim, in 1998. But FFIC has not refuted as a matter of law the allegation of unreasonable conduct and bad faith thereafter. Among other things, plaintiffs point to FFIC's failure to pay the difference between what it paid in 1996 and the $36,000 FFIC's contractor later estimated would be needed to complete the limited scope of repairs. Nor, without an assessment of the damages in question, may FFIC's refusal to pay after plaintiffs settled with CR be deemed reasonable.

[5] As part of its request for summary adjudication of the bad faith cause of action, FFIC also contended that the court should summarily adjudicate plaintiffs' claim for punitive damages on that cause. Such a claim is a proper subject for summary adjudication. (Code Civ. Proc., § 437c, subd. (f)(1).) The issue is whether plaintiffs established a triable issue that FFIC acted with malice or oppression (Civ.Code, § 3294, subd. (a)) in the handling of plaintiffs' claim that is alleged to have been in bad faith.

Plaintiffs submit that malice or oppression could be discerned by a trier of fact with respect to FFIC's (1) failure to pay even the difference between its initial payments and the cost estimated by its own contractor; (2) failure to make additional payments after receipt of new and sizeably greater damage estimates, and reinspection of the property; (3) failure even to communicate to plaintiffs the particular elements of disagreement with the new estimates (except to claim that plaintiffs had fabricated damage), so as to permit negotiation, especially after CR had perceived $450,000 damages in plaintiffs' related claims This conduct might-or might not-be found to have constituted malice, as defined for purposes of punitive damages by Civil Code section 3294, subdivision (c)(1). Summary adjudication of the punitive damages claim was premature.

5. IIED.

[6] FFIC obtained summary adjudication of plaintiffs' cause of action for IIED on the basis that plaintiffs could not establish "outrageous" conduct by FFIC. A distinguishing prerequisite of the IIED tort, outrageous conduct signifies behavior " 'utterly intolerable in a civilized community,' " not merely conduct with a bad intent, or such as would qualify for punitive damages. (*Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 496, 76 Cal.Rptr.2d 540.) The absence of such conduct may be determinable as a matter of law. (*Id.* at p. 494, 76 Cal.Rptr.2d 540.)

For their assertion of outrageous conduct, plaintiffs rely essentially on the same claims-handling behavior as discussed immediately above. Although that conduct, as depicted, presented triable issues of bad faith and malice, it did not rise to the extreme and exotic dimension warranting an IIED claim. Summary adjudication of this cause of action was not error.

6. Code of Civil Procedure Section 437c, Subdivision (b).

[7] Citing cases that have affirmed the granting of summary judgment for failure of the opposing party to file a separate statement of undisputed and disputed facts (see Code Civ. Proc., § 437c, subd. (b)), FFIC requests that the present judgment be affirmed because plaintiffs' separate statement on occasion included assertions that might be considered undocumented. Contrary to FFIC's suggestion, the record does not indicate that the trial court accepted this argument. Moreover, the statute does not appear to contemplate such a disposition, certainly when a party provides references to allegedly supporting evidence. Plaintiffs here filed a massive separate statement which did just that, and the criticism that FFIC levels at it also applies to FFIC's own 68-page separate statement. If factual assertions prove undisputed or unsupported, the proper remedy is a consequent ruling on the merits.

DISPOSITION

***8** The judgment is reversed, with directions to enter an order summarily adjudicating the fourth and fifth causes of action of the complaint, and otherwise denying FFIC's motion for summary judgment or summary adjudication. Plaintiffs shall recover costs on appeal.

We concur: RUBIN and BOLAND, JJ.

All Citations

Not Reported in Cal.Rptr.2d, 2002 WL 1573480