SONIA PERALDA et al., Plaintiffs and Appellants, v. FIRE INSURANCE EXCHANGE, Defendant and Respondent.

B198663

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FOUR

2008 Cal. App. Unpub. LEXIS 7673

September 22, 2008, Filed

PRIOR HISTORY: [*1]
APPEAL from a judgment of the Superior Court of Los Angeles County. Super. Ct. No. BC316387. Lee Smalley Edmon, Judge.

DISPOSITION: Affirmed.

COUNSEL: Law Office of Sassoon Sales and Sassoon Sales, for Plaintiffs and Appellants.

Greines, Martin, Stein & Richland LLP, Robert A. Olson and Sheila A. Wirkus, for Defendant and Respondent.

JUDGES: MANELLA, J.; WILLHITE, Acting P. J., SUZUKAWA, J. concurred.

OPINION BY: MANELLA

OPINION

In the underlying action, appellants Sonia Peralda and Edwin Rayter asserted claims for breach of insurance contract and bad faith against Fire Insurance Exchange (FIE). Following a bench trial, the trial court rendered judgment in favor of FIE on appellants' claims. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

FIE issued a fire insurance policy to appellants regarding their residence in Northridge. On November 29, 2000, a fire occurred in the residence. Appellants submitted a claim to FIE, which paid appellants more than $ 400,000, including $ 200,000 for repairs to the residence, $ 176,250 for damaged contents, and $ 60,484.50 for additional living expenses. After the renewal of their policy,

a second fire occurred in the residence on February 21, 2002. In response to appellants' claim regarding the second fire, [*2] FIE paid $ 70,000 for damaged contents, $ 32,000 for additional living expenses, and $ 180,000 as the undisputed amount payable under a lender's "loss payable" endorsement.

On June 11, 2003, after completing its investigation of the second fire, FIE denied appellants' claim on two grounds. FIE asserted that appellants' policy was void because appellants had engaged in fraud in connection with their claims regarding both fires. [1] Regarding appellants' claim following the first fire, FIE stated, inter alia, that appellants had intentionally inflated their additional living expenses by representing that they had leased a residence they, in fact, owned, and had intentionally misrepresented the costs incurred in rebuilding the fire-damaged residence. FIE asserted that these "constitute[d] material misrepresentations and concealments," and stated: "As such, they represent a material breach of the policy which renders the policy void at the time of the representation. Therefore, [the] policy became void before the second fire loss ever occurred. Even if the false representations and documentation is *[sic]* considered only upon its discovery, it still renders the policy void for the present [*3] loss."

1 According to FIE, evidence of appellants' fraud in connection with their first claim emerged only during its investigation of the second claim.

FIE also identified several misrepresentations in connection with appellants' claim following the second fire, including an inventory of destroyed personal property "based in large part on overstated items with false dates, prices, and sources." In addition, FIE noted misrepresentations about appellants' social security numbers and employment, and discrepancies in their accounts of the fires, both of which had originated in the residence's kitchen. FIE asserted that appellants' misrepresentations and concealments regarding the second claim also required the denial of the claim "in its entirety."

As a second ground for denying appellants' claim, FIE stated that appellants had not cooperated with FIE's investigation of the second fire. On this matter, FIE pointed to appellants' failure to provide requested information and documentation, as well as their apparently evasive and disingenuous testimony during examinations under oath.

Appellants initiated the underlying action against FIE in June 2004. On March 17, 2005, appellants filed their [*4] second amended complaint, which sought declaratory relief and asserted claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and unfair business practices (Bus. & Prof. Code, § 17200 et seq.). Prior to the bench trial on appellants' claims, the trial court denied appellants' motion in limine to exclude evidence of fraud in connection with their claim regarding the first fire. During the trial, appellants voluntarily dismissed their claim for unfair business practices and request for declaratory relief.

Following the 18-day trial, the trial court entered judgment in FIE's favor on appellants' remaining claims. In its statement of decision, the trial court found that FIE had properly denied appellants' claim because they failed to cooperate with FIE's investigation of the second fire. Moreover, the trial court found that appellants' policy was void because they had "made multiple material misrepresentations in the presentation of their claims." Regarding the claim for the first fire, the court found appellants had intentionally misrepresented that they were leasing alternative housing and intentionally inflated their claim for repair expenses. Regarding [*5] the claim for the second fire, the court found appellants had submitted a claim for over $ 300,000 for loss of contents "which the testimony established was not true."

The trial court concluded: "[A]t the time [appellants] presented their claim for the second fire, the policy of insurance was void based on the fact that [appellants] had knowingly and willfully concealed or misrepresented material facts and [FIE] was justified in denying the claim relating to the second fire on that basis. Moreover, in light of the fact that the court finds there were material misrepresentations made in connection with both claims, even if the misrepresentations made in connection with the first claim were not appropriately relied on by [FIE] to void the policy, the misrepresentations in connection with the second fire were a sufficient basis for [FIE] to find the policy void and deny the claim."

In addition, the trial court found that FIE had not breached the implied covenant of good faith and fair dealing prior to denying appellant's second claim. On this matter, the trial court rejected appellants' contention that FIE had acted unreasonably in paying only $ 180,000 under the loss payable endorsement.

DISCUSSION

Appellants [*6] contend that the trial court erred in (1) denying their motion in limine, and (2) determining that FIE had properly paid $ 180,000 under the loss payable endorsement.

A. *Motion In Limine*

Appellants contend that the trial court improperly denied their in limine motion to exclude evidence of fraud regarding their first claim. They do not dispute the existence of substantial evidence to support the findings that they had violated their duty to cooperate and that their fraud regarding the second claim had voided the policy. Instead, they argue that the erroneous admission of the evidence impaired the fairness of their trial, and thus constituted reversible error (see Code Civ. Proc., § 475). This contention fails on the record before us.

Initially, we find that appellants have forfeited the contention. To preserve an issue on appeal regarding the admission of evidence, a party must comply with Evidence Code section 353, which requires "an objection . . . so stated to make clear the specific ground of the objection . . . ." As our Supreme Court explained in *People v. Morris* (1991) 53 Cal.3d 152, 189-191 *(Morris),* overruled on another ground in *People v. Stansbury* (1995) 9 Cal.4th 824, 830 fn. 1, [*7] when the trial court denies a motion in limine to exclude evidence, the party opposing the evidence must renew its objection when the evidence is actually offered, *unless* the in limine motion satisfied Evidence Code section 353. An in limine motion meets the requirements of Evidence Code section 353 only when: "(1) a specific legal ground for exclusion is advanced and subsequently raised on appeal; (2) the motion is directed to a particular, identifiable body of evidence; and (3) the motion is made at a time before or during trial when the trial judge can determine the evidentiary question in its appropriate context." *(Morris, supra,* 53 Cal.3d at p. 190; see *Boeken v. Philip Morris* (2005) 127 Cal.App.4th 1640, 1675 [applying the *Morris* requirements].)

Appellants neither suggest they raised specific objections at trial nor provide citations to any such objections. Accordingly, their contention has been forfeited absent a showing that the motion satisfied the *Morris* requirements. Appellants have not made this showing. [2] The incomplete record appellants have provided contains the motion, FIE's opposition, and appellants' reply, but otherwise lacks a minute order or reporter's transcript [*8] that discloses the trial court's ruling on the motion. The motion, though accompanied by a copy of FIE's November 29, 2000 denial letter and other materials, asserted only that it sought the exclusion of evidence of "any fraud in the investigation of the

first fire." Nothing before us otherwise shows that appellants sought to exclude "a particular, identifiable body of evidence," or that the trial court, in ruling on the motion, "determine[d] the evidentiary question in its appropriate context." *(Morris, supra,* 53 Cal.3d at p. 190.) Appellants have thus failed to preserve their claim of error.

2 "A fundamental rule of appellate review is that '"[a] judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown."' [Citations.]" *(Conservatorship of Rand* (1996) 49 Cal.App.4th 835, 841, italics deleted.) To overcome this presumption, appellants must provide an adequate record that demonstrates error.

Moreover, appellants' contention fails on its merits. Appellants' policy, as applicable to each fire, contained the following provision: *"Concealment or Fraud:* [*9] This entire policy is void if any insured has knowingly and willfully concealed or misrepresented any material fact or circumstance relating to this insurance before or after the loss." [3] Generally, a fraud and concealment clause in an insurance policy voids the policy when the insured attempts to deceive the insurer with respect to "material matters." *(Leasure v. MSI Ins. Co.* (1998) 65 Cal.App.4th 244, 248 *(Leasure).)* The leading case regarding the applicable test of materiality is *Cummings v. Fire Ins. Exchange* (1988) 202 Cal.App.3d 1407 *(Cummings).* There, the court stated: "The materiality of the statement will be determined by the objective standard of its effect upon a reasonable insurer." *(Id.* at p. 1415, fn. 7, italics deleted.) Under this standard, "if the misrepresentation concerns a subject reasonably relevant to the insured's investigation, and if a reasonable insurer would attach importance to the fact misrepresented, then it is material." *(Id.* at p. 1417, italics deleted.)

3 This provision is a paraphrase of the term regarding fraud and concealment for standard form fire insurance policies found in Insurance Code section 2071: "This entire policy shall be void if, whether [*10] before or after a loss, the insured has willfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto."

In seeking to exclude evidence of fraud regarding the first claim, appellants' in limine motion contended that such evidence was not material to the second claim because their policy had been renewed in the interval between the two fires. Appellants argued that the phrase "[t]his entire policy" in the fraud and concealment provision referred exclusively to the policy in effect following the renewal, not the policy in force when they made the first claim. In addition, appellants argued that FIE had improperly considered the evidence of fraud regarding the first claim in denying the second claim. Although the record provided by appellants does not disclose the trial court's grounds for denying the in limine motion, the trial court, in entering judgment, determined under *Cummings* that appellants' fraud in connection with *both* claims had voided the policy. This determination raises the possibility that the trial court [*11] denied the in limine motion on the ground that the fraud regarding the first claim, taken in isolation, was sufficient to void the policy applicable to the second fire.

We need not examine this potential ground for the ruling on the motion, however, because the record discloses another ground adequate to support the ruling. As explained above, the trial court, in entering judgment, also determined that appellants' fraud regarding their second claim, taken in isolation, had voided the policy. To establish such fraud, FIE was obliged to show that the misrepresentations concerning the second claim were made "knowingly and willfully." Under Evidence

Code section 1101, subdivision (b), evidence regarding a "civil wrong[] or other act" is admissible to prove knowledge and intent. As our Supreme Court has explained: "Where fraud is charged, evidence of other frauds or fraudulent representations of like character, committed by the parties at or near the same time is admissible to prove intent." *(The Atkins Corporation v. Tourny* (1936) 6 Cal.2d 206, 215.) Thus, in *People v. Burnett* (1937) 21 Cal.App.2d 613, 614, the defendant submitted a false claim to an insurer, and was convicted of attempted [*12] grand theft. On appeal, the court in *Burnett* concluded that evidence of prior false insurance claims by the defendant had been properly admitted to establish knowledge and intent. *(People v. Burnett, supra,* 21 Cal.App.2d at p. 619.) The admissibility of evidence of prior fraud for such purposes is also well established in civil actions. *(The Atkins Corporation v. Tourny, supra,* 6 Cal.2d at p. 215; *Janisse v. Winston Inv. Co.* (1957) 154 Cal.App.2d 580, 588 ["It is well settled that evidence of other transactions to show motive, intent, knowledge, plan, and absence of mistake, in both civil and criminal cases, is admissible."].)

Here, an interval of only 15 months separated the two fires, each of which originated in the kitchen of appellants' residence. In view of these and the other similarities between the two claims, the trial court properly permitted FIE to present evidence of appellants' fraud regarding the first claim to show that they knowingly and willfully made misrepresentations regarding the second claim.

Appellants' other contention in the motion in limine -- namely, that FIE improperly relied on the fraud regarding the first claim in denying appellants' second claim -- fails [*13] for similar reasons. FIE's denial letter asserted that appellants' misrepresentations and concealments regarding their second claim were sufficient, by themselves, to justify the denial of appellants' claim. As explained above, appellants' fraud in their first claim constituted relevant circumstantial evidence that appellants intended to engage in fraud in their second claim. FIE was thus entitled to consider appellants' fraud regarding the first claim in denying appellants' second claim.

Appellants' reliance on *Leasure, supra,* 65 Cal.App.4th 244, is misplaced. There, the insureds made a claim for wind damage to the roof of their mobile home. *(Id.* at p. 246.) After their insurer issued checks in payment of the claim, the insureds, who were unable to contact the lienholders on their mobile home, forged the lienholders' endorsement on the checks in order to obtain the funds to repair the roof. *(Id.* at pp. 246-247.) A few months later, the insureds' mobile home was vandalized, and they submitted a second claim to their insurer, which denied the claim on the basis of the fraudulent endorsements. *(Id.* at p. 247.) The court in *Leasure* held that the insurer had erred in asserting that the [*14] endorsements had voided the policy, reasoning that they were not material misrepresentations because they "[did] not relate to [the insurer's] investigation to determine its obligations under the policy." *(Leasure, supra,* 65 Cal.App.4th at p. 248.) That is not the case here. Appellants' fraud in the first claim was probative of their intent to engage in fraud in the second claim. In sum, appellants have established no error in connection with the denial of their in limine motion.

B. *Loss Payable Endorsement*

Appellants contend the trial court erred in determining that FIE properly paid only $ 180,000 under a loss payable endorsement prior to denying the second claim. We disagree. Generally, loss payable endorsements are intended to protect mortgagees and other secured creditors. *(Home Savings of America v. Continental Ins. Co.* (2001) 87 Cal.App.4th 835, 843.) Such endorsements fall

into two categories. *(Id.* at pp. 843-846.) Under a simple loss payable endorsement, the insured's breach of policy obligations prevents the lienholder's recovery under the policy. *(Id.* at p. 842.) In contrast, under a so-called "standard" endorsement, "'a lienholder is not subject to the exclusions available [*15] to the insurer against the insured because an independent or separate contract of insurance exists between the lienholder and the insurer. In other words, there are two contracts of insurance within the policy -- one with the lienholder and the insurer and the other with the insured and the insurer.'" *(Id.* at p. 842, quoting *Foremost Ins. Co. v. Allstate Ins. Co.* (1992) 439 Mich. 378, 384.)

Here, the trial court determined that FIE had properly made an advance payment of $ 180,000 under the loss payable endorsement prior to denying appellants' second claim. In addition, the trial court found that appellants' lender had made no further claim or demand under the endorsement, and that appellants lacked standing to assert a claim or demand on behalf of the lender because the policy was void as to them. We see no error in these determinations.

Generally, "the courts have treated the rights of the [policy] owner and the 'loss payee' as independent." *(Savarese v. State Farm Etc. Ins. Co.* (1957) 150 Cal.App.2d 518, 522.) Thus, when the insurer properly cancels an insured's policy, the insured has no further rights under the policy, even though the lienholder retains rights under the policy. *(Mackey v. Bristol West Ins. Service of Cal., Inc.* (2003) 105 Cal.App.4th 1247, 1267.) [*16] Here, the policy is void as to appellants, and they have established no other basis upon which to assert a claim on behalf of their lender. [4]

4 The case authority upon which appellants rely is inapposite. In each case, the court concluded that the party asserting a claim under the policy was an insured under the policy, and as such, entitled to policy benefits. *(Tan Jay Internat., Ltd. v. Canadian Indemnity Co.* (1988) 198 Cal.App.3d 695, 706 [shareholder named as co-insured on policy issued to corporations may seek benefits under the policy]; *Delos v. Farmers Group* (1979) 93 Cal.App.3d 642, 659 [husband, as insured under the policy, may assert independent cause of action for damages arising from denial of wife's policy claim]; *Northwestern Mut. Ins. Co. v. Farmers' Ins. Group* (1978) 76 Cal.App.3d 1031, 1042 [permissive driver of vehicle is insured under terms of policy]; *Truestone, Inc. v. Travelers Ins. Co.* (1976) 55 Cal.App.3d 165, 171 [shareholders who are co-insureds with corporation under policy may assert claim for breach of policy].) As explained above, appellants have no rights as insureds under the policy.

There is also sufficient evidence to support the trial court's determination [*17] that FIE acted properly in making an advance payment of $ 180,000 under the loss payable endorsement. At trial, FIE submitted testimony from Michael Aronson, a certified real estate appraiser. According to Aronson, after the second fire, FIE hired him to estimate the value of the house immediately prior to the second fire. Aronson concluded that appellants' residence had been worth $ 480,000, including the value of the underlying land, which Aronson estimated as $ 300,000. FIE also submitted testimony from Barry Zalma, an insurance expert, that FIE's decision to pay $ 180,000 under the loss payee endorsement following Aronson's appraisal comported with insurance industry practice. Upon this evidence, the trial court concluded that FIE had acted reasonably in adjusting the claim prior to its discovery of appellants' fraud.

Appellants contend that Aronson underestimated the house's value, arguing that he overlooked the renovations following the first fire that increased the house's size by 900 square feet, and thus regarded the house as only 2,400 square feet in size, rather than 3,300 square feet. At trial, Aronson

testified that he had estimated the house's value by comparing it with [*18] similar houses in the area, and had tried to give appellants' house "the benefit of the doubt," but had mistakenly believed the house was 2,400 square feet. In view of this evidence, the trial court could properly conclude that Aronson's mistake was inadvertent, that FIE had acted reasonably before discovering the policy was void, and that appellants could not recover additional policy benefits due to their fraud. (See *Opsal v. United Services Auto. Assn.* (1991) 2 Cal.App.4th 1197, 1205 [insurer's erroneous failure to pay policy benefits is not bad faith unless the refusal to pay policy benefits was unreasonable].)

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs on appeal.

MANELLA, J.

We concur:

WILLHITE, Acting P. J.

SUZUKAWA, J.