

**RICHARD EDWARDS, SR. et al., Plaintiffs and Appellants, v. FIRE
INSURANCE EXCHANGE, Defendant and Respondent.**

D050041

**COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE
DISTRICT, DIVISION ONE**

2008 Cal. App. Unpub. LEXIS 2428

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PRIOR HISTORY: [*1]

APPEAL from an order and a judgment of the Superior Court of San Diego County, No. GIC859560. Richard E. L. Strauss, Judge.

DISPOSITION: Affirmed.

JUDGES: McINTYRE, J.; HALLER, Acting P.J., McDONALD, J. concurred.

OPINION BY: McINTYRE

OPINION

Richard Edwards, Sr. and his wife, Ann Nichols (together Plaintiffs), appeal from a judgment in favor of Fire Insurance Exchange (FIE) after the trial court granted FIE's motion for summary judgment. Plaintiffs assert the trial court erred in granting the motion because they had a legal right to recover insurance policy proceeds from FIE as assignees of the policy holder. Plaintiffs also appeal from an order denying their motion to compel production of documents. We affirm the challenged order and the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Edwards offered to purchase Judith Hansen's home for \$ 51,000 and take over her mortgage payments on the property. Hansen accepted the offer and on November 20, 2003, she signed a document memorializing the terms of the transfer. The same day, Edwards gave Hansen a \$ 17,000 down payment and Hansen executed and recorded a quitclaim deed conveying the property on behalf of herself, her husband and the Hansen Family Trust to Nichols. The following day, [*2] Hansen executed and had notarized a second quitclaim deed clarifying that she was transferring the property on behalf of herself to Nichols because the home had been moved out of the trust several months earlier. Hansen then moved to Northern California. About nine days later, a fire damaged

the home. The record does not indicate what happened to Mr. Hansen, but Plaintiffs represent that he passed away before the sale.

The following week, Edwards paid the balance due to Hansen and the parties agreed that Plaintiffs would be entitled to any insurance proceeds on the structure of the home under Hansen's homeowner's insurance policy with FIE. FIE denied Plaintiffs' claim for benefits and they filed this action in November 2004. After a series of motions, FIE answered Plaintiffs' second amended complaint for breach of contract and insurance bad faith in December 2005. Plaintiffs later sought leave to file a third amended complaint and to compel production of Hansen's insurance file, but the trial court denied both motions.

FIE then moved for summary judgment or in the alternative, summary adjudication, arguing that Hansen had no insurance benefits to assign Plaintiffs after the fire because [*3] her insurable interest in the property ended when she transferred ownership before the fire. The trial court agreed, granted the summary judgment motion and entered judgment in favor of FIE. Plaintiffs timely appealed.

DISCUSSION

I. *The Summary Judgment Motion*

A. Standard of Review

We review the trial court's decision granting summary judgment de novo (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860 (*Aguilar*)), applying the same three-step analysis required of the trial court. (*Bono v. Clark* (2002) 103 Cal.App.4th 1409, 1431-1432.) After identifying the issues framed by the pleadings, we determine whether the moving party has established facts justifying judgment in its favor. If the moving party has carried its initial burden, we then decide whether the opposing party has demonstrated the existence of a triable, material fact issue. (*Id.* at p. 1432.) We must strictly construe the moving party's evidence and liberally construe the opposing party's evidence (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 838-839) and we may not weigh the evidence or conflicting inferences. (*Aguilar, supra*, 25 Cal.4th at p. 856; Code Civ. Proc., § 437c, subd. (c).) A triable issue [*4] of material fact exists if the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. (*Aguilar, supra*, 25 Cal.4th at p. 850.)

B. Analysis

Plaintiffs' operative complaint alleged that Hansen transferred her rights under the FIE policy to them before and after the fire. Accordingly, we address both scenarios in turn. With respect to Plaintiffs' first claim, we note that the FIE policy provided that it could not be assigned without FIE's written consent. The standard form fire insurance policy for California contains such a provision (Ins. Code, § 2071) and such provisions are valid and enforceable (*Henkel Corp. v. Hartford Accident and Indemnity Co.* (2003) 29 Cal.4th 934, 943 (*Henkel*)) and operate "'to prevent an increase of risk and hazard of loss by a change of ownership without the knowledge of the insurer.' [Citation.]" (*University of Judaism v. Transamerica Ins. Co.* (1976) 61 Cal.App.3d 937, 941 (*University of Judaism*)). Nonetheless, delayed notice to an insurer of a pre-loss assignment does not necessarily excuse the insurer from paying for a covered loss where the [*5] person seeking to recover under the policy can show that the change of ownership did not increase the risk to the insurer

and the insurer suffered no prejudice from the late notice. (*Id.* at p. 942.) (All undesignated statutory references are to the Insurance Code.)

FIE presented evidence showing Hansen did not assign the policy to Plaintiffs before the fire. Specifically, it cited to a portion of Edwards's deposition testimony showing Edwards did not believe he assumed Hansen's insurance policy when he purchased the property. Plaintiffs' opposition did not controvert this evidence and they failed to show the existence of a triable issue of material fact in this regard. (Code Civ. Proc., § 437c, subd. (p)(2).) Because Plaintiffs failed to present evidence showing the existence of a pre-loss assignment, we are puzzled by their argument that FIE could not have reasonably withheld consent to a pre-loss assignment. Be that as it may, even assuming Plaintiffs had presented evidence showing a pre-loss assignment of the policy, this claim failed because they presented no admissible evidence showing that the change of ownership did not increase FIE's risk and that FIE suffered no prejudice from [*6] the late notice. (*University of Judaism, supra*, 61 Cal.App.3d at p. 942.)

It is well settled that an insured can assign insurance policy benefits without the consent of the insurer after a loss has occurred. (*Henkel, supra*, 29 Cal.4th at p. 944; *Greco v. Oregon Mut. Fire Ins. Co.* (1961) 191 Cal.App.2d 674, 682.) Here, it was undisputed that Hansen gave plaintiffs a written assignment of the policy benefits after the fire. As assignees, however, Plaintiffs stood in Hansen's shoes and acquired only her interest. (*Casa Eva I Homeowners Ass'n v. Ani Const. & Tile, Inc.* (2005) 134 Cal.App.4th 771, 783.)

FIE argued, and the trial court agreed, that Plaintiffs' causes of action failed because Hansen relinquished title before the fire occurred and had no interest insurable under the policy to assign the Plaintiffs. Plaintiffs contend the trial court erred because a triable issue of fact existed as to whether Hansen had an interest in the property after relinquishing title. As discussed below, Plaintiffs' contention lacks merit.

Property insurance is a personal contract indemnifying the insured against loss resulting from the destruction or damage to his interest in that property. (*Garvey v. State Farm Fire & Casualty Co.* (1989) 48 Cal.3d 395, 406; [*7] *Russell v. Williams* (1962) 58 Cal.2d 487, 490.) By statute, "[e]very interest in property, or any relation thereto, or liability in respect thereof, of such a nature that a contemplated peril might directly damnify the insured, is an insurable interest." (§ 281.) "[T]he measure of an insurable interest in property is the extent to which the insured might be damaged by loss or injury thereof" (§ 284) and an insurance policy is void if the insured has no insurable interest in the subject of the policy. (§§ 280, 287.) An insured must have an insurable interest in the property insured both when the policy takes effect and at the time of the loss (§ 286) and the transfer of the insured subject matter does not transfer the insurance, but suspends it until the same person becomes the owner of both insurance and subject matter insured. (§ 305.)

Here, it is undisputed that Hansen transferred title to the property to Plaintiffs before the fire. Because Hansen transferred complete ownership of the property before the fire, she lacked an insurable interest in the property when the fire occurred. (*Hoffman v. State Farm Fire & Casualty Co.* (1993) 16 Cal.App.4th 184, 191 [insured did not own property [*8] at the time of the manifestation of the loss and lacked an insurable interest in the property].)

To avoid this result, Plaintiffs argue that Hansen retained an insurable interest in the property after she transferred title because she had an obligation to preserve the collateral for her mortgagee and was still liable on the note. Plaintiffs, however, presented no authority to support the proposi-

tion that Hansen's continuing liability to her mortgagee gave her an insurable interest in the property and we have found no support for this proposition. The cases cited by Plaintiffs are inapposite because they involved situations where the party claiming an insurable interest had possession of the insured property when the loss occurred and had a pecuniary interest in the preservation of the insured property. (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 861-862, 875 [food processor had an insurable interest in the food it processed at its facility]; *California Food Service Corp. v. Great American Ins. Co.* (1982) 130 Cal.App.3d 892, 895, 897 [sublessee in possession of insured property and contractually bound to assume lessee's lease obligations [*9] had insurable interest in the insured property].)

Plaintiffs also suggest that Hansen retained an insurable interest in the property because they had not yet paid her the full purchase price for the property when the fire occurred; however, they failed to support this suggestion with any argument or authority and we deem it waived. (Cal. Rules of Court, rule 8.204(a)(1)(B); *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2002) 100 Cal.App.4th 1066, 1078.)

Finally, Plaintiffs assert the trial court erred in granting summary judgment because the operative complaint properly alleged claims for intentional interference with contract and prospective economic advantage. Alternatively, if we conclude such claims were not specifically pleaded in the complaint, Plaintiffs argue that the trial court erred by not treating the summary judgment motion as one for judgment on the pleadings and allowing them leave to amend their complaint. These assertions lack merit.

FIE did not argue in its summary judgment motion that Plaintiffs' second amended complaint contained causes of action for intentional interference with contract and prospective economic advantage that [*10] had been insufficiently pled and several months earlier the trial court had denied Plaintiffs' motion for leave to amend to add these claims. To the extent that Plaintiffs asked the trial court to treat FIE's summary judgment motion as one for judgment on the pleadings and to grant them leave to amend to add these claims, they have not shown that the trial court abused its discretion in denying that request.

II. Motion to Compel Production of Documents

Plaintiffs moved to compel Hansen's insurance agent to produce his insurance file on the property, including any dealings with Hansen or Edwards. FIE provided Plaintiffs with their insurance files, but opposed the motion as to Hansen's files, arguing Plaintiffs failed to: (1) obtain Hansen's consent to release the files and it was statutorily barred from divulging Hansen's files (§ 791.13); (2) give notice to Hansen under Code of Civil Procedure section 1985.3; (3) show good cause for the production; and (4) show how Hansen's files were relevant to the action. The trial court denied the motion, citing all of FIE's arguments. Eventually, after the trial court reviewed the documents in camera, FIE produced the non-privileged portions of [*11] Hansen's insurance file.

Plaintiffs contend the trial court erred when it refused to compel production of Hansen's insurance files because she was deceased at the time of the request; accordingly, it could not provide her notice and FIE had no right to object to the production. We disagree.

Section 791.13 prevents the disclosure of "any personal or privileged information . . . collected or received in connection with an insurance transaction[.]" Nonetheless, if such files are relevant to litigation involving other parties, disclosure may be conditioned on the written consent of the in-

sured. (§ 791.13, subd. (a).) Plaintiffs presented no evidence showing Hansen consented to the disclosure of the privileged portions of her insurance file and they cited no relevant authority showing that the protection of section 791.13 ended upon her death or that they could not have obtained the necessary authorization from Hansen before she died or Hansen's heirs after her death. More fundamentally, Plaintiffs failed to show how the privileged portions of Hansen's insurance file were relevant to this action (Code Civ. Proc., § 2017.010) and thus, that the trial court erred by refusing to order production [*12] of these documents. (*Avant! Corp. v. Superior Court* (2000) 79 Cal.App.4th 876, 881.)

DISPOSITION

The order and judgment are affirmed. Respondent is entitled to its costs on appeal.

McINTYRE, J.

WE CONCUR:

HALLER, Acting P.J.

McDONALD, J.