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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ENDURANCE AMERICAN SPECIALTY INSURANCE COMPANY, Plaintiff and Respondent, v. BENNINGTON GROUP, LLC et al., Defendants and Appellants.	B285909 (Los Angeles County Super. Ct. No. BC535853)

APPEAL from a judgment of the Superior Court of Los Angeles County, William F. Highberger, Judge. Affirmed.

O'Melveny & Meyers, Richard B. Goetz and Zoheb Noorani; Greines, Martin, Stein & Richland, Robert A. Olson and Edward L. Xanders for Plaintiff and Respondent.

Quadra & Coll, James A. Quadra, Rebecca Coll, and Robert Sanford; Weinstein & Numbers and Barron L. Weinstein for

Defendants and Appellants Bennington Group, LLC, Bennington Group West Inc., and Abul Shah.

Bowles & Verna, Michael V. Verna, Robert I. Westerfield, Mallory L. Homewood, and Alexandrea M. Tomp for Defendant and Appellant NRG Delta, LLC.

I. INTRODUCTION

Bennington Group, LLC (Bennington), Bennington Group West, Inc. (Bennington West), Abul Shah,[1] and NRG Delta, LLC (NRG)[2] sought payment on an insurance policy issued to Bennington by Endurance American Specialty Insurance Company (Endurance).[3] Endurance sought to rescind the insurance policy, contending that Bennington had made material misstatements in its application for insurance. The trial court granted Endurance summary judgment on its affirmative defense

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[1] Bennington is a Delaware limited liability company formed in 2007, and registered in New York as a foreign limited liability company. Bennington West is a California corporation formed in March 2010. Abul Shah is a member of Bennington and a principal of Bennington West. We will refer to Bennington, Bennington West, and Shah collectively as the "Bennington defendants."

[2] NRG is a Delaware limited liability company. NRG's predecessors-in-interest were Mirant Delta, LLC, and GenOn Delta, LLC. We will refer to the predecessors-in-interest as NRG.

[3] Endurance is a Delaware insurance company.

of rescission and the Bennington defendants and NRG appeal. We affirm.[4]

II. BACKGROUND[5]

A. *NRG-Bennington Contract*

On February 17, 2010, Bennington entered into a contract with NRG (NRG-Bennington Contract), in which Bennington agreed to dismantle oil tanks and related equipment at the NRG-owned Contra Costa Generating Station located in Antioch, California, in exchange for the right to resell the equipment as salvage (Project). The terms of the NRG-Bennington Contract required that Bennington obtain general liability insurance in the amount of $7 million. Bennington began work on the Project in March 2010.

B. *Application for Insurance Policy*

In March 2010, Shah formed Bennington West in order to pursue other recovery projects in California. Sometime after he

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[4] Endurance separately cross-appealed on a different issue. Because we affirm, we need not decide Endurance's cross-appeal.

[5] Because this is an appeal from a trial court's grant of summary judgment, we liberally construe the opposing party's evidence, and strictly scrutinize that of the moving party, resolving evidentiary doubts or ambiguities in the opposing party's favor. (*O'Riordan v. Federal Kemper Life Assurance Co.* (2005) 36 Cal.4th 281, 284 (*O'Riordan*).) Viewed in that light, the following are the relevant facts.

formed Bennington West, Shah asked NRG if it would agree to transfer the Project to Bennington West. NRG declined.

In early July 2010, Shah contacted an insurance broker (broker) for assistance in obtaining commercial general liability insurance for Bennington West.

On July 3, 2010, Bennington employee May Lai sent an email to the broker, stating, "Per . . . Shah's request, I am enclosing a sample Certificate of Liability Insurance that we currently have and a Loss Run Policy Report from a previous carrier." The broker forwarded this email, without comment, to Arrowhead Wholesale Insurance Services, LLC (Arrowhead), a wholesale insurance broker. Endurance eventually received a copy of Lai's July 3, 2010, email as part of a four-page long email chain among employees of Bennington, the broker, and Arrowhead, and included the email as part of the underwriting file. The referenced certificate of liability insurance and loss run policy report were not part of the underwriting file.

On July 14, 2010, Lai contacted the broker and requested that it procure commercial general liability insurance for Bennington instead of Bennington West. The broker did not "go back through" the application to determine if any of the responses needed to be changed now that the applicant was Bennington rather than Bennington West.

On July 14, 2010, the broker provided Bennington's insurance application to Arrowhead. On July 16, 2010, Arrowhead submitted the application to Endurance's managing general underwriter, Freberg Environmental Insurance (Freberg).[6]

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[6] The trial court found that the broker was permitted to transact with a foreign insurer because it could not find an

On July 16, 2010, Bennington signed the application, representing that the answers were true. But the application contained a number of misstatements, including Bennington's response to questions in the section entitled "Company History." For "Date Established," Bennington responded "Feb 1 2010." Bennington, however, had been in existence since 2007.

Sometime before July 19, 2010, an employee of Freberg received a no known loss letter, dated July 12, 2010. In the July 12, 2010, letter, Shah wrote "[w]e have had no known general liability losses in the last 5 years. [¶] Please let us know if you need additional information."

On July 19, 2010, an employee of Freberg told Arrowhead that if Bennington wished to obtain an exception to a particular form of coverage, it must submit a "no known loss letter stating no losses within the last 5 years, not just noting [commercial general liability], to bind coverage." On July 19, 2010, Shah prepared another letter stating that "[w]e have had no known pollution liability losses or professional liability losses in the last 5 years. Please let us know if you need additional information." Both letters (collectively, No Loss Letters) were on letterhead that stated "Bennington Group West Inc." with a street address identical to the address listed in Bennington's insurance application. Shah signed the No Loss Letters as "Chief Operating Officer."

On August 9, 2010, Endurance issued an insurance policy to Bennington for the period of July 16, 2010, to July 16, 2011 (Insurance Policy). The Insurance Policy included $7 million commercial general liability coverage, $1 million contractor's

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"'admitted'" insurer (Ins. Code, § 24), who was willing to act as an underwriter.

pollution liability coverage, and $1 million professional liability coverage.[7]

C. *NRG-Bennington Lawsuit*

On December 23, 2010, NRG terminated the NRG-Bennington Contract and barred Bennington from working on the Project. On January 3, 2011, Bennington filed a complaint against NRG, alleging numerous causes of action including conversion and quantum meruit (NRG-Bennington Lawsuit). Bennington later added a cause of action for breach of contract.

NRG filed a cross-complaint against Bennington for breach of contract and contractual and equitable indemnity. NRG later added negligence and fraud claims against Shah and other Bennington-related entities, including Bennington West.[8] NRG alleged that the Bennington defendants did not timely or competently dismantle the storage tanks and that they contaminated NRG's property during the attempted salvage.

On March 15, 2011, Bennington tendered its defense against the cross-complaint to Endurance. Endurance received the tender on March 17, 2011, through a third-party administrator. Endurance's claim file includes a document entitled "INITIAL STATUS REPORT," prepared by an

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[7] Endurance cancelled the Insurance Policy on February 10, 2011, because Bennington failed to pay the premiums.

[8] Bennington's subcontractors, vendors, and suppliers filed separate actions seeking payment for their work on the Project. All the related cases were consolidated into the NRG-Bennington Lawsuit.

Endurance employee on April 19, 2011, which summarized the claim and referenced the employee having conducted an internet search of Bennington.

On April 20, 2011, Endurance accepted the tender of defense, subject to a reservation of rights. Specifically, Endurance stated that it would defend Bennington "under a full and complete reservation of all our rights and defenses." The reservation of rights "extends to all facts, known and unknown, as they may pertain to this claim." Endurance further advised Bennington that "[a]ny action taken by us [Endurance] in the investigation, defense, or settlement of this claim shall not constitute or be construed as a waiver or an estoppel of any rights or defenses we have under the subject policy of insurance. The Company [Endurance] further reserves the right to deny coverage and withdraw from any further participation in this matter altogether, should facts be developed that determine the above-captioned policy does not cover the loss."

On August 22, 2014, the Bennington defendants, over Endurance's objection, entered into a settlement agreement with NRG, pursuant to which the parties released all of their respective claims except for NRG's claims against Bennington and Bennington West for negligence and breach of contract. The Bennington defendants assigned all of their assignable rights against Endurance to NRG, and stipulated to 43 facts on NRG's remaining claims.

On December 28, 2015, following a bench trial, the court in the NRG-Bennington Lawsuit issued its statement of decision in favor of NRG and against Bennington and Bennington West. On April 11, 2016, the trial court entered judgment against

Bennington and Bennington West for approximately $10.9 million.

III. PROCEDURAL HISTORY

A. *Pleadings*

On February 6, 2015, Endurance filed an amended complaint against the Bennington defendants and NRG, seeking a declaration that it owed them no duty to defend or indemnify in connection with the NRG-Bennington Lawsuit and asserting a claim of rescission, among other claims. As to the rescission claim, Endurance alleged that Bennington had made a number of false representations in its insurance application, including that "it was a new business."

On May 4, 2016, NRG filed a cross-complaint for breach of contract and other claims. On August 26, 2016, Endurance filed its answer to NRG's cross-complaint, asserting an affirmative defense of rescission based on Bennington's misrepresentations in the insurance application.

On September 28, 2016, Bennington filed its own cross-complaint for breach of the implied covenant of good faith and fair dealing. On October 31, 2016, Endurance filed its answer to Bennington's cross-complaint, again asserting rescission as an affirmative defense based on Bennington's misrepresentations in the insurance application.

The parties filed several other pleadings. On August 25, 2016, Endurance filed its second amended complaint. On September 27, 2016, and on September 28, 2016, the Bennington defendants and NRG, respectively, filed their

answers to the second amended complaint. On April 19, 2017, Endurance filed its third amended complaint, again asserting a rescission cause of action. On May 23, 2017, and June 8, 2017, NRG and the Bennington defendants, respectively, filed their answers to the third amended complaint. Defendants raised affirmative defenses of estoppel, waiver, and laches.

B. *Bench Trial on Coverage*

The trial court bifurcated the action into two phases. In Phase I, the court considered whether the Insurance Policy covered the judgment in the NRG-Bennington Lawsuit. In Phase II, the court considered Endurance's claim for rescission. At the conclusion of a bench trial in Phase I, the trial court issued a statement of decision concluding that the $10.9 million judgment in the NRG-Bennington Lawsuit was covered by the Insurance Policy.[9]

C. *Summary Judgment on Rescission*

On January 17, 2017, Endurance filed its motion for summary judgment on its rescission cause of action, arguing that it was entitled to rescind the Insurance Policy as a matter of law because Bennington had made material misstatements on the insurance application. In support of its motion, Endurance submitted Bennington's insurance application as well as a declaration from Renee Miller, chief underwriting officer at Freberg.

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[9] Endurance's cross-appeal concerns the trial court's Phase I ruling.

Miller stated that the insurance application was designed "specifically to elicit background and data to help Freberg to assess the coverage risk. In assessing such risk, Freberg may further investigate certain facts. This assessment ultimately allows Freberg either to offer a coverage quotation detailing terms and conditions of coverage or decline to offer coverage altogether. In this way, the application not only triggers the commencement of the underwriting process but also represents a central facet of it."

Miller then discussed the significance of Bennington's false statement that it had been established on February 1, 2010: "[W]hether a business is new or has been in existence for a period of years is important to Freberg. An existing business may present a complex array of risks. An existing business may also present additional issues related to safety, past and possible future losses, and ongoing projects. For an existing business, Freberg will request detailed operational information from the applicant, including the applicant's financial statements and loss runs. Freberg will also request from the applicant a list of up to ten active projects."

Miller explained that if "Freberg [had] known that Bennington was established in 2007, Freberg would have investigated further, requesting financial statements, loss runs, and a list of up to ten active projects." Miller also explained why other misstatements in the insurance application were material to Freberg.

On March 21, 2017, NRG filed an opposition to the motion, which was joined by the Bennington defendants.

On March 30, 2017, Endurance filed its reply.

On April 10, 2017, NRG and the Bennington defendants each filed supplemental oppositions to the summary judgment motion.

On April 11, 2017, Endurance filed a reply to the supplemental oppositions, arguing, among other things, that the oppositions' arguments premised on Endurance's purported delay in seeking rescission was inapplicable to an affirmative defense, citing *Styne v. Stevens* (2001) 26 Cal.4th 42 (*Styne*).

On April 20, 2017, with leave of court, Endurance filed an amended motion for summary judgment. Endurance moved for summary adjudication on its rescission cause of action,[10] as well as summary judgment on its affirmative defense of rescission.

On June 19, 2017, the Bennington defendants and NRG opposed the motion, contending that there were triable issues as to whether the misrepresentations in the insurance application were material and to their affirmative defenses of estoppel, waiver, and laches. NRG additionally argued that there was no concealment because Bennington did not know it neglected to communicate a material fact. Finally, NRG asserted that Endurance could not rescind the Insurance Policy because to do so would prejudice NRG's rights as a third party.

On June 28, 2017, Endurance filed its reply and asserted that it was not seeking to recover the defense costs it had paid on behalf of Bennington.

On July 10, 2017, Endurance orally moved to dismiss its complaint for declaratory relief without prejudice. Thus, by the time the court granted summary judgment, Endurance asserted

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[10] Endurance characterized the motion as a request for "summary judgment" on its rescission cause of action.

rescission only as an affirmative defense to the Bennington defendants and NRG's claims.

On August 22, 2017, the trial court issued its order granting the motion for summary judgment. The court made several evidentiary rulings, including overruling NRG's objection to Miller's declaration and sustaining Endurance's objection to the declaration of C. Todd Thomas, "a professional knowledgeable in the relevant field," that had been submitted by NRG.

The trial court found that Bennington's misstatement about its date of establishment was material because "[a] new business with no track record for the underwriter to evaluate is a fundamentally different risk (albeit an applicant with certain risks associated with its very newness) from the risks associated with a going business with a potential claims history worthy of inquiry and evaluation." The trial court also concluded that a number of other misstatements in the insurance application were material.

Citing *Styne, supra*, 26 Cal.4th 42 and *French v. Construction Laborers Pension Trust* (1975) 44 Cal.App.3d 479 (*French*), the trial court concluded that because Endurance no longer alleged rescission as an affirmative cause of action, but only as a defense, the doctrines of laches, waiver, and estoppel did not apply. The court reasoned that waiver additionally did not apply because Endurance specifically reserved its rights at the time it accepted tender. Finally, the court rejected NRG's argument that rescission was not permitted because NRG would be prejudiced as a third party, citing Civil Code section 1693 and Insurance Code section 11580, subdivision (b)(2).

On August 24, 2017, the trial court entered judgment in favor of Endurance and against the Bennington defendants and NRG.

IV. DISCUSSION

A. *Summary Judgment Standard of Review*

"'"[A] defendant moving for summary judgment based upon the assertion of an affirmative defense . . . [']has the initial burden to show that undisputed facts support each element of the affirmative defense' . . . . If the defendant does not meet this burden, the motion must be denied." [Citations.]' [Citation.] '[T]he burden shifts to the plaintiff to show there is one or more triable issues of material fact regarding the defense after the defendant meets the burden of establishing all the elements of the affirmative defense. [Citations.]'" (*Shiver v. Laramee* (2018) 24 Cal.App.5th 395, 400; *Jessen v. Mentor Corp.* (2008) 158 Cal.App.4th 1480, 1484–1485.)

"On appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.)

B. *Insurer's Right to Rescind*

"When a policyholder conceals or misrepresents a material fact on an insurance application, the insurer is entitled to rescind the policy. 'Each party to a contract of insurance shall

communicate to the other, in good faith, all facts within his knowledge which are or which he believes to be material to the contract . . . .' (Ins. Code, § 332.) . . . 'If a representation is false in a material point . . . the injured party is entitled to rescind the contract from the time the representation becomes false.' ([Ins. Code,] § 359.) '[A] rescission effectively renders the policy totally unenforceable from the outset so that there was never any coverage and no benefits are payable.' (*Imperial Casualty* [*& Indemnity Co. v. Sogomonian* (1988)] 198 Cal.App.3d [169,] 182 [(*Imperial Casualty*)].)" (*LA Sound USA, Inc. v. St. Paul Fire & Marine Ins. Co.* (2007) 156 Cal.App.4th 1259, 1266–1267 (*LA Sound*).)

An insurer may rescind a contract based on a misrepresentation made by an insurance broker on behalf of the insured. (*Superior Dispatch, Inc. v. Insurance Corp. of New York* (2010) 181 Cal.App.4th 175, 192.) Moreover, an insurer may rescind a policy even if the misrepresentation was unintentionally made. (Ins. Code, § 331; *O'Riordan, supra*, 36 Cal.4th at p. 286–287; *Mitchell v. United National Ins. Co.* (2005) 127 Cal.App.4th 457, 473 (*Mitchell*).)[11] An insurer may also raise rescission as an affirmative defense in an answer to an insured's complaint for breach of contract. (*LA Sound, supra*, 156 Cal.App.4th at p. 1268.)

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[11] NRG's argument on appeal that the trial court erred in granting summary judgment on rescission because Bennington did not intentionally or recklessly make any misrepresentations is thus meritless.

C. *No Triable Issue of Material Fact on Materiality*

The Bennington defendants and NRG argue that the trial court erred in granting summary judgment because there were triable issues of material fact as to whether Bennington's misstatements were material. We will focus our analysis on Bennington's misstatement as to its age, namely, its statement that it had been in existence for five months (since February 1, 2010), when it had been formed three years earlier, in 2007. (See *Uhrich v. State Farm Fire & Cas. Co.* (2003) 109 Cal.App.4th 598, 607–608 ["We need only address sufficient grounds to affirm" on appeal of summary judgment].)

"'Materiality is determined solely by the probable and reasonable effect which truthful answers would have had upon the insurer. [Citations.] The fact that the insurer has demanded answers to specific questions in an application for insurance is in itself usually sufficient to establish materiality as a matter of law.' (*Thompson v. Occidental Life Ins. Co.* (1973) 9 Cal.3d 904, 916 [(*Thompson*)] . . . .)" (*LA Sound, supra*, 156 Cal.App.4th at pp. 1268–1269.) The materiality of questions and answers on an insurance application is determined by that particular insurer. In other words, materiality is subjective. (See, e.g., *LA Sound, supra*, 156 Cal.App.4th at pp. 1268–1269; *Mitchell, supra*, 127 Cal.App.4th at p. 474; *Imperial Casualty, supra*, 198 Cal.App.3d at p. 181.) "The test for materiality is whether the information would have caused the underwriter to reject the application, charge a higher premium, or amend the policy terms, had the underwriter known the true facts." (*Mitchell, supra*, 127 Cal.App.4th at p. 474.)

Here, Endurance offered the declaration of Freberg's chief underwriting officer, Miller, who explained that if Bennington had truthfully responded that it was established in 2007, Freberg would have conducted further investigation and ultimately rejected the application. This evidence established the materiality of Bennington's misrepresentation. (*LA Sound, supra*, 156 Cal.App.4th at p. 1269 [materiality may be shown by the effect truthful response would have had on the insurance company].) Endurance thus satisfied its initial burden of demonstrating it was entitled to rescind the Insurance Policy.

Accordingly, the burden shifted to the Bennington defendants and NRG to raise a triable issue of material fact.[12]

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[12] There is a split of authority as to whether materiality is a question of law or a question of fact. (Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2019) ¶ 5:208.) Courts that have held that materiality is one of law have reasoned: "The fact that the insurer has demanded answers to specific questions in an application for insurance is in itself usually sufficient to establish materiality as a matter of law." (*Thompson, supra*, 9 Cal.3d at p. 916, citing *Cohen v. Penn Mut. Life Ins. Co.* (1957) 48 Cal.2d 720, 726; accord, *LA Sound, supra*, 156 Cal.App.4th at pp. 1268–1269; *West Coast Life Ins. Co. v. Ward* (2005) 132 Cal.App.4th 181, 187.) Courts holding that the question of materiality is one of fact have reasoned: "An incorrect answer on an insurance application does not give rise to the defense of fraud [and rescission] where the true facts, if known, would not have made the contract less desirable to the insurer." (*Ransom v. Penn Mut. Life Ins. Co.* (1954) 43 Cal.2d 420, 427; accord, *Mitchell, supra*, 127 Cal.App.4th at p. 475; *Imperial Casualty, supra*, 198 Cal.App.3d at p. 181.) We need not resolve the dispute. As we will explain, assuming materiality is a question of fact, the Bennington defendants and NRG have failed to meet their burden of demonstrating that there was a triable

(Code Civ. Proc., § 437c, subd. (p)(2).) NRG contends that it met its burden because Miller's testimony should not be believed: "[t]he trier of fact is not required to believe the post mortem testimony of an insurer's agents that insurance would have been refused had the true facts been disclosed." But NRG's *argument* does not raise a triable issue of fact. "The aim of summary judgment is to discover whether the parties possess *evidence* requiring the weighing procedures of a trial." (*Barnett v. Penske Truck Leasing* (2001) 90 Cal.App.4th 494, 499, italics added.) Thus, "[s]ummary judgment generally cannot be denied based on lack of credibility alone." (*Richards v. Department of Alcoholic Beverage Control* (2006) 139 Cal.App.4th 304, 319.)

Next, NRG notes that "[t]he policyholder may offer expert testimony on the issues of materiality and reliance." Although this is a true statement of law, the observation is inapposite because NRG did not successfully introduce any such expert testimony.[13]

Finally, the Bennington defendants and NRG contend that evidence of Endurance's post-issuance conduct, that is, its delay in seeking rescission, raises a triable issue of fact as to the materiality of Bennington's misstatement. They argue that Endurance did not consider the misstatement about age to be material because Endurance did not rescind the insurance contract when it first learned of the misrepresentation, which

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issue as to whether Bennington's statement about its age was material.

[13] As noted, although NRG sought to introduce the testimony of a purported expert, Thomas, the trial court sustained an objection to that testimony, and NRG does not challenge that evidentiary ruling.

was after the filing of the NRG-Bennington Lawsuit, but instead agreed to represent Bennington against NRG.[14] Although this evidence may be relevant to the defenses of waiver, laches, and estoppel, discussed further below, it is insufficient to raise a triable issue as to materiality which "is to be determined solely by the probable and reasonable effect which truthful answers *would have had* upon the insurer . . . ; i.e., was the insurer misled into accepting a risk, fixing the premium of insurance, estimating the disadvantages of the proposed contract or making his inquiries." (*Merced County Mut. Fire Ins. Co. v. State of California* (1991) 233 Cal.App.3d 765, 772, italics added.) No reasonable factfinder could conclude that Endurance's initial acceptance of tender and defense of Bennington rendered Bennington's earlier misstatement immaterial. To the contrary, "we can, and do, justify the insurer's duty to defend the entire . . . action prophylactically, as an obligation imposed by law in support of the policy. To defend meaningfully, the insurer must defend immediately." (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 49.) Thus, the Bennington defendants and NRG failed to meet their burden of demonstrating that Bennington's misstatement about its age was not material.

D. *No Duty of Inquiry*

NRG next points to documents in Endurance's underwriting file, specifically, Lai's July 3, 2010, email to the

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[14] On this record, it is reasonable to infer that Endurance learned by April 19, 2011, after Endurance had conducted an internet search of Bennington, that Bennington had formed in 2007.

broker and the July 12 and 19, 2010, No Loss Letters from Shah, to argue that "[a] jury could very well have found that such evidence was sufficient to put Endurance on inquiry notice" that the misstatement about Bennington's age was erroneous.

An insurer has "no obligation to verify the accuracy of the representations" in an insurance application. (*Mitchell, supra*, 127 Cal.App.4th at p. 476.) An insurer may, however, waive the materiality of a misstatement pursuant to Insurance Code section 336 which provides that "[t]he right to information of material facts may be waived . . . by neglect to make inquiries as to such facts, where they are distinctly implied in other facts of which information is communicated." (See also *Colony Ins. Co. v. Crusader Ins. Co.* (2010) 188 Cal.App.4th 743, 753.)

According to NRG, Lai's July 3, 2010, email and the No Loss Letters put Endurance on notice that it should inquire about Bennington's age, and because it failed to do so, Endurance has waived its right to rescind the insurance contract based on the materiality of the misstatement.

In considering whether the July 3, 2010, email and No Loss Letters "distinctly implied" that Bennington's age as reflected on the insurance application was false, we apply the ordinary dictionary definition of "distinct," which is "distinguishable to the eye or mind as being discrete . . . or not the same." (Merriam-Webster's Online Dict. (2019) <http://www.merriam-webster.com/dictionary/distinct> [as of Jan. 29, 2020], archived at <https://perma.cc/XRU6-GP8Z>.) Contrary to NRG's contention, Endurance's receipt of an email chain that included the July 3, 2010, email, referencing a "sample Certificate of Liability Insurance that we currently have and a Loss Run Policy Report from a previous carrier," suggested, at best, that Bennington had

a certificate of liability insurance and a loss run policy report. The email, however, did not reference any dates or include any other information that would alert Endurance that Bennington was formed prior to February 1, 2010. Nor did Endurance receive a copy of the underlying documents referenced in the email. Thus, there was no information distinguishable to the eye or mind that Bennington's age was incorrectly stated.

Further, contrary to NRG's argument that the No Loss Letters should have caused Endurance to investigate why the letterhead was from Bennington West, not Bennington, we conclude that the difference between the name of the insurance applicant, "Bennington Group LLC" and the name on the letterhead, "Bennington West Group Inc." was not so marked or distinct that it raised a duty of inquiry. The No Loss Letters were comprised entirely of two sentences each. The July 12, 2010, No Loss Letter stated, "We have no known general liability losses in the last 5 years." The July 19, 2010, No Loss Letter stated, "We have had no known pollution liability losses or professional liability losses in the last 5 years." Both letters stated, "Please let us know if you need additional information." The No Loss Letters made no reference to Bennington's age at all. And, although the letters referred to having sustained no loss in five years, this was the period of time for which Freberg sought information. Moreover, the letters were signed by Shah, a member of Bennington, and included the same address as the one listed on the insurance application. On these facts, we conclude that no reasonable trier of fact could find that the email and No Loss Letters distinctly implied that Bennington's stated date of establishment was incorrect.

E. *Laches, Estoppel, and Waiver*

The Bennington defendants and NRG next contend that the trial court erred in granting summary judgment because triable issues exist as to their defenses of laches, estoppel, and waiver.[15] We disagree.

1. Laches

"Laches is an equitable, affirmative defense which requires a showing of both an unreasonable delay by the plaintiff in bringing suit, '"plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay." [Citation.]' [Citations.] 'If, in light of the lapse of time and other relevant circumstances, a court concludes that a party's failure to assert a right has caused prejudice to an adverse party, the court may apply the equitable defense of laches to bar further assertion of the right.'" (*Highland Springs Conference & Training Center v. City of Banning* (2016) 244 Cal.App.4th 267, 282.) "On undisputed facts, the applicability of laches may be decided as a matter of law." (*Committee to Save the Beverly Highlands Home Assn. v. Beverly Highlands Homes Assn.* (2001) 92 Cal.App.4th 1247, 1266.)

The trial court concluded that the defense of laches was barred as a matter of law by *Styne, supra*, 26 Cal.4th at page 52 because Endurance, having dismissed its affirmative claims

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15 The Bennington defendants contend that triable issues exist as to the defenses of laches and estoppel. NRG argues such triable issues exist as to the defenses of waiver and estoppel.

seeking rescission, asserted rescission only as an affirmative defense.

NRG, however, contends that *Styne, supra*, 26 Cal.4th 42 does not apply because Endurance first raised rescission as a cause of action before also asserting it as an affirmative defense.[16] The fact that Endurance initially filed a complaint for declaratory relief, which it then dismissed, has no bearing on whether the defense of laches was available against its still-pending affirmative defense of rescission. NRG does not cite to a single case that limits *Styne* to those litigants who have not previously filed an affirmative claim. Moreover, the reasoning of *Styne*, that laches should not bar an affirmative defense, supports its application here: "Statutes of limitations bar 'actions or proceedings' (e.g., *French, supra*, 44 Cal.App.3d 479, 485), thus guarding against stale claims and affording repose against long-delayed litigation. They act as shields, not swords. (*Id.* at p. 486.) Thus, we long ago explained with respect to a fraud defense that 'neither the limitation of the statute nor the doctrine of laches will operate to bar the defense of the invalidity of the agreement upon the ground of fraud, for so long as the plaintiff is permitted to come into court seeking to enforce the agreement,

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16 NRG argues the trial court erred by considering *Styne, supra*, 26 Cal.4th 42 because Endurance purportedly did not raise the argument until its reply. NRG cites *Balboa Ins. Co. v. Aguirre* (1983) 149 Cal.App.3d 1002, 1010 in support. That case is inapposite as it involved an argument raised for the first time in a reply brief on *appeal*. Moreover, as noted, Endurance raised the argument in its April 11, 2017, reply to defendants' supplemental oppositions to Endurance's January 17, 2017, summary judgment motion. This appeal concerns the amended summary judgment motion filed on April 20, 2017.

the defendant may allege and prove fraud as a defense. *In short, it is not incumbent upon one who has thus been defrauded to go into court and ask relief, but he may abide his time, and when enforcement is sought against him excuse himself from performance by proof of the fraud*.' (*Estate of Cover* [(1922)] 188 Cal. 133, 140–141.) *The same reasoning applies to any grounds for asserting the illegality of the contract upon which the plaintiff sues*." (*Styne, supra*, 26 Cal.4th at p. 52, italics added.) Here, by the time of summary judgment, Endurance raised rescission only defensively and laches did not bar that defense. (See *Pringle v. Water Quality Ins. Syndicate* (C.D. Cal. 2009) 646 F.Supp.2d 1161, 1172 [even though insurer raised rescission in a counterclaim, "[i]n light of *Styne*, [insurer's] argument[s] must be considered defensive, and therefore the statute of limitations is not applicable"].)

2. Estoppel

"The elements of equitable estoppel are '(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel has a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury. [Citation.]'" (*Schafer v. City of Los Angeles* (2015) 237 Cal.App.4th 1250, 1261.) When the facts are undisputed, the existence of estoppel is a question of law. (*Steinhart v. County of Los Angeles* (2010) 47 Cal.4th 1298, 1315.)

According to the Bennington defendants, because Endurance accepted Bennington's tender and provided a defense,

it is estopped from rescinding the Insurance Policy. But this argument ignores that when Endurance accepted Bennington's tender, it did so under an express reservation of rights, which stated that "[a]ny action taken by us [Endurance] in the investigation, defense, or settlement of this claim shall not constitute or be construed as a waiver or an estoppel of any rights or defenses we have under the subject policy of insurance," including denial of coverage. "Courts have repeatedly held that an insurer does not waive or relinquish any coverage defenses it fails to assert at the time of its acceptance of a tender of defense, even when it does not make any express and full reservation of rights for a substantial period of time after the defense has been accepted." (*Ringler Associates Inc. v. Maryland Casualty Co.* (2000) 80 Cal.App.4th 1165, 1189 [collecting cases].) Thus, the doctrine of estoppel does not bar the rescission claim, as a matter of law.

3. Waiver

"'"In general, to constitute a waiver, there must be an existing right, a knowledge of its existence, an actual intention to relinquish it, or conduct so inconsistent with the intent to enforce the right as to induce a reasonable belief that it has been relinquished."' [Citations.] . . . [¶] Waiver is ordinarily a question for the trier of fact; '[h]owever, where there are no disputed facts and only one reasonable inference may be drawn, the issue can be determined as a matter of law.'" (*DuBeck v. California Physicians' Service* (2015) 234 Cal.App.4th 1254, 1265 (*DuBeck*).)

The Bennington defendants and NRG contend that because Endurance continued to defend Bennington even after learning, by at least September 2011, that it had been formed prior to February 1, 2010, Endurance has waived the defense of rescission. They cite *DuBeck, supra*, 234 Cal.App.4th 1254 in support of their contention that there are triable issues on whether Endurance lost its right to rescind. *DuBeck* is distinguishable. That case concerned an insured who had made a material misrepresentation on her medical insurance application. (*Id.* at p. 1259.) When it discovered the misrepresentation 17 months after issuing the policy, the insurance company sent a letter to the insured stating that "'rather than rescind the coverage completely,'" it elected to cancel it.[17] (*Id.* at pp. 1259–1260, italics removed.) The insurance company further indicated that it would cover any claims for covered services incurred before the cancellation. (*Id.* at p. 1259.) The insurance company "maintained that position for over two years, neither disavowing its own affirmation of appellant's policy coverage nor offering to return her premiums." (*Id.* at p. 1266.) The insured sued the insurance company two years after issuance of the cancellation letter, asserting the company had no right to cancel coverage. (*Id.* at p. 1260.) In its answer, the insurance company raised an affirmative defense of rescission. (*Ibid.*) The insurance company moved for summary judgment on rescission, and the trial court

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[17] "'Rescission' is a 'retroactive termination' of a contract, as compared to 'cancellation,' which is a 'prospective termination.' [Citation.] 'The consequence of rescission is not only the termination of further liability, but also the restoration of the parties to their former positions by requiring each to return whatever consideration has been received.'" (*Nmsbpcsldhb v. County of Fresno* (2007) 152 Cal.App.4th 954, 959–960.)

granted the motion. (*Id.* at pp. 1261, 1263.) The Court of Appeal reversed, finding the insurance company's "conduct was wholly inconsistent with the assertion of its known right to rescind." (*Id.* at p. 1266.)

Unlike the insurance company in *DuBeck, supra*, 234 Cal.App.4th 1254, Endurance did not specifically elect to forego any of its rights. Rather, Endurance notified Bennington that it did not waive any of its rights by defending Bennington, including its right to deny coverage. Thus, *DuBeck* does not support the argument that there are triable issues as to whether Endurance waived its rescission rights.

F. *No Prejudice to a Third Party*

Finally, NRG cites *Beckwith v. Sheldon* (1913) 165 Cal. 319 (*Beckwith*) in support of its argument that the trial court could not enter summary judgment on Endurance's rescission defense because to do so would prejudice NRG, a third party. In *Beckwith,* our Supreme Court held: "It is, of course, fundamental that where the rights of others have intervened and circumstances have so far changed that rescission may not be decreed without injury to those parties and their rights, rescission will be denied and the complaining party left to his other remedies." (*Id.* at p. 324.) *Beckwith* is inapplicable here.

At the time the trial court granted summary judgment on Endurance's affirmative defense of rescission, NRG was no longer a third party, having been assigned Bennington's rights under the Insurance Policy pursuant to the settlement agreement. Indeed, it appears that NRG's standing to sue was based on its status as an assignee. (See *Clark v. California Ins. Guarantee*

Assn. (2011) 200 Cal.App.4th 391, 397–398 ["Unless the third party [judgment creditor] obtains an assignment by the insured of its rights under the insurance contract, the third party has no right to bring a claim upon a duty owed only to the insured"].) Even if NRG had standing to sue based on its status as a judgment creditor, it could not preclude the defense of rescission because, as we discussed above, Endurance accepted Bennington's tender pursuant to a reservation of rights. (See *J. C. Penney Casualty Ins. Co. v. M. K.* (1991) 52 Cal.3d 1009, 1018 ["an insurer that timely and adequately reserves its right to deny coverage and that does not subsequently intentionally waive its reservation of rights is not collaterally estopped by a judgment in favor of a third party against its insured"].)

Beckwith's holding does not apply to an assignee like NRG. "An assignment carries with it all the rights of the assignor. [Citations.] 'The assignment merely transfers the interest of the assignor. The assignee "stands in the shoes" of the assignor, taking his rights and remedies, subject to *any defenses* which the *obligor* has against the assignor prior to notice of the assignment.' [Citation]." (*Johnson v. County of Fresno* (2003) 111 Cal.App.4th 1087, 1096; accord, *Searles Valley Minerals Operations Inc. v. Ralph M. Parsons Service Co.* (2011) 191 Cal.App.4th 1394, 1402.) Thus, NRG, as Bennington's assignee to the Insurance Policy, was subject to Endurance's affirmative defense of rescission.

We conclude that Endurance met its burden of demonstrating that it was entitled to the affirmative defense of rescission based on Bennington's material misrepresentation as to its date of establishment. The Bennington defendants and NRG did not meet their burden of raising a triable issue of

material fact as to that defense. Endurance therefore is entitled to summary judgment. We need not decide the parties' arguments concerning the additional misstatements that the trial court concluded were material as a matter of law. Nor do we need to discuss Endurance's cross-appeal.

V. DISPOSITION

The summary judgment is affirmed. Endurance American Specialty Insurance Company is entitled to recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KIM, J.

We concur:

RUBIN, P. J.

BAKER, J.