Mata v. Allstate Insurance Co.

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INTRODUCTION

Plaintiffs Gabriela Mata and Ernest G. Mata (plaintiffs) brought an action for breach of contract, negligence, breach of the covenant of good faith and fair dealing, and breach of fiduciary duty against their insurance company, Allstate Insurance Company (Allstate), and their insurance broker, Mickey Herman (Herman) (collectively defendants). The action arose out of an August 9, 2003, fire that destroyed a building housing plaintiffs' flower shop and was based on the asserted inadequacy of plaintiffs' insurance coverage. The trial court sustained, with leave to amend, defendants' demurrers to plaintiffs' complaint.

Thereafter, plaintiffs filed a first amended complaint asserting causes of action for breach of contract and breach of the covenant of good faith and fair dealing and omitting the causes of action for negligen ce and breach of fiduciary duty. The trial court sustained, with leave to amend, defendants' demurrer to the first amended complaint. Plaintiffs filed a second amended complaint in which they asserted causes of action for breach of contract and breach of the covenant of good faith and fair dealing and added back in a cause of action for negligence. The trial court sustained defendants' demurrer to plaintiffs' second amended complaint, this time denying plaintiffs leave to amend. Plaintiffs appeal from the trial court's order dismissing plaintiffs' action. We affirm.

DISCUSSION

I. Standard of Review

"`In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. "We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." (Serrano v. Priest (1971) 5 Cal.3d 584, 591 [96 Cal.Rptr. 601, 487 P.2d 1241, 41 A.L.R.3d 1187].) Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the

complaint states facts sufficient to constitute a cause of action. [Citation.]' (Blank v. Kirwan (1985) 39 Cal.3d 311, 318 [216 Cal.Rptr. 718, 703 P.2d 58] (Blank).) We will uphold a judgment on an order sustaining a demurrer if any one of several grounds in the demurrer is well taken. (Aubry v. Tri-City Hospital Dist. (1992) 2 Cal.4th 962, 967 [9 Cal.Rptr.2d 92, 831 P.2d 317].)" (Andonagui v. May Dept. Stores Co. (2005) 128 Cal.App.4th 435, 439.)

"`Generally it is an abuse of discretion to sustain a demurrer without leave to amend if there is any reasonable possibility that the defect can be cured by amendment. [Citation.]' (Cooper v. Leslie Salt Co. (1969) 70 Cal.2d 627, 636 [75 Cal.Rptr. 766, 451 P.2d 406] (Cooper); Blank, supra, 39 Cal.3d at p. 318.) `The burden of proving such reasonable possibility is squarely on the plaintiff.' (Blank, supra, 39 Cal.3d at p. 318; see Cooper, supra, 70 Cal.2d at p. 636.) `Plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading. [Citation.]' (Cooper, supra, 70 Cal.2d at p. 636.)" (Andonagui v. May Dept. Stores Co., supra, 128 Cal.App.4th at p. 439.)

II. Plaintiffs' Breach of Contract Cause of Action

Plaintiffs contend that the trial court erred in sustaining Allstate's demurrer to their breach of contract cause of action in their second amended complaint. Plaintiffs also contend that, even if the demurrer was properly sustained, the trial court abused its discretion in denying them leave to amend. The trial court properly sustained Allstate's demurrer without leave to amend.

"A cause of action for damages for breach of contract is comprised of the following elements: (1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff. (Reichert v. General Ins. Co. (1968) 68 Cal.2d 822, 830 [69 Cal.Rptr. 321, 442 P.2d 377].)" (Careau & Co. v. Security Pacific Business Credit, Inc. (1990) 222 Cal.App.3d 1371, 1388.) Plaintiffs, in their breach of contract cause of action, allege, in pertinent part, that Allstate and Herman had an "obligation implicit in their contractual obligation to provide and maintain the policy of fire insurance (Exhibit A) as well as insurance for contents and other covered items which, if lost through one of the insured-covered perils, would adequately and fairly reimburse the Plaintiffs for their loss . . . ." The cause of action further alleges that "Defendants . . . failed to maintain limits of insurance and coverage adequate to insure against a devastating total fire loss, which fire occurred on August 9, 2003 . . . ." Plaintiffs allege that Allstate and Herman breached the insurance policy by failing "to advise the Plaintiffs that Plaintiffs had the ability to purchase, and should have been given the information to purchase insurance sufficient to cover a peril, which if occurred would result in the Plaintiffs being under-insured for such a loss; and further, Defendants had an implicit obligation to review the insured's coverage and thereafter failed to periodic review of the Policy of Insurance with relation to the value of the property of the Plaintiffs . . . to make sure that the Plaintiffs had adequate coverage."

The trial court sustained Allstate's demurrer to the breach of contract cause of action on the ground

that plaintiffs failed to identify a provision in the insurance policy that Allstate allegedly breached. As the trial court noted, plaintiffs' breach of contract cause of action does not identify any provision in the insurance policy that it alleges defendants breached. Absent circumstances not alleged here, defendant had no contractual duty to advise plaintiffs to obtain different or additional insurance than provided for in the policy. "[A]s a general proposition, an insurance agent does not have a duty to volunteer to an insured that the latter should procure additional or different insurance coverage."[1] (Fitzpatrick v. Hayes (1997) 57 Cal.App.4th 916, 927; see Gibson v. Government Employees Ins. Co. (1984) 162 Cal.App.3d 441, 443 [holding, in a breach of fiduciary duty action, that "absent some conduct on the part of the insurer consistent with assuming broader duties, the insurer's fiduciary duties are limited to those arising out of the insurance contract and do not encompass the duties asserted" to advise the insured of "(1) the availability of coverage in addition to that requested [or] (2) the inadequacy of their policy limits"].)

On appeal, plaintiffs contend that the essence of their contract cause of action against Allstate is that they "did not get what Allstate promised and what they paid for." Although not entirely clear, plaintiffs' contract cause of action concerns the alleged failure of Allstate to maintain adequate coverage limits or to advise plaintiffs to maintain such coverage. Plaintiffs contend that their second amended complaint alleges that "the insurance coverage that was promised differed from the coverage that was actually provided." There is no such allegation in the second amended complaint.

Plaintiffs contend that their breach of contract cause of action can be amended to allege that Allstate engaged in unfair adjustment practices by invoking an unconscionable provision to avoid its contractual obligation to provide replacement cost coverage. Coverage A of plaintiffs' insurance policy concerning buildings provides, in pertinent part, "This policy covers the replacement cost (or the actual cash value, if such is indicated in the Declarations) of the building(s) for which a description and limit of liability is shown in the Declarations." The Declarations state that the coverage for buildings in Coverage A is "Replacement Cost." The section of the policy entitled, "Coverage A - Conditions; 1. How We Settle a Loss; a. Replacement Cost" provides, in pertinent part, that Allstate will pay the replacement cost of property, without deduction for depreciation, in an amount not to exceed "i. The replacement cost of any part of the property damaged with equivalent material; or [¶] ii. The amount actually and necessarily spent to repair or replace the damaged property; or [¶] iii. The limit of liability applying to the property." That section then provides, "We will not pay more than the actual cash value of the damage until the repair or replacement is completed. If you decide not to repair or replace the damaged property, settlement will be on an actual cash value basis, not to exceed the limit of liability applying to the property. You may make further claim for any additional replacement cost payment provided we are notified in writing within 180 days after loss of your intent to make such further claim."

Plaintiffs contend that the provision in the Conditions section that limits coverage to the actual cash value under certain circumstances is unconscionable because it "shifts the risk of loss to the insured and contradicts the spirit and intent of replacement cost coverage." They contend that the provision

is unconscionable because it requires an insured to "come out of pocket for the amount in excess of the cash value," because it makes the receipt of replacement cost contingent upon rebuilding, and because an insured who elects not to repair or replace a damaged building will not receive replacement cost and will only receive actual cash value. Plaintiffs' proffered amendment fails to state a breach of contract cause of action because the provision at issue is not unconscionable.

The judicially created doctrine of unconscionability contains both procedural and substantive elements. "The procedural element of an unconscionable contract generally takes the form of a contract of adhesion, `"which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it."' [¶] Substantively unconscionable terms may take various forms, but may generally be described as unfairly one-sided." (Little v. Auto Stiegler, Inc. (2003) 29 Cal.4th 1064, 1071, citing Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal.4th 83, 113 and 119 (Armendariz).) "To be substantively unconscionable, a contractual provision must shock the conscience. (California Grocers Assn. v. Bank of America (1994) 22 Cal.App.4th 205, 214 [27 Cal.Rptr.2d 396]; Kinney v. United HealthCare Services, Inc. (1999) 70 Cal.App.4th 1322, 1330 [83 Cal.Rptr.2d 348] [`"Substantive unconscionability" focuses on the terms of the agreement and whether those terms are "so one-sided as to `shock the conscience.'" [Citations.]'].)" (Wayne v. Staples, Inc. (2006) 135 Cal.App.4th 466, 480.)

"`The prevailing view is that [procedural and substantive unconscionability] must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability.' [Citation.] But they need not be present in the same degree. `Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves.' [Citations.] In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (Armendariz, supra, 24 Cal.4th at p. 114.)

"Actual cash value is the fair market value of a structure at the time it is destroyed. [Citation.]" (Fire Ins. Exchange v. Superior Court (2004) 116 Cal.App.4th 446, 463.) "A replacement cost policy does more than an actual cash value policy: it necessarily places the insured in a better position than actual cash value would provide. [Citation.] [¶] As one commentator explained, `Such windfalls . . . are inherent in "replacement cost" policies, which obligate insurers to reimburse the insured for the actual cost of repairs and construction without deducting any amount for depreciation. For example, if an insured needed to replace a damaged roof, the insurer would be liable for the cost of the entire new roof, even if the damaged roof had been 10 years old.' (Wood, The Insurance Fallout Following Hurricane Andrew (1994) 48 U. Miami L.Rev. 949, 951-952, fn. omitted.)" (Fire Ins. Exchange v. Superior Court, supra, 116 Cal.App.4th at p. 464.)

The terms of the provision at issue here are not so one-sided as to shock the conscience. (See Wayne v. Staples, Inc., supra, 135 Cal.App.4th at p. 480.) The provision that Allstate "will not pay more than

the actual cash value of the damage until the repair or replacement is completed" is fairly interpreted as providing that Allstate will pay up to the actual cash value of the damage in advance of the completion of repair or replacement. Such an advance can be expected to allow insureds to arrange for repair or replacement of damaged property. When, alternatively, an insured decides not to repair or replace damaged property, the insured still receives the cash value in settlement. Such an alternative recovery is a reasonable measure by Allstate to limit its exposure for replacement coverage to those instances where its insureds actually repair or replace damaged property. (See Fire Ins. Exchange v. Superior Court, supra, 116 Cal.App.4th at p. 465.)

Plaintiffs also point to language in the trial court's ruling sustaining Allstate's demurrer to plaintiffs' breach of contract cause of action as support for their contention that their second amended complaint can be amended to state viable causes of action. In its ruling, the trial court stated that the allegations in plaintiffs' breach of contract cause of action "sound more like fraud or misrepresentation than breach of contract." Plaintiffs point to this language as evidence that the trial court itself recognized that the second amended complaint "asserted sufficient facts to establish a cause of action" under "at least two cognizable legal theories." Having identified these legal theories, plaintiffs contend, the trial court abused its discretion in denying leave to amend. The trial court's statement, however, simply expressed a view that the allegations in the breach of contract cause of action sounded more like allegations in a fraud or misrepresentation action than allegations in a breach of contract action, and did not identify viable alternative legal theories. Moreover, plaintiffs fail to explain how their second amended complaint could be amended to assert causes of action for fraud or misrepresentation.

III. Plaintiffs' Breach of the Covenant of Good Faith and Fair Dealing Cause of Action

In the breach of the covenant of good faith and fair dealing cause of action in their second amended complaint, plaintiffs allege that Allstate and Herman[2] failed to perform their "implicit contractual obligation" to provide them with "sufficient limits of liability" to "make the Plaintiffs whole" for the "covered perils" in plaintiffs' insurance policy. On appeal, plaintiffs contend that the trial court erred in sustaining defendants' demurrer to their breach of the covenant of good faith and fair dealing cause of action without leave to amend, arguing that that cause of action is valid because their second amended complaint stated or can state a viable cause of action for breach of contract and because Allstate had a good faith duty to advise them that "the conflicting terms of the policy might result in a denial or reduction of benefits." The trial court properly sustained defendants' demurrer without leave to amend.

"The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made. [Citation.]" (Guz v. Bechtel National, Inc. (2000) 24 Cal.4th 317, 349.) The covenant does not add substantive terms to a contract. (Id. at pp. 349-350 [the covenant "cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the

specific terms of their agreement"].)

As we held, plaintiffs' insurance policy does not contain a duty on the part of the insurer, express or implied, to ensure that plaintiffs obtained additional coverage than provided for in the policy. (See Fitzpatrick v. Hayes, supra, 57 Cal.App.4th at p. 927; Gibson v. Government Employees Ins. Co., supra, 162 Cal.App.3d at p. 443.) The covenant of good faith and fair dealing will not imply such a duty. (Guz v. Bechtel National, Inc., supra, 24 Cal.4th at p. 349.) Thus, the trial court properly sustained defendants' demurrer.

Plaintiffs cannot amend their breach of the covenant of good faith and fair dealing to state a viable claim. Plaintiffs failed to state a cause of action for breach of contract, and they have failed to demonstrate that they can amend their second amended complaint to state a breach of contract cause of action. As for plaintiffs' contention that Allstate had a duty to inform plaintiffs that "conflicting terms of the policy might result in a denial or reduction of benefits," we assume plaintiffs are referring to the section of the insurance policy that provides, in pertinent part, "We will not pay more than the actual cash value of the damage until the repair or replacement is completed. If you decide not to repair or replace the damaged property, settlement will be on an actual cash value basis, not to exceed the limit of liability applying to the property." This provision does not conflict with other provisions of the policy and is not, as plaintiffs state, set forth in fine print. The provision clearly states when an insured will receive actual cash value rather than replacement cost. This provision is reasonable and not unconscionable, and Allstate was under no duty to inform plaintiffs as to its operation or as to alternatives.

IV. Plaintiffs' Negligence Cause of Action

Plaintiffs alleged a negligence cause of action - apparently against Herman - in their original complaint. After the trial court sustained defendants' demurrer to plaintiffs' original complaint with leave to amend, plaintiffs elected not to assert a negligence cause of action in their first amended complaint. Plaintiffs then asserted a negligence cause of action against Herman in their second amended complaint after the trial court sustained defendants' demurrer to plaintiffs' first amended complaint. Plaintiffs allege in their second amended complaint that "Defendant Herman, having been the only agent of Plaintiffs since the inception of the issuance of the original policy of insurance . . . had a duty, being an expert in selling and underwriting policies of commercial fire insurance, and advising insured policy holders as to the adequacy of such insurance. [¶] By being negligent, and in failing to so protect, advise and continue to make sure that the policy of insurance this Defendant (Herman) wrote for Plaintiffs, he caused Plaintiffs to be damaged . . . ." The trial court sustained Herman's demurrer to plaintiffs' negligence cause of action in their second amended complaint, without leave to amend, on the grounds that "[w]here an agent acts in the name of the principal and the agency is disclosed, only the principal and not the agent is liable," and plaintiffs added the negligence cause of action without leave to amend to do so after their negligence cause of action was "eliminated from the first amended complaint." Plaintiffs contend that the trial court

erred in sustaining Herman's demurrer to the negligence cause of action in their second amended complaint and abused its discretion in denying leave to amend.

Plaintiffs' failure to assert their negligence cause of action in their first amended complaint foreclosed the opportunity to raise that claim in their second amended complaint. (See People ex rel. Dept Pub. Wks. v. Clausen (1967) 248 Cal.App.2d 770, 785 [the "granting of leave to amend must be construed as permission to the pleader to amend the cause of action which he pleaded in the pleading to which the demurrer has been sustained"].) Accordingly, the trial court properly sustained Herman's demurrer to the negligence cause of action without leave to amend. Because plaintiffs did not have leave to amend the first amended complaint to add a cause of action for negligence in the second amended complaint, we do not consider their claims that the allegations in their negligence cause of action are reasonably interpreted as encompassing, or can be amended to assert, claims that Herman negligently failed to procure the coverage they requested or that he misrepresented the coverage and terms of the policy he procured.

DISPOSITION

The judgment is affirmed. Defendants are awarded their costs on appeal.

I concur:

KRIEGLER, J.

Turner, P. J.

I concur in the judgment. As to the third cause of action, this case does not fall within the scope of Paper Savers, Inc. v. Nacsa (1996) 51 Cal.App.4th 1090, 1104-1105 which could provide a basis for reversing the judgment. There is no general duty on the part of an insurance salesperson to advise a prospective insured as to the proper amount of coverage to secure. (Id. at p. 1096; see Croskey, Cal. Practice Guide: Insurance Litigation (The Rutter Group) ¶ 2:58, pp. 2-18-2-19 (rev. # 1 2004).) The exception to this rule is when the salesperson uses superior knowledge to respond to a prospective insured's inquiries. (Paper Savers, Inc. v. Nacsa, supra, 51 Cal.App.4th at pp. 1097-1104; Free v. Republic Ins. Co. (1992) 8 Cal.App.4th 1726, 1729.) But I agree with trial court that plaintiffs have not alleged the facts necessary to come within the circumstances discussed by our Division Seven colleagues in Paper Savers, Inc. to permit liability for failure to advise a potential insured as to the level of advisable coverage.

TURNER, P. J.

1. This general rule "changes, however, when-but only when-one of the following three things happens: (a) the agent misrepresents the nature, extent or scope of the coverage being offered or provided . . ., (b) there is a request or inquiry by

the insured for a particular type or extent of coverage . . ., or (c) the agent assumes an additional duty by either express agreement or by `holding himself out' as having expertise in a given field of insurance being sought by the insured . . . ." (Fitzpatrick v. Hayes (1997) 57 Cal.App.4th 916, 927.)

2. Although the parties do not address Herman's liability for breach of the covenant of good faith and fair dealing, Herman was not alleged to be a party to the insurance policy and therefore could not have breached a covenant implied from it. (See Gruenberg v. Aetna Ins. Co. (1973) 9 Cal.3d 566, 576 ["non-insurer defendants were not parties to the agreements for insurance; therefore, they are not, as such, subject to an implied duty of good faith and fair dealing"]; Austero v. National Cas. Co. (1976) 62 Cal.App.3d 511, 516 ["Although an action for bad faith breach of the covenant of good faith and fair dealing sounds in tort, the duty of good faith and fair dealing derives from and exists solely because of the contractual relationship between the parties. (Gruenberg v. Aetna Ins. Co., supra, 9 Cal.3d at pp. 576, 577-578; Truestone, Inc. v. Travelers Ins. Co., 55 Cal.App.3d 165, 170 [127 Cal.Rptr. 386].) Thus, one who is not a party to the underlying contract may not be held liable for breach of an implied covenant of good faith and fair dealing for as to him no such implied covenant exists. (Gruenberg v. Aetna Ins. Co., supra, 9 Cal.3d at p. 576.)"]