Filed 8/28/12 Foster v. Western Air Limbach CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

MATTHEW FOSTER, Plaintiff and Respondent, v. WESTERN AIR LIMBACH LP, Defendant and Appellant.	B230038 (Los Angeles County Super. Ct. No. BC402670)

APPEAL from a judgment of the Superior Court of Los Angeles County. Kenneth R. Freeman, Judge. Reversed and remanded with direction.

Horvitz & Levy, H. Thomas Watson and Jason R. Litt; Bullard, Brown & Beal, James E. Bullard and Lee H. Graham, for Defendant and Appellant.

Madison Harbor and Ali Parvaneh, for Plaintiff and Respondent.

Western Air Limbach LP (Western Air) appeals from the judgment for Matthew Foster. We reverse and enter judgment for Western Air because Foster did not pursue a viable claim against Western Air.

FACTS AND PROCEEDINGS

In April 2006, Matthew Foster was installing an elevator inside a 12-story high rise under construction when a 10- to 12-foot long metal stud fell down the open elevator shaft and hit him, causing serious injuries. An inspection immediately after the accident indicated the stud fell from the 11th floor where the employees of appellant Western Air were working. Earlier that workday, someone had removed the barricade covering the 11th floor's opening to the elevator shaft through which the stud fell.[1] Foster filed a personal injury complaint against the project's general contractor, Hathaway Dinwiddie Construction Company, and two subcontractors: The Raymond Group (Raymond) and appellant Western Air.

Both subcontractors had written contracts with general contractor Hathaway in which they promised to defend and indemnify Hathaway for any claims against Hathaway arising from the subcontractors' work. After Foster filed his personal injury complaint, Hathaway tendered to the subcontractors its request for defense and indemnification. The insurer for subcontractor Raymond, American Safety Insurance Group (American Safety), agreed to provide a defense and indemnification to Hathaway in Foster's lawsuit. Appellant, in contrast, rejected the tender and refused to defend or indemnify Hathaway. In conjunction with requesting a defense and indemnification, Hathaway also filed a cross-complaint against appellant and Raymond based on their defense and indemnity obligations. The cross-complaint alleged causes of action for breach of contract to indemnify; breach of contract to defend; breach of contract to obtain

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[1] Appellant blames others for the accident, but the trial court found appellant was principally responsible.

insurance; comparative indemnity/apportionment of fault; total equitable indemnify; and, declaratory relief.[2]

All three defendants – Hathaway, Raymond, and appellant – settled Foster's personal injury claims against them before trial. Under the settlement, Raymond's insurer, American Safety, agreed to pay Foster $700,000 on Hathaway's behalf and $100,000 on Raymond's behalf. American Safety also agreed to pay the costs of defense for Hathaway and Raymond. Additionally, Foster accepted appellant's Code of Civil Procedure section 998 offer to settle for $5,001.

In addition to the settlement's monetary payments to Foster, general contractor Hathaway, subcontractor Raymond, and insurer American Safety assigned to Foster their "causes of action" and "rights of recovery" against appellant. The written assignment covered "all of Assignors' rights, title, interest and benefits with respect to the causes of action and rights of recovery against [appellant] as set forth within [Hathaway's] Cross-Complaint. . . . This Assignment of Rights expressly encompasses the transfer of all of Assignors' rights, as against [appellant] and/or its insurance carriers, for breach of contract to indemnify, breach of contract to defend, breach of contract to obtain insurance, comparative indemnity/apportionment of fault, total equitable indemnity and declaratory relief." In accord with the assignment, Hathaway and Raymond dismissed their cross-complaints against appellant without prejudice.

In November 2008, Foster filed his complaint against appellant which is at issue in this appeal. The complaint alleged exactly the same causes of action contained in general contractor Hathaway's cross-complaint against appellant which Hathaway had assigned to Foster in settlement of the personal injury action. Following a bench trial, the court entered a general verdict against appellant. The court awarded Foster $700,000 in

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[2] The Raymond Group also cross-complained against Hathaway and appellant for equitable indemnification and contribution, but its cross-complaint does not enter into our analysis.

damages, $89,158.94 in attorney's fees, and $165,723.38 in interest. This appeal followed.

DISCUSSION

Appellant contends the court erred in entering judgment for Foster because the claims that Foster received through his personal injury settlement with general contractor Hathaway, subcontractor Raymond, and Raymond's insurer American Safety, contained no viable claim against appellant. We agree.

1. *Foster Cannot Recover – because Hathaway could not have recovered – for Breach of Contract*

Foster tried his case against appellant as one for breach of appellant's contractual duty to defend and indemnify Hathaway –contractual duties Hathaway assigned to Foster in the personal injury settlement. Foster's appellate brief repeatedly emphasizes his contractual theory of recovery, stating, for example, "The judgment should be affirmed because Hathaway (and Foster as its assignee) had a contractual right to indemnity against Appellant . . . ." Later in his brief, he writes: "The Trial Court . . . specifically found Appellant liable under the subcontract [between Hathaway and appellant]. . . . The subcontract takes preemptive effect over any equitable indemnity claims, and the assignment agreement preempts any subrogation." Keeping with Foster's theory at trial, the court entered judgment for Foster under a contractual theory. Foster states the judgment "was limited to awarding [him] that which he was entitled to as the assignee of the express contractual claims held by Hathaway and/or [American Safety] against Appellant." And therein lies the judgment's fatal flaw, because Foster could not recover for breach of contract.

An essential element of breach of contract is damages. (*Emerald Bay Community Assn. v. Golden Eagle Ins. Corp.* (2005) 130 Cal.App.4th 1078, 1088 (*Emerald Bay*); *Bramalea California, Inc. v. Reliable Interiors, Inc.* (2004) 119 Cal.App.4th 468, 473 [damages aim to make contracting party whole following a contract's breach].) Because

American Safety stepped up to the plate, Hathaway incurred no out-of-pocket of expenses from appellant's failure to defend and indemnify Hathaway in Foster's personal injury lawsuit. Hathaway thus suffered no damages. When an insured party – whether Hathaway or its assignee, Foster – suffers no loss because a third party makes the insured whole, then the insured cannot state a contract-based cause of action. (See *Patent Scaffolding Co. v. William Simpson Constr. Co.* (1967) 256 Cal.App.2d 506, 510-511 [contractor's failure to obtain promised insurance for one subcontractor did not support cause of action for breach of contract because subcontractor suffered no damages when second subcontractor's insurance compensated first subcontractor].) As one court noted, an "insured's right of recovery is restricted to the actual amount of the loss." (*Emerald Bay*, at p. 1090.)

Foster tries to distinguish case law which requires a plaintiff to suffer damages to recover for breach of contract. Foster contends appellant breached its duties to defend and indemnify whether or not Hathaway incurred any out-of-pocket expenses because those duties did not depend on Hathaway suffering a loss. (*Alberts v. American Casualty Co.* (1948) 88 Cal.App.2d 891, 888-889; Civ. Code, § 2778, subd. (1).) Regardless of the merit to Foster's contention in the abstract, the contention is beside the point because insurer American Safety provided Hathaway its full measure of defense and indemnification when American Safety paid all of Hathaway's defense and settlement costs. By doing so, American Safety left Hathaway with no unsatisfied *defense or indemnification* claim. On the other hand, out-of-pocket expenses do matter for breach of contract because Hathaway could state such a claim only if it suffered damages. (*Emerald Bay, supra,* 130 Cal.App.4th at p. 1088; *Bramalea California, Inc. v. Reliable Interiors, Inc., supra,* 119 Cal.App.4th at p. 473; *Patent Scaffolding Co. v. William Simpson Constr. Co., supra,* 256 al.App.2d at pp. 510-511.) American Safety's payment of Hathaway's defense and settlement costs makes *Emerald Bay, supra,* at page 1078, on point. "The insured's right of recovery is restricted to the actual amount of the loss. Hence, where there are several policies of insurance on the same risk [i.e. the policy subcontractor Raymond provided through American Safety, and the policy appellant

should have provided] and the insured has recovered the full amount of its loss from one or more, but not all, of the insurance carriers, the insured has no further rights against the insurers who have not contributed to its recovery. Similarly, the liability of the remaining insurers to the insured ceases, even if they have done nothing to indemnify or defend the insured." (*Emerald Bay* at p. 1090 quoting *Fireman's Fund Ins. Co. v. Maryland Cas. Co.* (1998) 65 Cal.App.4th 1279.) In short, Hathaway (and Foster by assignment) had a right to demand appellant, or subcontractor Raymond, or both, defend and indemnify Hathaway in Foster's personal injury lawsuit without Hathaway incurring any out-of-pocket expenses, but Hathaway (and Foster) could not recover for breach of the contractual duties to defend and indemnify unless Hathaway suffered damages, which did not happen here because American Safety fully paid all of Hathaway's defense and settlement costs.[3]

2. *Foster Cannot Recover Under Subrogation Because He Did Not Pursue That Theory at Trial*

Foster alternatively contends we may rely on American Safety's right to subrogation in Foster's personal injury lawsuit to affirm the trial court's judgment. As part of the settlement of Foster's lawsuit, American Safety assigned to Foster all of American Safety's claims against appellant. The assignment stated: "[Hathaway, Raymond, and American Safety] irrevocably assign, transfer and grant to [Foster] all of [their] rights, title, interest and benefits with respect to the causes of action and rights of

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3 American Safety's payment of Hathaway's entire defense and settlement costs arguably gave American Safety a subrogation claim against appellant, and a contribution claim against appellant's insurer (if appellant had procured insurance), on the ground that both subcontractors Raymond and appellant should share the costs of defending and indemnifying Hathaway (*Hartford Cas. Ins. Co. v. Mt. Hawley Ins. Co.* (2004) 123 Cal.App.4th 278, 286-287), but, as we discuss *post*, Foster did not pursue those theories at trial – he relied solely on breach of contract.

recovery against [appellant] as set forth within [Hathaway's] Cross-Complaint."[4] From the assignment, Foster stepped into American Safety's shoes, receiving all the rights American Safety possessed against appellant. (*Searles Valley Minerals Operations Inc. v. Ralph M. Parson Service Co.* (2011) 191 Cal.App.4th 1394, 1402.) Foster was therefore entitled to the same recovery American Safety could have recovered if American Safety had filed suit in its own name. (*Salaman v. Bolt* (1977) 74 Cal.App.3d 907, 919.)

"Subrogation is defined as the substitution of another person in place of the creditor or claimant to whose rights he or she succeeds in relation to the debt or claim. By undertaking to indemnify or pay the principal debtor's obligation to the creditor or claimant, the 'subrogee' is equitably subrogated to the claimant (or 'subrogor'), and succeeds to the subrogor's rights against the obligor. [Citation.] In the case of insurance, subrogation takes the form of an insurer's right to be put in the position of the insured in order to pursue recovery from third parties legally responsible to the insured for a loss which the insurer has both insured and paid. [Citation.]" (*Fireman's Fund Ins. Co. v. Maryland Cas. Co., supra,* 65 Cal.App.4th at pp. 1291-1292; *Kardly v. State Farm Mut. Auto. Ins. Co.* (1989) 207 Cal.App.3d 479, 488 ["Subrogation is the right of an insurer to take the place of its insured to pursue recovery from legally responsible third parties for

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4 Appellant contends Foster received nothing by assignment from American Safety because the assignment covered only "the causes of action and rights of recovery against [appellant] as set forth *within [Hathaway's] Cross-Complaint*." (Emphasis added.) Although appellant accurately quotes the language, we find appellant interprets the language too narrowly. The reference to "causes of action" sensibly applies, as appellant urges, to the claims alleged in Hathaway's cross-complaint. But the reference to "rights of recovery" must refer to something else, or risk being redundant. We will assume for the sake of argument that rights of recovery included subrogation because "rights of recovery" is a recognized way to refer to an insurer's subrogation rights. (See e.g. *Commercial Union Assurance Co. v. City of San Jose* (1982) 127 Cal.App.3d 730, 739; *State Farm Mut. Auto. Ins. Co. v. Davis* (1981) 122 Cal.App.3d Supp. 23.) We thus find the trial court correctly found after hearing all the evidence that "We have a valid assignment. So Foster is in the shoes of either the insurance company [American Safety] or the contractor."

losses paid to the insured by the insurer."].) For example, an insurer who pays an insured $500,000 on a fire policy is subrogated to the insured's rights to obtain damages from the third person who set the fire. The insurer brings the negligence claim in its own name.

Foster raises subrogation for the first time on appeal. He did not plead subrogation in his complaint in this action.[5] He did not pursue the theory at trial. And the trial court did not rest its judgment on subrogation. Ordinarily, a plaintiff may not raise a new theory for the first time on appeal. (See e.g. *Griffin Dewatering Corp. v. Northern Ins. Co. of New York* (2009) 176 Cal.App.4th 172, 210-211 [plaintiff's recovery limited to theories alleged in complaint or added by amendment to complaint to conform complaint to proof].) A reviewing court will, however, affirm a trial court's judgment if the judgment is correct under any theory. (*Superior Motels, Inc. v. Rinn Motor Hotels, Inc.* (1987) 195 Cal.App.3d 1032, 1055 fn. 13; *Board of Administration v. Superior Court* (1975) 50 Cal.App.3d 314, 319-320; see generally 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, §§ 414-415.) To affirm a judgment based on a theory not tried below, that theory must apply as a matter of law based on undisputed facts. (*Id.*)

A subrogation claim by an insurer such as American Safety has multiple elements. (*Interstate Fire & Casualty Ins. Co. v. Cleveland Wrecking Co.* (2010) 182 Cal.App.4th 23, 33-34; *Fireman's Fund Ins. Co. v. Maryland Cas. Co., supra,* 65 Cal.App.4th at pp. 1291-1292.) One element is that American Safety must have indemnified Hathaway for a loss for which appellant Western Air was primarily liable. (*Interstate Fire* at p. 33.) A second element is that American Safety paid Hathaway's settlement and defense costs not as a volunteer, but to protect American Safety's interests. (*Ibid.*) A third element is that "justice requires that the loss be entirely shifted from the insurer [American Safety] to the defendant [Western Air], whose equitable position is inferior to that of the insurer." (*Id.* at pp. 33-34.)

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5 Foster's authorities that he need not have pleaded a subrogation cause of action do not support him. (See *Greco v. Oregon Mut. Fire Ins. Co.* (1961) 191 Cal.App.2d 674; *Engle v. Endlich* (1992) 9 Cal.App.4th 1152.)

None of these elements can be established as a matter of law based on undisputed facts in the record. First, appellant offered evidence that others contributed to the accident. Such evidence included Foster's acceptance of appellant's settlement offer of $5,001, compared to the $700,000 general contractor Hathaway and $100,000 subcontractor Raymond paid, which permits the inference of different levels of culpability. Second, Foster did not put into evidence American Safety's insurance policy with subcontractor Raymond under which American Safety defended and indemnified Hathaway. Thus, we cannot conclusively determine whether American Safety paid Hathaway's settlement and defense as a volunteer or to protect its own interests. Third, because Foster did not raise subrogation at trial, appellant had no particular reason to urge weighing of equities to determine whether they justified shifting American Safety's loss entirely to appellant. And, finally, because Foster did not raise subrogation, appellant had no reason to raise waiver as an affirmative defense. (See Croskey, Cal. Practice Guide: Insurance Litigation (The Rutter Group 2010) ¶ 9:112, p. 9-48 [insurance policy may contain waiver of right to subrogation].) For the foregoing reasons, Foster's failure to pursue subrogation at trial prevents us from affirming the judgment on that basis.

3. *Conclusion*

Foster's breach of contract theory against appellant Western Air at trial does not support the judgment because Hathaway suffered no contract damages. A subrogation theory under which the case might have been tried cannot support the judgment because the theory was not pled or pursued in the trial court, nor can it be established on appeal as a matter of law. There being no sustainable theory of recovery in the record to support the judgment, the judgment cannot stand.

DISPOSITION

The judgment is reversed and the trial court is directed to enter judgment for appellant Western Air Limbach LP. Each side to bear its own costs on appeal.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

SORTINO, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.