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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

ZENITH INSURANCE COMPANY, Plaintiff and Appellant, v. LIBERTY MUTUAL FIRE INSURANCE COMPANY, Defendant and Appellant.	B284295 (Los Angeles County Super. Ct. No. BC505477)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gregory Keosian, Judge. Reversed and remanded.

Valle Makoff, Jeffrey B. Valle, Susan L. Klein, and Steven M. Ragona for Plaintiff and Appellant.

Lindahl Beck and Kelley K. Beck for Defendant and Appellant.

In this appeal and cross-appeal concerning coverage under a workers' compensation insurance policy, defendant Liberty Mutual Fire Insurance Company (Liberty) appeals from the judgment entered against it and in favor of plaintiff Zenith Insurance Company (Zenith) following a jury trial on Zenith's claims for equitable contribution and indemnity. Liberty contends the trial court erred by submitting to the jury the legal determination of whether Liberty's policy covered a claim against a successor entity that acquired the assets of the named insured corporation. In a defensive cross-appeal, Zenith contends that if the judgment is reversed, the trial court erred by ruling that the de facto merger doctrine did not apply, as a matter of law, to transfer the benefits of the Liberty policy from the named insured corporation to the successor entity.

The trial court erred by submitting to the jury the legal determination of coverage under the Liberty policy. We reverse the judgment on that basis and remand the matter to the trial court for a determination of Liberty's obligations, if any, under the Liberty policy. We reject Zenith's contentions in the cross-appeal.

BACKGROUND

Shea Homes SHPIP

Liberty has issued workers' compensation and general liability insurance policies to Shea Homes (Shea) since 2010. Shea, a residential real estate developer, maintains an owner-controlled insurance program called the Shea Homes Partnership Insurance Program (SHPIP). The SHPIP is a "wrap" insurance program in which Shea purchases workers' compensation and employers' liability insurance coverage for contractors and subcontractors who have entered into construction contracts with Shea at specified project sites and who have been enrolled in the program.

Pursuant to the terms of a master agreement Shea enters into with enrolled contractors, and a SHPIP program manual that discusses the program's implementation and administration, Shea pays the premiums to Liberty for the SHPIP coverage, and each month, enrolled contractors submit to Shea their payroll information from Shea jobsites to calculate the cost of insurance coverage. Shea calculates the cost of insurance for each of its contractors based on the rates each contractor pays for its conventional (non-SHPIP) workers' compensation insurance and deducts the cost of the SHPIP insurance from the contractor's monthly pay. Because enrolled contractors on Shea jobsites pay for workers' compensation insurance through the SHPIP, enrolled contractors exclude their Shea payroll from their conventional workers' compensation policies so that they do not pay double premiums for coverage for their Shea work.

Shea requires contractors enrolled in the SHPIP to secure and maintain at their own cost insurance coverage, including workers' compensation insurance, for work performed away from Shea jobsites. Shea requires contractors who are not enrolled in the SHPIP to secure and maintain, at their own cost, workers' compensation and other insurance coverage for work performed on Shea jobsites.

Shea's third party SHPIP administrator, Orion Risk Management (Orion), processes contractor enrollments, provides enrollment information to Liberty, and obtains contractor payroll reports that are the bases for SHPIP premium payment deductions. After Orion provides enrollment information to Liberty, Liberty administratively processes the enrollment and issues to the enrolled contractor a Liberty policy providing SHPIP coverage. Once enrolled, a contractor is placed on an excel spreadsheet of approved Shea trade partners. An enrolled contractor has its Liberty policy automatically renewed for each policy year thereafter in which it remains on the approved trade partner spreadsheet and in which it has a current construction contract with Shea.

Falcon Framing and FFC

Falcon Framing Company, Inc. (Falcon) was an approved Shea trade partner and had been continuously enrolled in the SHPIP since at least 2009. On March 1, 2012, Falcon and Shea entered into a construction contract for the Shea Seaside project in Encinitas, California.

At all relevant times, Falcon's sole officers and shareholders were Lester "Chip" Phipps and Terry Morgan. In 2012, Morgan and Phipps decided to dissolve Falcon and form a new corporate entity named FFC, Inc. (FFC) when they learned that Falcon's prior owner, Michael Connolly, operated a boat under Falcon's ownership that Connolly wanted to charter in Cabo San Lucas. Morgan and Phipps formed FFC because of concerns about potential liability associated with Connolly's boat.

FFC was formed on April 5, 2012. Its sole shareholders and officers were Morgan and Phipps, and it conducted the same business, at the same office, with the same customers, suppliers, and equipment as Falcon. FFC acquired Falcon's assets for no consideration, and Falcon was dissolved on August 13, 2012.

Morgan and Phipps did not notify Shea, Orion, or Liberty that they had dissolved Falcon and were continuing their business operations through FFC until August 20, 2012, when an FFC employee was injured while working at the Shea Seaside project.

Liberty policy

Liberty issued a workers' compensation and employers liability insurance policy, number WA2-66D-066133-692 (the Liberty policy), with a policy period from 8/1/2012 to 8/1/2013, to Falcon as the named insured. The Liberty policy was a renewal of previous policy Liberty had issued to Falcon for the period 8/1/2011 to 8/1/2012.

The Liberty policy includes an Unintentional Errors and Omissions Endorsement that states:

> "It is agreed that in the event of your unintentional failure to disclose all hazards, prior occurrences or factual information on applications, supplements or other documents existing as of the inception date of this policy, will not prejudice the coverage provided under this policy."

Zenith policy

Zenith issued a workers' compensation policy to Falcon for work on projects other than Shea jobsites. Just as Falcon paid for its SHPIP coverage based on Shea payroll hours, Falcon's premiums for the Zenith policy were calculated based on project payroll hours, excluding any Falcon payroll on Shea projects.

The accident

On August 20, 2012, an FFC employee named Marc Corbett (Corbett) was injured while working at the Shea Seaside project in Encinitas. At the time of the accident, Falcon had been paid in full for the Seaside project, and had paid, through deductions from its Shea payroll, all of the premiums for the Liberty policy issued to Falcon. Although Falcon had been paid in full for the Seaside project, some finishing work remained to be completed, and FFC sent Corbett and other employees to the jobsite to complete that work. Corbett's first day of work for FFC was August 13, 2012. He had never been employed by Falcon.

FFC tendered the workers compensation claim for Corbett's injuries to Liberty and to Zenith. Liberty denied coverage for the claim. Zenith paid a total of $3,239,003.86, subject to a reservation of rights, to resolve the claim.

The current action

Zenith commenced this action against Liberty for declaratory relief and equitable indemnity.[1] In response to Zenith's request for a jury trial, the trial court asked the parties to brief the issue of whether the case should be tried by a jury or by the court. Following a hearing at which the parties argued their respective positions, the trial court found that Zenith was entitled to a jury trial on its equitable indemnity and declaratory relief claims. The parties stipulated to a general verdict form.

The trial

Zenith presented evidence at the trial that Liberty does no investigation or underwriting with respect to contractors to whom it issues workers' compensation policies under the SHPIP program. Orion's program director for the SHPIP and Liberty's supervising underwriter both testified that once Orion notifies Liberty to enroll a new contractor in the SHPIP program, enrollment of the contractor and issuance of a Liberty policy to that contractor is purely an administrative process. The Orion program director and Liberty's supervising underwriter further testified that had Falcon's owners notified Orion that they had formed FFC and submitted documentation showing that FFC had the same ownership, operations, and workers' compensation insurance risk module as Falcon, Orion would have enrolled FFC in the SHPIP and Liberty would have added FFC to the SHPIP policy. Zenith also presented evidence that there was no difference in workers' compensation insurance risk between Falcon and FFC. Zenith's insurance expert testified, over

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[1] Zenith also sued FFC and Ehrenfeld & Company (Ehrenfeld), the agent that sold the Zenith policy to Falcon. Before the trial, Zenith settled with FFC and Ehrenfeld for $875,000. The parties stipulated that the settlement applied as an offset to any damages Zenith recovered from Liberty.

Liberty's objection, that based on insurance industry custom and practice, the creation of FFC was a "change in name only" and that Liberty's policy covered the Corbett claim.

At the close of Zenith's case, Liberty moved for a directed verdict, arguing that whether Liberty's policy could be interpreted to extend coverage to FFC's employee Corbett was properly determined by the court as a matter of law. The trial court denied the motion.

Liberty then presented evidence that Shea was not advised, before the Corbett accident, that FFC employees were on its jobsite. Liberty also presented evidence that although Shea streamlined its enrollment process for contractors who were already enrolled in the SHPIP program and who wished to go out of business and have its principals form a new company, the process required a formal written explanation of the reasons for dissolving the old entity and forming the new company, approval by Shea's purchasing department and division presidents, a signed agreement under which the new company expressly agreed to assume all the existing warranty obligations of the new company, and the new company's signature on the Shea master agreement.

Liberty's expert testified that the enrollment process is an important part of an owner controlled insurance wrap program to confirm the eligibility of the contractor, and to have an existing contractual relationship with the contractor, even if the contractor is a new entity created by the owners of an existing trading partner. Liberty's expert further testified that a new entity owned by the same principals as a dissolved trading partner, with the same risk module as the dissolved entity, must still satisfy the owner's and the insurer's requirements for becoming an insured under the wrap program.

Jury instructions

The trial court instructed the jury on Zenith's declaratory relief claim as follows:

> "Zenith Insurance Company seeks a declaration that Liberty Mutual Fire Insurance Company owes coverage to FFC, Inc. for Corbett's Workers' Compensation claim and that Zenith Insurance Company is entitled to reimbursement from Liberty Mutual Fire Insurance Company for some or all of the Workers' Compensation benefits that it has paid in connection with Corbett's Workers' Compensation claim.
>
> "Liberty Mutual Fire Insurance Company disputes both of these obligations. You will be asked to determine whether:
>
> "1. Liberty Mutual owes coverage to FFC, Inc. for Corbett's workers' compensation claim; and,
>
> "2. Whether Zenith Insurance Company is entitled to the reimbursement from Liberty for some or all of the Worker's Compensation benefits it has paid in connection with Corbett's Workers' Compensation Claim."

As to Zenith's equitable indemnity contribution claim, the trial court gave the following instruction:

> "Equitable indemnity contribution applies where one party pays a debt for which another is partly or primarily liable and which in equity in good conscience should have been paid by the latter party.
>
> "In order to prevail on this claim for equitable indemnity and contribution, Zenith must show that:

> "Number 1. Corbett's injury was covered --- was a covered claim under Liberty's Workers' Compensation policy under which FFC sought coverage; and,
>
> "2. That Liberty Mutual was partly or primarily responsible for covering the claim.
>
> "You will be asked to determine the percentages of responsibility of Liberty Mutual and Zenith for coverage of Corbett's Worker's Compensation claim."

The trial court also instructed the jury regarding the master agreement and the construction contract between Shea and Falcon:

> "In this case, Zenith Insurance Company contends that FFC, Inc. is a successor to Falcon Framing Company, Inc. so that it should be treated as a party to:
>
> "1. The Shea Homes master agreement that Falcon Framing, Inc entered into on or about January 1, 2009; and
>
> "2. The Shea Homes Construction Contract for Onsite Construction, Contract Number 173265BC, that Falcon Framing Company, Inc. entered into on or about May 1, 2012.
>
> "In order to determine whether FFC, Inc. is a successor to Falcon Framing, you are to consider that a corporation is a successor if it takes the place that another corporation has left and sustains the like part or character."

Liberty objected to the foregoing three jury instructions.

The trial court gave the following instruction on the errors and omissions endorsement to Liberty's policy: "The unintentional errors and omissions endorsement contained in [Liberty's] policy only applies to the named insured's failure to have disclosed information to [Liberty] on applications, supplements, or other documents existing as of the August 1, 2012 inception date of the policy in effect on the date of Mr. Corbett's accident. Such a failure to disclose will not prejudice the coverage provided under the policy, but it will not expand coverage . . . that did not otherwise exist."

The trial court rejected a request by Zenith to instruct the jury on the de facto merger doctrine, reserving for the court's determination the issue of whether the doctrine applied to Zenith's claims.

Jury verdict and JNOV

The jury returned a general verdict in which it found in favor of Zenith and against Liberty and that Zenith was entitled to reimbursement from Liberty in the amount of $3,230,003.86.

Liberty filed a motion for judgment notwithstanding the verdict (JNOV), in which it argued that the jury, in finding that Liberty's policy covered Corbett's claim, impermissibly decided a legal issue to be adjudicated by the court -- whether Liberty's policy covered FFC when only Falcon was a named insured under the policy. The trial court denied the motion, ruling that "there were factual issues for the jury to decide as to whether the inadvertent omission of the fact that Phipps and Morgan were operating their business on behalf of Shea under the name of FFC as opposed to Falcon Framing was an 'unintentional' failure'" within the meaning of the unintentional errors and omissions endorsement to the Liberty policy. The trial court concluded that the jury had "implicitly found that the failure to use the 'FFC' name instead of the 'Falcon Framing' name was an unintentional event such that Liberty's policy covered Corbett, who was an employee of FFC instead of Falcon Framing." In response to Liberty's argument that it was the trial court's responsibility to interpret the policy to determine whether FFC was an insured, the trial court cited the following principle articulated by the appellate court in *University of Judaism v. Transamerica Ins. Co.* (1976) 61 Cal.App.3d 937, 941 (*University of Judaism*): "While court[s] are generally responsible for interpreting contracts, '[f]orfeitures on technical grounds which bear no substantial relationship to the insurer's risk are disfavored.'"

Judgment was entered in Zenith's favor on July 24, 2017, in the amount of $3,480,164.67, which included prejudgment interest and an offset for the pretrial settlement Zenith had reached with the other defendants. The judgment included the trial court's ruling that the de facto merger doctrine "does not apply as a matter of law because the transfer of Falcon Framing's business to FFC, Inc. occurred before the Corbett accident that gave rise to the Workers' Compensation claim at issue." This appeal and cross-appeal followed.

DISCUSSION

I. Standard of review

A trial court must render judgment notwithstanding the verdict whenever a motion for a directed verdict for the aggrieved party should have been granted. (Code Civ. Proc., § 629.) "A motion for judgment notwithstanding the verdict may be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence in support. [Citation.] [¶] The moving party may appeal from the judgment or from the order denying the motion for judgment notwithstanding the verdict, or both. [Citation.] As in the trial court, the standard of review is whether any substantial evidence --contradicted or uncontradicted -- supports the jury's conclusion. [Citations.]" (*Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68.)

However, to the extent a motion for JNOV raises legal issues such as the interpretation of a statute or contract, we review the trial court's ruling on the motion de novo. (See *Gunnell v. Metrocolor Laboratories, Inc*. (2001) 92 Cal.App.4th 710, 718-719.)

II. Liberty's appeal

A. Applicable legal principles.

To address Liberty's claim of error, some discussion of the principles applicable to interpretation of an insurance policy is appropriate.

The interpretation of an insurance policy is generally a question of law. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18.) It is therefore a court's responsibility to determine coverage issues. (Croskey, et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2017) ¶ 4:1, p. 4-1.) "It is error to leave policy interpretation to the jury, unless the interpretation involves the credibility of extrinsic evidence. [Citations.]" (*Ibid*.; *California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 35.)

"Insurance coverage sometimes depends on disputed facts other than those relating to the policy's meaning . . . . These disputed factual issues are jury triable." (Croskey, et al., Cal Practice Guide: Insurance Litigation, *supra*, ¶ 4:2, p. 4-1.) The court must then determine coverage based on the facts found by the jury. (*Ibid.*)

B. The trial court erred in not determining coverage under the Liberty policy

It was error for the trial court to submit to the jury the legal determination of whether Liberty owes coverage to FFC for Corbett's workers' compensation claim. *University of Judaism, supra*, 61 Cal.App.3d 937, cited by the trial court in its ruling denying Liberty's motion for JNOV, undermines rather than supports the trial court's conclusion that the coverage issue was for the jury. *University of Judaism* involved interpretation of a fire insurance policy provision that stated that an assignment of the policy would not be valid except with the written consent of the insurer. (*Id*. at pp. 939-940.) The owners of the insured property had transferred their interest in the property and assigned the policies insuring the property to the plaintiff. After the property was subsequently destroyed by a fire, the insurers were notified of the loss, the transfer of the property, and the assignment of the policies to the plaintiff. (*Ibid.*) The insurers denied coverage on the ground that the plaintiff had no valid interest in the policies because the insurers had not consented to the assignment before the loss. (*Id*. at p. 940.) The trial court agreed and entered judgment in the insurers' favor. The appellate court reversed. In doing so, the court considered the purpose and history of the provision at issue, applied rules of construction applicable to insurance contracts, and concluded that "[t]he language of the provision is consistent with plaintiff's theory that defendants should be deemed to have consented to the assignment, and that such consent relates back to the time of the assignment." (*Id*. at p. 942.) Both the trial court and the appellate court, not a jury, interpreted the policy provision at issue in *University of Judaism*. That case accordingly does not support the trial court's conclusion here that the jury, and not the court, was responsible for interpreting the Liberty policy.

Catholic Healthcare West v. California Ins. Guarantee Assn. (2009) 178 Cal.App.4th 15, cited by Zenith as support for its position that Liberty owed coverage under its policy for FFC's claim because FFC succeeded to Falcon's rights under the policy, is similarly inapposite. In that case, both the trial court and the Court of Appeal, not a jury, interpreted the workers' compensation policy provisions at issue and determined whether there was coverage for a successor entity's claim. (*Id.* at pp. 17-18.) *Catholic Healthcare* does not support the conclusion that the jury, and not the trial court, should have made the coverage determination in this case.

We disagree with the trial court's conclusion that the coverage determination in this case involved the resolution of purely factual issues for the jury to decide and did not involve interpreting the Liberty policy. Here, although the jury found that FFC was a "successor" to Falcon under the assignment provision to the Shea master agreement, there was no legal determination as to whether that provision affected Liberty's obligations. There is no evidence that Liberty was a party to the master agreement or that the agreement included or incorporated the Liberty policy. Similarly, while the jury found that the failure of Falcon's owners to notify Shea, Orion, and Liberty that they were dissolving Falcon and forming FFC was "inadvertent" within the meaning of the errors and omissions endorsement to the Liberty policy, there was no legal determination of whether that endorsement by its terms applies given the facts of this case.

The trial court was responsible for determining coverage under the Liberty policy. Because the trial court never interpreted any provisions of the policy, we have no legal ruling to review. (See *Sanborn v. Pacific Mut. Life Ins. Co.* (1940) 42 Cal.App.2d 99, 105 ["An appellate court is a reviewing court, and . . . not a trial court or court of first instance"].) We therefore reverse and remand the case to the trial court to interpret the policy and to determine Liberty's obligations thereunder.

III. Zenith's cross-appeal

The trial court did not err by ruling that the de facto merger doctrine does not apply as a matter of law because the accident giving rise to Corbett's workers' compensation claim occurred after the asset transfer by Falcon to FFC. The de facto merger doctrine operates to transfer the benefits of a predecessor corporation's insurance policies to a successor entity that is sued for the predecessor's torts. (*Westoil Terminals Co. v. Harbor Ins. Co.* (1999) 73 Cal.App.4th 634, 639-641 (*Westoil Terminals*).) The doctrine applies when there is a change in the form of ownership but the successor entity conducts the same operations, under the same name, with the same equity interests, and under the same control as its predecessor. (*Id*. at p. 640.)

Although there was evidence that FFC conducted the same business operations as Falcon, under the same ownership, equity interests, and control, FFC's liability did not result from any of Falcon's actions or activities. The workers' compensation claim at issue was for injuries sustained by an FFC employee who had never worked for Falcon.

We reject Zenith's argument that the de facto merger doctrine enables a successor corporation to obtain coverage under a predecessor's insurance policies for liabilities resulting solely from the successor's activities. None of the cases cited by Zenith support this argument. *Westoil* concerned insurance coverage for claims asserted against a successor entity for torts committed by a predecessor corporation. (*Westoil Terminals, supra*, 73 Cal.App.4th at pp. 638-639.) *General Accident Ins. Co. v. Superior Court* (1997) 55 Cal.App.4th 1444 involved a successor corporation's liability in tort for injuries resulting from its predecessor's distribution of asbestos products. (*Id*. at pp. 1445-

1446.) We decline to extend the de facto merger doctrine to the circumstances presented in this case.

DISPOSITION

The judgment is reversed and the matter is remanded for a determination of Liberty's obligations under the Liberty policy. Liberty is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

____________________________, J.
CHAVEZ

We concur:

____________________________, Acting P. J.
ASHMANN-GERST

____________________________, J.
HOFFSTADT