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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

TANYA JOHNSON, Plaintiff and Appellant, v. AUTOMOBILE CLUB OF SOUTHERN CALIFORNIA et al., Defendants and Respondents.	B244338 (Los Angeles County Super. Ct. No. BC473567)

APPEAL from a judgment of the Superior Court of Los Angeles County. Barbara M. Scheper, Judge. Affirmed.

Law Office of Joseph R. Henderson, Joseph R. Henderson; DK Law Group, Deborah Meyer-Morris for Plaintiff and Appellant.

Mandell & Associates, Barbara J. Mandell, Alla S. Policastro for Defendants and Respondents.

Tanya Johnson purchased auto insurance but admittedly failed to pay the premium bill. After the policy was cancelled for nonpayment, Johnson caused a freeway accident. When the insurer rejected her claim on the grounds that the policy was not in effect at the time of the accident, Johnson sued the insurer. The trial court sustained demurrers to her third pleading without leave to amend and dismissed the action. We affirm.

FACTS AND PROCEDURAL HISTORY

The Complaint

On November 16, 2011, plaintiff Johnson filed suit against Auto Club of Southern California and Interinsurance Exchange of the Automobile Club (Auto Club). The complaint alleges that on September 22, 2010, Johnson remitted "$270.00 as part payment on the annual premium of $903.00" for an insurance policy (the Policy) from Auto Club. Johnson "was never specifically told that the $270 was a down payment. She was informed that she would receive a bill in the future but assumed . . . the billing would be closer to when the $270.00 would have been exhausted on a prorated basis." Johnson then left the country and did not return until November 19, 2010. The following day, Johnson lost control of her vehicle on the Conejo Grade and struck three cars.

After the accident, Johnson discovered that an insurance bill was sent to her on October 2, 2010, with a due date of October 17. "Another letter dated November 9, 2010 from the defendants advised plaintiff [of] 'confirmation of cancellation due to non-payment of premium.'" Johnson informed Auto Club of her accident, but the claim was denied based on the cancellation of the Policy.

When she purchased the Policy, Johnson was never "told of what payments would be necessary to continue the policy in force and when those payments might be due. As a result, plaintiff believed that her initial payment would be more than sufficient to provide coverage during the time that she was on vacation. The plaintiff could not have reasonably understood that the defendants would have required a payment so soon after the initial contract was entered." Although the complaint purported to assert claims for breach of contract and bad faith on the title page, it only contained a third cause of action for unfair business practices.

The First Amended Complaint

Johnson filed a first amended pleading. Like the complaint, it purported to assert claims for breach of contract and bad faith, but contained only a third cause of action for unfair business practices. The first amended complaint repeats, verbatim, the factual allegations from the original complaint.

The Second Amended Complaint

By stipulation, Johnson was allowed to file a second amended complaint (SAC). The SAC repeats the factual allegations that she made a partial payment on the premium, knew that she would receive a bill in the future, and "assumed" that the initial payment would be exhausted before she received another bill. A bill was sent to her, due on October 17. The SAC repeats allegations that Johnson left the country, caused an accident the day after she returned, and then learned that the Policy was cancelled on November 9, 2010, for nonpayment of the premium. It restates that Johnson "believed" her initial payment was sufficient to provide coverage during her vacation and "could not have reasonably understood" she needed to make a second payment "so soon after the initial contract was entered into."

The SAC asserts that Auto Club's failure to pay the claims arising from Johnson's auto accident was a breach of contract; a breach of the implied covenant of good faith and fair dealing; and she seeks damages and an injunction for unfair business practices.

Auto Club's Demurrers to the SAC

On demurrer, Auto Club argued that the SAC contains no factual allegations demonstrating a breach of Policy terms. Johnson made partial payment on her insurance premium. She admittedly failed to pay her bill, the Policy cancelled, and Auto Club notified her in writing of the cancellation. As a result, there was no coverage when Johnson had a car accident. At most, plaintiff alleges that she made erroneous assumptions about the premium due dates. Johnson nowhere specifies which contractual terms were violated when Auto Club cancelled the Policy. It is not an unfair business practice for an insurer to cancel a policy when an insured fails to pay the premium owed.

In opposition, plaintiff conceded that the SAC "may not be a model pleading." Nonetheless, she argued that Auto Club never advised her of her payment options, other than the "AAAuto Pay Plan" automatic debit program that she declined when she made her initial payment. No written documentation gave actual or constructive notice of when the next payment was due; the Policy is silent on the subject of the premium due date. "As a result of [this] failure to provide this notice" of the billing schedule, plaintiff "failed to make the first installment payment of $70.22 thereby resulting in the cancellation of her policy." Plaintiff reasoned that the lack of a billing schedule creates a triable issue of fact as to whether she breached the Policy by failing to timely pay a premium installment. The cancellation frustrated plaintiff's ability to receive the benefits of her insurance contract, amounting to a breach of the covenant of good faith and fair dealing and an unfair business practice. Plaintiff summarily requested leave to amend, but offered no clue how she could cure the defects in her pleading.

The Trial Court's Ruling

On August 8, 2012, the trial court sustained the demurrers without leave to amend, for the reasons stated in Auto Club's moving papers. At the hearing, the court observed that plaintiff did not arrange to have her bills paid while on vacation, yet it was her obligation to make premium payments. The court wrote, "Plaintiff has failed to allege facts sufficient to support any of the causes of action. The complaint acknowledges that plaintiff was notified that a payment was due, that she failed to make the payment and that thereafter she was notified that the policy was cancelled." The court signed an order of dismissal on the day of the hearing and plaintiff timely appealed.

DISCUSSION

1. Appeal and Review

Appeal lies from the dismissal order after the trial court sustained demurrers without leave to amend. (Code Civ. Proc., §§ 581d, 904.1, subd. (a)(1); *Serra Canyon Co. v. California Coastal Com.* (2004) 120 Cal.App.4th 663, 667; *Tanen v. Southwest Airlines Co.* (2010) 187 Cal.App.4th 1156, 1162.) We review de novo the ruling on the demurrers, exercising our independent judgment to determine whether a cause of action

has been stated as a matter of law. (*Desai v. Farmers Ins. Exchange* (1996) 47 Cal.App.4th 1110, 1115.) "[I]t is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment." (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.)

2. <u>Demurrers Were Properly Sustained</u>

In all three of her pleadings, Johnson alleged that (1) she made partial payment on her auto insurance premium; (2) she was informed that she would receive a bill for the outstanding balance; (3) she "assumed" the next billing date was months away; (4) she departed the country; (5) during her absence, Auto Club sent her an insurance bill on October 2, with a due date of October 17, 2010; (6) the bill was unpaid; (7) Auto Club sent her a "confirmation of cancellation due to non-payment of premium" on November 9, 2010; (8) Johnson was in an auto accident on November 20, 2010; (9) she then discovered that the Policy was cancelled; and (10) Auto Club denied her claim because the Policy was not in effect at the time of her accident.

Attached to the SAC is a copy of the Policy. In the first section, the Policy states that "We will provide the insurance you have selected in return for the premium due us." Under the provision "What You Must Pay," the Policy reads, "You agree to pay the premium stated in the declaration for the policy period . . . ." Under the "Termination" provision, the Policy indicates that Auto Club "may stop coverage afforded by this policy by mailing or delivering notice of cancellation or nonrenewal to your address shown in the declarations. This mailing will constitute proof of notice as of the date we mail it." The termination provision also reads, "Cancellation for nonpayment of premium is considered cancellation by you."

It is clear that Johnson had a contractual obligation to pay the premium in order to have insurance coverage. Failure to pay the premium was deemed to be a cancellation by the insured. She admittedly failed to pay the premium because she was away on vacation, and made no bill-paying arrangements, though Auto Club offered her an "Auto Pay" option that she declined when she initially purchased the Policy. Had Johnson

chosen to have "Auto Pay," the premium would have been automatically debited from her bank account. Johnson received written notice that the Policy was cancelled for nonpayment of premium but, as with the premium bill, she did not see the cancellation notice because she was on vacation.

Though Johnson "assumed" that there would be a longer period of time before the next premium installment was due, her assumption is not based on any contractual term. Rather, it is pure speculation. The insurer had no duty to continue its performance under the Policy when it had no indication that the insured intended to keep her part of the bargain by paying the premium. Johnson did not respond to the premium bill or to the notice of cancellation by tendering payment. Under the circumstances, the Policy was deemed to be cancelled under the "Termination" provision, because the essence of the parties' agreement was that Johnson would pay the premium in return for coverage.

The SAC fails to state a claim for breach of contract. On its face, the SAC shows that Johnson failed to perform her part of the bargain by paying her premium, thereby cancelling the Policy under the "Termination" provision. Auto Club has no liability for claims arising after the Policy was cancelled for nonpayment of premium, and it did not breach the Policy by denying postcancellation claims.

The SAC fails to state a claim for breach of the implied covenant of good faith and fair dealing. A bad faith claim "cannot be maintained unless policy benefits are due under the contract." (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 35.) Because the insurer properly denied Johnson's claim—due to her constructive cancellation of the Policy—there can be no cause of action for breach of the covenant of good faith. (*Ibid*.)

Finally, the SAC fails to state a claim for unfair or unlawful business practices. A plaintiff suing under the Unfair Practices Act (Bus. & Prof. Code § 17000 et seq.) may show that the acts or practices at issue are (1) unlawful or (2) unfair or deceptive. (*Coast Plaza Doctors Hospital v. UHP Healthcare* (2002) 105 Cal.App.4th 693, 700.) The SAC alleges that Johnson "was deceived into believing that she would have continuous insurance coverage beyond the time the second payment was demanded." This deceit

was not the result of affirmative misrepresentations made by Auto Club about premium due dates, but was based on plaintiff's assumption that she would not be billed for an additional premium payment within 30 days after purchasing the Policy.

To succeed, a plaintiff proceeding with an Unfair Practices lawsuit must demonstrate injury in fact and loss of money or property caused by an unfair business practice. (Bus. & Prof. Code, § 17204; *Peterson v. Cellco Partnership* (2008) 164 Cal.App.4th 1583, 1590.) Plaintiff cancelled the Policy when she failed to pay her insurance bill in October and failed to respond to the notice sent to her in November, confirming that the Policy was being cancelled. As a result, she was not injured by any act of Auto Club, but by her own failure to arrange the payment of her premium while she was on vacation, to keep the Policy in effect.

As respondent observes, there is nothing inherently unfair about a business cancelling a service if a customer fails to pay for it. To the extent that the Policy was cancelled before Johnson's payment of $270 was exhausted, the Policy addresses this contingency: "At any time you cancel the policy during the first policy period, cancellation will be short rated, meaning *the premium due us will be more than a proportionate share of the annual premium*." (Italics added.) Thus, a purchaser like Johnson is warned that cancellation during the initial policy period will use up more than the first $270 paid toward the annual premium of $903. Johnson was not deceived; rather, she failed to read the Policy terms carefully.

3. <u>Leave to Amend</u>

Johnson asked the trial court for leave to amend, in a single sentence in her opposition to the demurrers. Neither in writing nor at the hearing did she advise the court how she could amend her pleading to cure its defects. On appeal, she seeks leave to allege new facts and new claims. (Code Civ. Proc., § 472c, subd. (a) [the possibility of amending a pleading is "open on appeal"].) A plaintiff has the burden of showing a reasonable possibility that an amendment would cure any defects. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081; *Trinity Park, L.P. v. City of Sunnyvale* (2011) 193 Cal.App.4th 1014, 1027; *Smith v. State Farm Mutual Automobile Ins. Co.* (2001) 93

Cal.App.4th 700, 711.) The papers must spell out how an amendment can cure a defect or change the legal effect of the pleading. Leave to amend should not be granted if it would be an exercise in futility. (*Long v. Century Indemnity Co.* (2008) 163 Cal.App.4th 1460, 1467-1468.)

Johnson offers new theories of recovery that were not advanced in the trial court. Specifically, she argues that Auto Club violated the federal Truth in Lending Act (TILA) and the state Automobile Financial Responsibility Law (Veh. Code, § 16000 et seq.). These claims may be disposed of as a matter of law.

First, insurance policies allowing policyholders to pay premiums by installment are not credit or lending transactions: the policyholder may—at any time—terminate the contract without further obligation, simply by notifying the insurer or by withholding a payment. A "credit" situation only arises when a debtor is *required* to make full and complete payment, a condition not present in this case. Thus, TILA does not apply to insurance policy installments because they are not credit transactions. (*Azar v. Prudential Ins. Co. of America* (N.M.App. 2003) 68 P.3d 909, 921-922, 929.)

In any event, plaintiff acknowledges in her brief that Auto Club sent her a TILA statement. The TILA statement shows a first payment date of September 22, 2011 (the Policy inception date) and indicates that all further payments are due on the 22nd day of "each succeeding month." Per the TILA statement, Johnson was billed in October. She cites no authority for the proposition that Auto Club had to provide her with a TILA statement on the day she applied for auto insurance.

Second, the state Financial Responsibility Law is inapposite. Its purpose is to (1) ensure that drivers are financially capable of providing recompense to people injured by their negligence and (2) permit the state to suspend the driving privilege of an uninsured motorist. (Notes re Statement of Legislative Intent, Stats. 1974, ch. 1409 & Stats. 1989, ch. 808, Deering's Ann. Code (2000 ed.) foll. Veh. Code, § 16000, p. 398.) The law contains no requirement that an insurer must continue to provide insurance coverage for a policyholder who allows a policy to lapse by failing to pay a premium, ignores a written notification of cancellation, and fails to call and reinstate the policy.

Plaintiff relies upon Insurance Code section 381, which mandates that an insurance policy include a "statement of the premium." The declarations page of the Policy states, on its face, that the annual premium is $903, and the SAC states that plaintiff made "part payment on the annual premium of $903.00." Any interest or fees charged an insured to pay the premium in installments are not part of the premium, and need not be disclosed in the declarations page or elsewhere in the insurance policy. (*In re Ins. Installment Fee Cases* (2012) 211 Cal.App.4th 1395, 1404-1407; *Interinsurance Exchange of the Automobile Club v. Superior Court* (2007) 148 Cal.App.4th 1218, 1231.) Plaintiff was clearly advised of the total premium. Insurance Code section 381 does not assist her.

Contrary to her argument, Johnson's Policy was not "summarily cancelled." The SAC indicates that Auto Club sent Johnson a premium bill on October 2; it was not until November 9, 2010, that Auto Club issued a cancellation notice, when the premium was long overdue. Auto Club is entitled to send a notice of cancellation for nonpayment of premium. (Ins. Code, § 661, subd. (a).) Under the Policy terms, failure to pay the premium bill is deemed to be a cancellation by the insured, it was not a summary cancellation by the insurer.

On appeal, Johnson for the first time offers entirely new facts and suggests that she can state a claim for negligence. The new facts are that Johnson advised Auto Club's sales agent that plaintiff "would be traveling outside the United States of America for an extended vacation, and that she needed to obtain insurance for her vehicle. . . . Although Appellant advised Respondent that she would be out of the country, Respondent negligently failed to offer and/or discuss with Appellant payment options offered by Respondent that would ensure that her automobile coverage did not lapse for non-payment while she was out of the country. Specifically, Respondent failed to explain the benefits of the 'AAAuto Pay Plan' or of the 'Full Payment Plan' to Appellant, and more importantly failed to offer these payment plan options to Appellant at the time she purchased her insurance policy."

Johnson's proposed amendment fails. She previously admitted that she was offered the "AAAuto Pay Plan" automatic debit plan as a payment option on the insurance application.[1] She declined to have payments made automatically, despite her plan to leave the country for several months. Johnson cannot amend her pleading in a way that contradicts prior admissions that she (1) elected not to pay the full premium when purchasing the Policy and (2) declined to execute the AAAuto Pay Plan.

DISPOSITION

The judgment is affirmed.
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BOREN, P.J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.

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[1] In opposition to the demurrers, plaintiff stated that the insurance application "is silent as to the due dates of future installment payments or as to the methods of payment, other than the AAAuto Pay Plan, which is a direct debit plan," and she sets forth the terms of that payment plan. Plaintiff wrote that "she declined to execute the AAAuto Pay Plan agreement."