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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

PATRICIA A. CHAPPELLE, Plaintiff and Appellant, v. ALLIANCE UNITED INSURANCE COMPANY, Defendant and Respondent.	B235585 (Los Angeles County Super. Ct. No. BC457071)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ramona G. See, Judge. Affirmed.

Engstrom, Lipscomb & Lack and Scott A. Marks for Plaintiff and Appellant.

Demler, Armstrong & Rowland, David A. Ring and Robert W. Armstrong for Defendant and Respondent.

Plaintiff and appellant Patricia A. Chappelle appeals from the judgment entered following the trial court's order sustaining without leave to amend the demurrer filed by defendant and respondent Alliance United Insurance Company. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND[1]

Sometime before March 4, 2009, respondent issued to Maria M. Marquez Cardoza (Marquez) an automobile insurance policy with bodily injury policy limits of $15,000 per accident. On March 4, 2009, Marquez gave Alvaro Escobar Corado (Corado) permission to drive her car while she rode as a passenger. Corado got into an accident with appellant, and police officers determined that Corado was at fault. Appellant was taken to the hospital because of head, neck, and back pain. She retained the law firm of Waterman & Harris to represent her in connection with the injuries she suffered.

Respondent's claims adjuster sent appellant an authorization form, asking for authorization for respondent to obtain appellant's records. On April 24, 2009, appellant's counsel responded that they would not have appellant execute the authorization form.

On May 14, 2009, appellant's counsel sent respondent a letter, enclosing appellant's accident-related medical bills to date, which totaled $2,160. The letter demanded $50,000 or the policy limit and stated that the offer would be open for 15 days. On May 27, 2009, appellant's counsel sent respondent another letter, claiming an additional $8,250 in medical costs. On June 2, 2009, appellant's counsel sent another letter, stating that they would extend the offer for 10 days.

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[1] The facts are taken from the allegations of the complaint, which we assume to be true. (*Wolkowitz v. Redland Ins. Co.* (2003) 112 Cal.App.4th 154, 161 (*Wolkowitz*).)

Appellant's counsel sent additional letters on June 23 and July 2, 2009, providing more medical information to respondent, claiming another $2,000 in medical costs, and asking respondent to reply as soon as possible before the offer expired.

Appellant's counsel sent respondent a letter on July 22, 2009, describing the findings of appellant's doctors, her medical treatment and further costs, and demanding $75,000 or the policy limits. The letter indicated that the offer would be open for 10 days and then withdrawn. On July 30 and August 11, 2009, respondent offered appellant $10,000 under the policy to settle her claims against Corado. On August 17, 2009, respondent offered appellant the $15,000 bodily injury policy limit to settle her claims against Corado.

On September 15, 2009, appellant filed a lawsuit against Corado and numerous Does. In June and July 2010, appellant and Corado executed a "Settlement Agreement, Stipulated Judgment, Covenant Not to Execute and Agreement to Assign Actions Related to a Bad Faith Failure to Settle." The stipulated judgment purported to settle appellant's claim against Corado for $1,715,000, with $15,000 to be paid upon execution of the agreement.[2] Appellant agreed not to attempt to execute any judgment against Corado, and Corado assigned to appellant his rights against respondent "for failing in bad faith to settle within the policy limits when they had an opportunity to do so." The agreement was signed by appellant, Howard Harris (attorney for appellant), Corado, and

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[2] The agreement indicated that there was a codefendant, Hector Loaiza, who was not a party to the agreement. The agreement included a provision to dismiss the complaint with prejudice as to Loaiza.

Philip Bloeser (attorney for Corado).[3] Respondent issued a check to appellant in the amount of $15,000, dated July 1, 2010.

On March 10, 2011, appellant filed a complaint against respondent for breach of the implied covenant of good faith and fair dealing. Appellant alleged that respondent breached the implied covenant of good faith and fair dealing when it failed to accept her policy limit demands within the time frame she set forth. According to the complaint, respondent owed a duty to Corado to promptly investigate and evaluate appellant's claims because a reasonable investigation would have revealed that the value of her claims was greatly in excess of the policy limits. Appellant further alleged that respondent breached the implied covenant in numerous other respects, including failing to request an interview or recorded statement from appellant, and failing to request an extension of time from appellant's counsel in order to complete an investigation and evaluation of appellant's claim before the expiration of her policy limit settlement offer.

Respondent filed a demurrer to the complaint. Respondent argued that it could not be bound by the settlement agreement because it had not participated in the agreement and did not agree to it.

Appellant opposed the demurrer and requested leave to amend the complaint. In support of the opposition, appellant attached correspondence between her counsel and Corado's counsel.

After holding a hearing, the trial court sustained respondent's demurrer without leave to amend. The court relied on the express language of the stipulated judgment, stating that the parties to the agreement were appellant and Corado, not respondent. The court also reasoned that counsel for the insured signed the

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[3] The agreement also was signed by an attorney in Kansas, who stated that, at Bloeser's request, Corado appeared in his office in Kansas for the reading of the agreement by a translator, and by the court certified translator.

agreement as attorney for Corado, not for respondent, and therefore found that the insurer had not consented to and participated in the stipulated judgment. The court entered judgment in favor of respondent. Appellant filed a timely notice of appeal.

DISCUSSION

"On appeal from a judgment after a demurrer is sustained without leave to amend, we assume the truth of the facts alleged in the complaint, as well as those facts that reasonably can be inferred from those expressly pleaded, and the facts of which judicial notice can be taken. We determine de novo whether the complaint states facts sufficient to state a cause of action and does not disclose a complete defense. [Citations.] We affirm the judgment if it is correct on any ground stated in the demurrer, regardless of the trial court's stated reasons. [Citation.] [¶] It is an abuse of discretion to sustain a demurrer if there is a reasonable probability that the defect can be cured by amendment. [Citation.] The burden, however, is on the plaintiff to demonstrate how the complaint can be amended to state a valid cause of action. [Citation.]" (*Wolkowitz*, *supra*, 112 Cal.App.4th at pp. 161-162.) "'[S]uch a showing can be made for the first time to the reviewing court . . . .' [Citation.]" (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1153-1154.)

We agree with the trial court that respondent cannot be bound by the stipulated judgment because it did not consent to or participate in the agreement. We further conclude that appellant has failed to demonstrate how the complaint could be amended to state a valid cause of action. We therefore affirm.

I. Breach of the Duty of Reasonable Settlement

"The failure of a liability insurer to perform its implied duty to accept a reasonable settlement offer of a covered claim gives rise to a claim for the insured against the insurer for breach of the covenant of good faith and fair dealing, or a 'bad faith' claim, based on the insurer's refusal to settle the third party claim." (*DeWitt v. Monterey Ins. Co.* (2012) 204 Cal.App.4th 233, 236.)

"An insurer that breaches its duty of reasonable settlement is liable for all the insured's damages proximately caused by the breach, regardless of policy limits. [Citations.] Where the underlying action has proceeded to trial and a judgment in excess of the policy limits has been entered against the insured, the insurer is ordinarily liable to its insured for the entire amount of that judgment [citations], excluding any punitive damages awarded [citation]. The insured's action for breach of the contractual duty to settle may be assigned to the claimant, regardless of whether assignments are permitted by the policy. [Citation.]" (*Hamilton v. Maryland Casualty Co.* (2002) 27 Cal.4th 718, 725 (*Hamilton*).)

Here, however, the underlying action did not proceed to trial, but instead was "terminated by settlement, resulting in a *stipulated* judgment coupled with a covenant not to execute against the insured." (*Hamilton*, *supra*, 27 Cal.4th at p. 725.) This case therefore comes within the purview of *Hamilton*, which held that "where the insurer has accepted defense of the action, no trial has been held to determine the insured's liability, and a covenant not to execute excuses the insured from bearing any actual liability from the stipulated judgment, the entry of a stipulated judgment is insufficient to show, even rebuttably, that the insured has been injured to *any* extent by the failure to settle, much less in the amount of the stipulated judgment. In these circumstances, the judgment provides no reliable

basis to establish damages resulting from a refusal to settle, an essential element of plaintiffs' cause of action. [Citation.]" (*Id.* at p. 726.)

The facts of this case are similar to those in *Hamilton*. The insured in *Hamilton* tendered the defense of invasion of privacy claims to its insurer, which retained an attorney for the insured. The claimants demanded $1 million to settle their claims, but the insurer countered with an offer to settle for $150,000. The claimants then entered into a settlement agreement with the insured, which agreed to have a stipulated judgment entered against it for $3 million and to assign to claimants any breach of contract claim it might have against the insurer. As occurred here, the claimants agreed not to execute the judgment against the insured. The claimants, acting as the insured's assignees, then brought suit against the insurer for breach of the insurance contract for the insurer's failure to accept their settlement offers.

The court acknowledged that a "policyholder denied a defense for covered claims by its liability insurer may make a reasonable settlement with the plaintiff, in good faith, and then maintain (or assign) an action against the insurer for breach of its defense duties." (*Hamilton*, *supra*, 27 Cal.4th at p. 728.) However, "[a] *defending* insurer cannot be bound by a settlement made without its participation and without any actual commitment on its insured's part to pay the judgment, even where the settlement has been found to be in good faith for purposes of [Code Civ. Proc.] section 877.6." (*Id.* at p. 730, italics added.) *Hamilton* explained that "'the breach of duty to settle within policy limits present[s] only the possibility that a judgment might be rendered in excess of policy limits.' [Citation.]" (*Id.* at p. 726.) Because it is possible that the insurer could successfully defend the underlying litigation, "resulting in a defense judgment or a judgment for the claimants lower than the policy-limits settlement offer," a settlement that is

reached without the insurer having such opportunity is predicated only on the possibility that damage would result from the breach of the duty to settle. (*Id.* at pp. 726-727.)

As in *Hamilton*, respondent here offered a defense to its insured, Corado. "Where, as here, the insured, without the insurer's agreement, stipulates to a judgment against it in excess of both the policy limits and the previously rejected settlement offer, and the stipulated judgment is coupled with a covenant not to execute, the agreed judgment cannot fairly be attributed to the insurer's conduct, even if the insurer's refusal to settle within the policy limits was unreasonable." (*Hamilton*, *supra*, 27 Cal.4th at p. 731.) Respondent therefore cannot be bound by the stipulated judgment signed by appellant and Corado. (*Id.* at p. 730; see also *Wolkowitz*, *supra*, 112 Cal.App.4th at p. 166 [concluding that "for purposes of an action against the debtor's insurer based on an unreasonable refusal to settle, the bankruptcy court's approval of an uncontested claim without an evidentiary hearing provides no reliable basis to establish damages resulting from the refusal to settle."].)

Appellant attempts to distinguish *Hamilton* by arguing that respondent's participation in the agreement is evidenced by its payment of the $15,000 policy limit to her. We disagree.

Appellant contends that respondent was not obligated to pay the policy limit because of the settlement, relying on *Travelers Casualty & Surety Co. v. Superior Court* (2005) 126 Cal.App.4th 1131, 1141: "[W]hen the insurer is defending its insured, and the insured settles with a plaintiff without the insurer's consent or participation, and the settlement contains a covenant by the plaintiff not to execute in exchange for an assignment of the insured's policy rights against the insurer, the insurer has no obligation to pay. In essence, coverage is forfeited." She argues

that, because respondent had no obligation to pay the $15,000 policy limit, its payment of that amount is "compelling evidence" respondent participated in and consented to the agreement.

We disagree. Respondent's payment of the policy limit to appellant does not reasonably suggest that the insurer participated in or agreed to be bound by the stipulated judgment, which was greatly in excess of the policy limit. Moreover, the allegations in the complaint indicate that respondent offered the policy limit to appellant as early as August 17, 2009.

More importantly, the fact that respondent paid the policy limit does not address the primary concern of *Hamilton* that "a settlement between the insured and third party claimants that was entered into without the *defending* insurer's consent or participation, and where the insured had no obligation to pay the judgment . . . provided no reliable basis to establish damages proximately caused by the refusal to settle. [Citation.]" (*Wolkowitz, supra,* 112 Cal.App.4th at p. 163.)

"An essential element of a cause of action for breach of the implied covenant based on the refusal to settle is resulting damages. [Citation.]" (*Wolkowitz, supra,* 112 Cal.App.4th at p. 162.) Corado has suffered no damages for respondent's alleged breach of the duty of reasonable settlement.

The $1,715,000 stipulated judgment here illustrates the concern expressed by the court in *Pruyn v. Agricultural Ins. Co.* (1995) 36 Cal.App.4th 500, 518, that "a stipulated or consent judgment which is coupled with a covenant not to execute against the insured brings with it a high potential for fraud or collusion. 'With no personal exposure the insured has no incentive to contest liability or damages. To the contrary, the insured's best interests are served by agreeing to damages in any amount as long as the agreement requires the insured will not be personally responsible for those damages.' [Citation.]" Corado had no incentive to contest

liability and so agreed to a $1,715,000 judgment that did not have any relation to the medical costs appellant alleged she had submitted to respondent.

II. Dual Representation of Insurer and Insured

Appellant also argues that respondent is bound by the agreement because Bloeser, the attorney hired to represent Corado, was acting on behalf of both Corado and respondent. We disagree.

"In California, it is settled that absent a conflict of interest, an attorney retained by an insurance company to defend its insured under the insurer's contractual obligation to do so represents and owes a fiduciary duty to both the insurer and insured. [Citations.] 'It is a well accepted and oft repeated principle that the attorney retained by the insurance company for the purpose of defending the insured under the insurance policy owes the same duties to the insured as if the insured had hired the attorney him or herself.' [Citations.]" (*Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1406-1407.)

"In this 'usual tripartite relationship existing between insurer, insured and counsel, there is a single, common interest shared among them. Dual representation by counsel is beneficial since the shared goal of minimizing or eliminating liability to a third party is the same.' (*San Diego Federal Credit Union v. Cumis Ins. Society, Inc.* [(1984) 162 Cal.App.3d 358,] 364 (*Cumis*).) [¶] Under certain circumstances, however, a conflict of interest or potential conflict of interest may impose upon the insurer a duty under [Civ. Code] section 2860 to provide independent counsel, commonly referred to as '*Cumis* counsel,' for the insured. . . . [I]n order to '"eliminate the ethical dilemmas and temptations that arise along with conflict in joint representations,"' the insurer is required to provide its insured with independent counsel of the insured's choosing 'who

represents the insured, not the insurer'; and the insured may thereafter control the defense of the case. [Citations.]" (*Long v. Century Indemnity Co.* (2008) 163 Cal.App.4th 1460, 1468-1470, fns. omitted.)

Here, Corado's and respondent's interests in the stipulated judgment clearly were in conflict. In representing Corado, therefore, Bloeser's duty was to Corado, not to respondent.

Appellant argues that the settlement was under respondent's control and that she had no right to interfere with respondent's defense of the case, citing the following language from *Safeco Ins. Co. v. Superior Court* (1999) 71 Cal.App.4th 782, 787 (*Safeco*): "When the insurer provides a defense to its insured, the insured has no right to interfere with the insurer's control of the defense, . . . [¶] In the present case, [the insurer] indisputably provided a defense and, accordingly, had the right to control that defense and to decide on its own whether or not to settle. The [insured] had no authority to settle the matter without the consent of Safeco."

Appellant omits the pertinent language from *Safeco*, which, in addition to the above, states that "a stipulated judgment between the insured and the injured claimant, without the consent of the insurer, is ineffective to impose liability upon the insurer. [Citations.]" (*Safeco*, *supra*, 71 Cal.App.4th at p. 787.) The court added that "'the potential for abuse [is] apparent in a situation where an insurer, in the absence of a breach of its duty to its insured, could be bound by a consent judgment of this nature.' [Citations.]" (*Ibid.*) The court thus concluded that a stipulated judgment reached by the claimant and the insured was not enforceable against the insurer because the insurer "indisputably provided a defense" to the insured. (*Ibid.*) *Safeco* accordingly does not support appellant's position.

III. Appellant's Proposed Amendments

On appeal, appellant contends that she can allege additional facts to amend the complaint sufficient to overcome the demurrer. We disagree.

The amendments appellant proposes to make to the complaint do not cure the complaint of the essential flaw found in *Hamilton*: no reliable basis to show damages.

The allegations appellant proposes to add indicate only that respondent may have agreed to pay appellant the $15,000 policy limit. For example, appellant alleges that Eve Korff, the first attorney hired by respondent to represent Corado, told Harris that respondent would consider the proposed settlement agreement. However, according to appellant, respondent's response to the proposal was to hire Bloeser to represent Corado, an allegation that supports the inference that Bloeser was representing Corado's interests, not respondent's.

In addition, appellant alleges that, because the agreement did not specify who was responsible to pay the $15,000 policy limit, appellant's counsel, Harris, contacted Bloeser to confirm the understanding that respondent was paying the policy limit pursuant to the agreement. Appellant alleges that Bloeser responded to this query by telling Harris that respondent had agreed to pay the policy limit as part of the agreement. Appellant further alleges that respondent sent the $15,000 policy limit check to Bloeser, with instructions to send the check to Harris only after the agreement was signed and a dismissal as to any claim against Loaiza was provided.

These allegations, if proven, would establish only that respondent agreed to pay appellant the $15,000 policy limit, not that respondent agreed to a $1,715,000 judgment. The complaint already alleged that respondent offered to pay appellant

the $15,000 policy limit. The amendments appellant alleges she can make to her complaint do not alter the fact that Corado has not suffered any damages.

Appellant has failed to demonstrate how the complaint can be amended to state a valid cause of action. We therefore affirm the judgment of dismissal.

DISPOSITION

The judgment is affirmed. Respondent shall recover costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.