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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

NEW LIFE AGENCY, INC., Plaintiff, Appellant and Cross-Respondent, v. BEITLER SERVICES, INC., Defendant, Respondent and Cross-Appellant.	B224724 (Los Angeles County Super. Ct. No. SC100518)

APPEALS from a judgment of the Superior Court of Los Angeles County. Jacqueline A. Connor, Judge. Affirmed in part, reversed in part.

Law Offices of Brooks P. Marshall and Brooks P. Marshall, for Plaintiff, Appellant and Cross-Respondent.

Murphy, Pearson, Bradley & Feeney, Michael P. Bradley, Jeff C. Hsu, for Defendant, Respondent and Cross-Appellant.

This is a dispute between two insurance agencies over responsibility for the medical expenses of a surrogate mother under a policy issued by the defendant as agent of Lloyd's of London. After a bench trial the court rendered a verdict in favor of the defendant but found there was no "prevailing party" for purposes of awarding costs. Both sides filed timely appeals. We reverse the judgment insofar as it denies costs to the defendant. We affirm the judgment in all other respects.

FACTS AND PROCEEDINGS BELOW

The plaintiff, New Life Agency, Inc., is an insurance agency providing health insurance policies to intended parents, surrogates and others involved in the field of assisted reproduction. Defendant Beitler Services, Inc. is an insurance agency with authority from Lloyd's of London to enter into insurance contracts providing secondary coverage for the medical expenses of surrogate mothers. New Life and Beitler entered into a contract in which New Life agreed to market, sell and administer Beitler's "Surrogate Mother Special Liability Policy" (the Beitler policy).

New Life sold the Beitler policy to a set of intended parents to cover the maternity and birth expenses of a surrogate mother. It is undisputed that the Beitler policy was secondary to any benefits provided by the surrogate mother's own health insurer, Healthnet. Beitler bound the terms and conditions of the policy which included a "self insured retention" (SIR) in the amount of $15,000 in the event of multiple births.

The surrogate mother gave birth to twins in January 2006.

In February 2006, Beitler's third-party administrator sent Beitler an email stating: "We have received information as to an Exclusion in Healthnet contracts that surrogacy is not covered when it is done for compensation. I quote: 'Services for pregnancies that result under a surrogate parenting agreement are not covered when compensation is obtained for the surrogacy.' This page is on file in the patient's claim folder. We will be releasing claims for the [surrogate mother]."

On March 6, 2006, Beitler advised New Life that it would not pay benefits on the surrogate mother's claim until it received "complete copies of the relevant documents" including "a complete copy of the full policy" as proof that Healthnet denied coverage of the surrogate mother's pregnancy.

On January 24, 2007, Beitler sent New Life an email confirming the parties' discussion of the surrogate mother's claim earlier that day. In that email Beitler stated that before it would process the payment of the surrogate mother's outstanding medical bills, it needed proof that the remaining $1,600 of the $15,000 SIR had been satisfied. It stated that "upon receipt of proof of payment" from New Life that it had paid the $1,600 on the surrogate mother's behalf it would "consider the [SIR] satisfied." In addition, Beitler demanded proof of Healthnet's exclusion of the surrogate mother's pregnancy in the form of a "written denial from Healthnet to that effect."

On January 26, 2007, New Life sent an email to Beitler purporting to attach "a copy of [the surrogate mother's] policy and the exclusion for surrogacy." Beitler's General Counsel, James M. Gartland, replied to this email on January 29, 2007. Referring to the question whether the surrogate mother's Healthnet policy excluded surrogacy, he stated: "The attachment that you sent me is not sufficient to satisfy what we need on the Coordination of Benefits issue. [You] forwarded to me a three page excerpt of what is represented to be [the surrogate mother's] Healthnet policy. No declarations page(s) of the policy were enclosed. A full and complete copy of the policy with the declarations page(s), identifying the policy number, insured, policy period and terms and conditions of the policy is necessary for me to be able to meaningfully review the policy and its terms and conditions." Gartland repeated Beitler's earlier demand for "copies of the written denials [of surrogacy coverage] from Healthnet to that effect."

Beitler did not make any payments under its policy for the surrogate mother's pregnancy. It took the position that neither the surrogate mother, the intended parents nor New Life ever provided it with evidence that the SIR had been satisfied and that the surrogate mother's Healthnet policy excluded surrogate pregnancy.

In late January 2007, after receiving threats of lawsuits and damning publicity from the surrogate mother and the intended parents, New Life paid the surrogate mother's medical bills. It then brought this action against Beitler for indemnity, breach of contract and various torts.

Following a one-day bench trial the court found that New Life failed to meet its burden of proof as to each cause of action in its complaint. The court rendered judgment for Beitler but concluded that there was no prevailing party for purposes of awarding costs because "[b]oth sides have 'dirty hands' in their relationship with each other[.]" New Life appeals from the judgment on the merits; Beitler appeals from the judgment insofar as it fails to award it costs from New Life.

DISCUSSION

I. NEW LIFE'S APPEAL

The trial court found New Life failed to meet its burden of proof that Beitler wrongfully failed to pay the surrogate mother's medical expenses because New Life failed to prove that it supplied Beitler with "the two critical pieces of information" that Beitler reasonably required in order to pay benefits: "the policy or a declaration from Healthnet, and correct information about the satisfaction of the [SIR]."

When a court sitting as the trier of fact concludes that the party with the burden of proof failed to carry that burden, our standard of review is "whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.]" (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 279.) Specifically, the questions are whether the appellant's evidence was "uncontradicted and unimpeached" and whether it was "of such character and weight as to leave no room for a judicial determination that it was insufficient to support a finding" in the appellant's favor. (*Roesch v. De Mota* (1944) 24 Cal.2d 563, 571.) In this case the answer to both questions is no.

New Life produced the following evidence to show that the surrogate mother's Healthnet policy did not cover surrogate pregnancies. (1) An email from Beitler's third-party administrator stating: "We have received information as to an Exclusion in

Healthnet contracts that surrogacy is not covered when it is done for compensation. I quote: 'Services for pregnancies that result under a surrogate parenting agreement are not covered when compensation is obtained for the surrogacy.' This page is on file in the patient's claim folder." (2) A January 2007 email from New Life to Beitler purporting to attach "a copy of [the surrogate mother's] policy and the exclusion for surrogacy." The exclusion attached to the email stated in relevant part: "The following is a list of services, supplies and treatments which are not covered: . . . 30. . . . surrogacy." (3) The testimony of Melissa Anderson, New Life's Claims Manager, that she attached the surrogacy exclusion in the surrogate mother's Healthnet policy to the January 2007 email to Beitler. (Anderson admitted that contrary to her statement in her email, she did not attach the surrogate mother's entire policy, only the purported exclusion.)

The trial court found this evidence insufficient to satisfy New Life's burden of proof that the surrogate mother's Healthnet policy excluded surrogate pregnancies. The court acknowledged that the document Anderson emailed to Beitler "may possibly be pages from the alleged Healthnet policy, but there are plain and obvious contradictions that make Beitler's request for either the actual policy or a straightforward declaration from Healthnet reasonable." The court noted the discrepancy between the surrogacy exclusion quoted by Beitler's third-party administrator and the surrogacy exclusion in the document New Life sent to Beitler. "[A]t best," the court concluded, Beitler "had 'an' exclusion, not 'the' exclusions. It had 'something' but that 'something' was not clear." The court was entitled to reject Anderson's testimony that the purported exclusion she sent to Beitler came from the surrogate mother's Healthnet policy. (*Shaw v. County of Santa Cruz*, *supra*, 170 Cal.App.4th at p. 279 [the trier of fact is the exclusive judge of the credibility of the evidence and can reject even uncontradicted evidence "as unworthy of credence"].) Anderson did not explain how she came into possession of the purported exclusion, how she knew it came from a policy issued to the surrogate mother and, assuming that it did, what period of time it covered and whether there were any exceptions to the exclusion. As a reviewing court we cannot substitute our evaluation

of a witness's credibility for that of the trier of fact. (*People v. Allen and Johnson* (2011) 53 Cal.4th 60, 78.)

For the reasons given above, we cannot say that the evidence compelled a finding as a matter of law that the Healthnet policy excluded surrogate pregnancies.[1]

II. BEITLER'S APPEAL

Based on its finding that "both sides have 'dirty hands,'" the trial court declined to award costs to Beitler under Code of Civil Procedure section 1033.5.[2]

Section 1032, subdivision (a)(4) describes four categories of "prevailing parties" who, under section 1032, subd. (b), are "entitled as a matter of right to recover costs[.]" The categories include "a defendant as against those plaintiffs who do not recover any relief against that defendant." (§ 1032, subd. (a)(4).) New Life did not recover any relief against Beitler. Therefore, Beitler was the "prevailing party" and entitled to a cost award against New Life. (*Michell v. Olick* (1996) 49 Cal.App.4th 1194, 1198 [if a party comes within one of the four statutory categories of prevailing parties "that party is entitled to costs as a matter of right; the trial court has no discretion to order each party to bear his or her own costs"].)

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[1] Given this holding we need not address the issue of whether the intended parents or New Life satisfied the SIR.

[2] All future statutory references are to the Code of Civil Procedure.

DISPOSITION

The judgment is reversed insofar as it denies costs to Beitler. In all other respects the judgment is affirmed. Appellant to pay costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, Acting P. J.

We concur:

CHANEY, J.

JOHNSON, J.