Filed 9/13/12 Boyajyan v. Gabrielian and Associates 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

LUSINE BOYAJYAN, Plaintiff and Appellant, v. GABRIELIAN AND ASSOCIATES INSURANCE SERVICES et al., Defendants and Respondents.	B231802 (Los Angeles County Super. Ct. No. EC 048362)

APPEAL from a judgment of the Superior Court for the County of Los Angeles. William D. Stewart, Judge. Affirmed.

McKennon|Schindler, McKennon Law Group, Robert J. McKennon, Eric J. Schindler and Reid A. Winthrop for Plaintiff and Appellant.

Gilbert, Kelly, Crowley & Jennett and Tim Kenna for Defendants and Respondents Gabrielian and Associates Insurance Services and Leo Gabrielian.

Sedgwick, Michael R. Davisson, Susan Koehler Sullivan, and Douglas J. Collodel for Intervenor and Respondent American Guarantee and Liability Insurance Company.

This is an appeal from the grant of a motion for summary judgment in an action against an insurance broker for professional negligence in procuring a disability policy, which resulted in the policy being rescinded. The complaint is governed by a two-year statute of limitations. (Code Civ. Proc., § 339.) Defendants Gabrielian and Associates Insurance Services, Inc. and Leo Gabrielian sought summary judgment on the ground the action was time-barred. The trial court granted the motion in an April 12, 2010 minute order. On July 15, 2010, before judgment had been entered, plaintiff filed a motion for reconsideration of the summary judgment ruling. The trial court, after considering the additional evidence plaintiff presented, and after inviting and receiving supplemental briefing, issued a statement of decision on December 1, 2010, granting reconsideration but again granting summary judgment, this time on a different limitations theory. We find plaintiff was not entitled to reconsideration of the order granting summary judgment, and we affirm on the ground that the trial court correctly granted summary judgment.

THE UNDISPUTED FACTS ON WHICH THE COURT GRANTED SUMMARY JUDGMENT

Plaintiff had known defendant Leo Gabrielian (Leo) for 10 years. She "trusted him with all [her] insurance needs and never did anything without his consultation and approval." In late 2004, while plaintiff was working in Virginia, she asked Leo to procure both life and disability insurance coverage for her. Leo recommended plaintiff apply for a life insurance policy from Guardian Life Insurance Company (Guardian) and a disability policy from Berkshire Life Insurance Company (Berkshire). Leo worked out of California at that time and was not licensed to sell insurance in Virginia. Nonetheless, due to her trust and confidence in Leo ("I told Leo that I did not trust anyone else in these matters"), plaintiff asked defendant to go through a Virginia agency to procure the life and disability policies. Plaintiff followed Leo's advice, buying both the Berkshire disability policy and the Guardian life insurance policy.

Plaintiff also relied on defendant to help her fill out the application for the Berkshire policy. In her application for the Berkshire policy, on Leo's advice, plaintiff did not disclose that she had another group disability policy through Northwestern

Mutual. It was the failure to disclose plaintiff's coverage under this policy that was the basis for Berkshire's denial of her claim when plaintiff became disabled, as described more fully below.

After she received the Guardian life insurance policy and the Berkshire disability policy, plaintiff sent both policies to Leo and asked him to review them for accuracy. Leo noticed that the face amount and premium waiver rider on the Guardian life insurance policy were not what plaintiff had requested. Plaintiff asked Leo to correct the errors. Plaintiff had to submit a supplemental application to change the waiver of premium, under which the premiums would be waived in the event of disability. As she had done with the Berkshire disability policy, plaintiff sent the completed supplemental application to Leo to review for completeness and accuracy. Leo reviewed it and told plaintiff to submit it as she had completed it. Plaintiff later learned that Leo noticed errors in that application but failed to inform her and told her to submit it knowing it had wrong information on it. That wrong information was the basis for Guardian's rescission of the waiver of premium rider on the life insurance policy.

Plaintiff became permanently disabled due to depression in October 2005. She made a claim for coverage under the Berkshire disability policy and for waiver of payment of the premium on the Guardian life insurance policy. Berkshire and Guardian separately investigated her claim of total disability. Guardian discovered plaintiff had not disclosed certain medical treatments and medication, denied her claim for a waiver of premium, and rescinded the waiver of premium benefit in her life insurance policy by letter dated May 23, 2006. After a long investigation, Berkshire denied her claim in October 2006, stating that plaintiff had failed to disclose the group disability policy she had through Northwestern Mutual. Since Guardian had also rescinded its waiver of premium because of Leo's error, plaintiff was unable to pay her premiums and lost the life insurance policy as well.

On November 2, 2006, plaintiff filed a lawsuit in Ohio against Guardian, Berkshire, and two Ohio insurance agents of Guardian. Plaintiff alleged that Guardian rescinded the waiver of premium on her life insurance policy as a result of negligence by

the Ohio agents on whom she relied in submitting her application. In the Ohio suit, plaintiff alleged a separate count against Berkshire concerning the disability policy. Plaintiff alleged that "Berkshire's agents further failed to assert and obtain additional disability benefits to which plaintiff was entitled"; that she became disabled and applied for disability benefits under her policy in December 2005; that Berkshire "failed to grant plaintiff's disability claim in breach of the contract of insurance"; that Berkshire "further . . . failed to process plaintiff's claim in an appropriate manner, and failed to apprise plaintiff of a decision on her claim for a period of over ten months"; and that as a result of Berkshire's conduct, plaintiff was damaged in loss of benefits and other damages, including emotional distress.

One of the Ohio insurance agents filed a third party complaint against Leo and Gabrielian and Associates in January 2007, alleging he had an agreement with them "regarding the handling of Plaintiff Boyajyan's Guardian Life Insurance Company Policy." Plaintiff did not name either Leo or Gabrielian and Associates in the Ohio lawsuit.

Plaintiff sued defendants Leo and Gabrielian and Associates in this case on November 6, 2008. Defendants moved for summary judgment on January 15, 2010. Defendants' motion asserted the two-year statute of limitations in Code of Civil Procedure section 339 began to run on the date plaintiff filed her Ohio lawsuit. All of the above-described facts were undisputed. Plaintiff also did not dispute these facts: "Berkshire apprised Plaintiff of a decision on her claim in approximately October 2006"; "[i]n Plaintiff's Ohio Action . . . Plaintiff accused her insurance agent, who assisted her in obtaining the disability policy, of wrongdoing with respect to obtaining the disability policy"; and "Plaintiff claims that Defendants were negligent because they . . . gave erroneous advice that impacted [my] $1.5 million waiver of premium claim."

In her opposing declaration, plaintiff declared that "in October of 2006, Berkshire denied my claim stating that I had failed to disclose the Northwestern disability policy in my application. Since Guardian rescinded its waiver of premium also because of Leo's error I was unable to pay my premiums and lost my life insurance policy as well."

Plaintiff also declared she "learned for the first time that Leo was directly involved in serious errors and breached his promises to me when [the Ohio insurance agent] filed suit against Leo in January of 2007 and made certain allegations. [Plaintiff] did not know the details and the extent of Leo's involvement and breach until Leo and [the Ohio insurance agent] gave their depositions in my first lawsuit." Plaintiff's attorneys informed her she could sue Leo in California and had two years from January 2007 to do that.

The court granted the summary judgment motion on April 12, 2010.

SUBSEQUENT PROCEDURAL BACKGROUND

Plaintiff moved for reconsideration of the order granting summary judgment. She alleged she had discovered two new facts. First, she discovered she was mistaken in having declared that Berkshire denied her claim in October 2006. In fact, she was first notified that Berkshire denied her claim after she received a copy of a letter from Berkshire's Ohio counsel to plaintiff's Ohio counsel dated December 1, 2006. This letter had been in plaintiff's files since her Ohio counsel sent it to her. Plaintiff's California counsel had asked her to send all her file documents to him. But plaintiff did not find the letter in her files until newly retained cocounsel asked her to review her files again in June 2010. Plaintiff's lawyer who had represented her from the filing of the complaint through the entry of summary judgment had also written a letter to plaintiff's Ohio counsel, asking Ohio counsel to send a copy of plaintiff's file. Ohio counsel complied, but the file was incomplete and did not include any document showing the date when plaintiff was notified of the rescission of her disability policy.

The second allegedly new fact was that, after the court issued its order granting summary judgment, plaintiff asked her lawyer to investigate whether she could sue defendants in Armenia. In the course of the investigation, counsel discovered that Leo had traveled out of state for personal reasons for several weeks between November 2006 and November 2008, tolling the statute of limitations and making the complaint against Leo timely.

We need not describe here the complete procedural history of the case that ensued. In summary, the trial court agreed to reconsider its order but again granted defendant's summary judgment motion.

DISCUSSION

A. Standard of Review

Our Supreme Court has said that the purpose of the 1992 and 1993 amendments to the summary judgment statute was "to liberalize the granting of motions for summary judgment." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854.) "It is no longer called a 'disfavored remedy.' It has been described as having a salutary effect, ridding the system, on an expeditious and efficient basis, of cases lacking any merit." (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 248.) A defendant moving for summary judgment meets its burden of showing there is no merit to a case if that party has shown that there is a complete defense to the action. If the defendant does so, the burden shifts back to the plaintiff to show that a triable issue of fact exists as to that defense. (Code Civ. Proc., § 437c, subds. (*o*)(2), (p)(2).)

On appeal, "we take the facts from the record that was before the trial court . . . . 'We review the trial court's decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained.' " (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037.) We liberally construe the declarations of the party opposing summary judgment to determine the existence of triable issues of fact. "We accept as true the facts . . . in the evidence of the party opposing summary judgment and the reasonable inferences that can be drawn from them." (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 67.)

" 'The trial judge's stated reason for granting summary judgment is not binding on us because we review its ruling, not its rationale.' [Citation.]" (*United Parcel Service Wage & Hour Cases* (2010) 190 Cal.App.4th 1001, 1009.)

B. The Trial Court Correctly Granted Summary Judgment

We find the trial court properly concluded plaintiff knew or should have known of her claims against defendants by not later than November 2, 2006, the date on which she

filed the Ohio action. Plaintiff filed this action on November 6, 2008, and therefore this case was barred by the two-year statute of limitations. The undisputed facts before the trial court showed plaintiff trusted and relied on Leo for all her insurance needs and "never did anything without his consultation and approval." Even though Leo was not licensed to sell insurance in Virginia, where plaintiff was living when she bought the Guardian life insurance policy and the Berkshire disability policy, plaintiff asked Leo to go through a Virginia agency because she did not trust anyone else to be her insurance agent and broker.

Plaintiff bought the policies from Guardian and Berkshire on Leo's advice, and she relied on him to help her complete the applications correctly. She specifically asked Leo for advice on whether to disclose in the Berkshire application that she had disability coverage through Northwestern Mutual. He told her not to disclose the other policy, she followed his advice, and based on that nondisclosure, Berkshire denied her disability claim and rescinded her policy. Plaintiff testified in her declaration that she knew in October 2006, before she filed the Ohio lawsuit, that Berkshire denied her claim based on the failure to disclose the Northwestern Mutual policy. In her Ohio lawsuit, she specifically alleged Berkshire "failed to grant her disability claim in breach of the contract of insurance" and as a result of Berkshire's conduct, plaintiff was damaged in loss of benefits and other damages, including emotional distress.

Accepting plaintiff's testimony as true, we find plaintiff knew by not later than November 2, 2006, that she had suffered injury as a result of Berkshire's failure to grant her disability claim. Plaintiff also either knew, or should have known, that her injury was caused at least in part by Leo's negligence in telling her not to disclose the Northwestern Mutual disability coverage. She testified in her declaration in opposition to the summary judgment motion that "in October of 2006, Berkshire denied my claim stating that I had failed to disclose the Northwestern disability policy in my application." In the same declaration, she testified the reason she did not disclose the Northwestern disability policy was because Leo advised her not to disclose it. The discovery rule provides "that the accrual date of a cause of action is delayed until the plaintiff is aware of her injury

and its negligent cause." (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1109.) In *Jolly*, the court considered "what constitutes sufficient knowledge to start the statute running." (*Ibid.*) The court's short answer was that the limitations period begins "when the plaintiff suspects, or should suspect, that she has been wronged." (*Id.* at p. 1114.)

In *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797 (*Fox*), a products liability case involving a defendant's demurrer on statute of limitations grounds, the Supreme Court concluded: "Simply put, in order to employ the discovery rule to delay accrual of a cause of action, a potential plaintiff who suspects that an injury has been wrongfully caused must conduct a reasonable investigation of all potential causes of that injury. If such an investigation would have disclosed a factual basis for a cause of action, the statute of limitations begins to run on that cause of action when the investigation would have brought such information to light." (*Id.* at pp. 808-809.)

In *Fox*, there was no question that the plaintiff suspected her injury was wrongfully caused, as she promptly sued her doctor and hospitals for malpractice—the question in *Fox* was whether the plaintiff should have suspected a different type of wrongdoing (products liability) by a different defendant. Similarly, here, it is undisputed that by November 2, 2006, plaintiff knew she had been injured by Guardian's rescission of the premium waiver on her life insurance policy, by Berkshire's failure to pay benefits, and by the negligence of Guardian's insurance agents. The focus of the Ohio lawsuit was Guardian's rescission of the premium waiver on the life insurance policy, but the Ohio lawsuit included allegations that Berkshire also failed to pay benefits to plaintiff, causing her to suffer damages. The question here is whether plaintiff should have suspected that the negligence of Leo and his agency contributed to her damages from Berkshire's failure to pay benefits.

The undisputed facts—that in the Ohio lawsuit filed November 2, 2006, plaintiff claimed to have suffered injury by Berkshire's failure to pay disability benefits; Berkshire denied her claim for disability benefits because she failed to disclose the Northwestern policy; and plaintiff relied on Leo's advice to not disclose the Northwestern policy—are

susceptible of only one legitimate inference, that plaintiff had actual or inquiry notice of her claims against Leo and his agency not later than November 2, 2006.

Plaintiff's statement (in the same declaration in which she admitted these facts) that she did not know of defendants' negligence until Guardian's insurance agency filed the third party complaint in Ohio in January 2007, did not create a material factual dispute. It is well settled that testimony controverting clear admissions may be disregarded as irrelevant, inadmissible or evasive. (*Niederer v. Ferreira* (1987) 189 Cal.App.3d 1485, 1503; see also *Leasman v. Beech Aircraft Corp.* (1975) 48 Cal.App.3d 376, 382-383.)

This principle has even more compelling force here. The authorities cited above discuss the effect of admissions against interest obtained in discovery. Here, the admissions against plaintiff's interest were presented in her own declaration in opposition to the summary judgment motion, which rested entirely on the statute of limitations. The facts recited in a declaration submitted in opposition to a summary judgment motion are admissions against interest in the truest sense. Any conclusory statement purporting to contradict admissions against interest on a dispositive point in a declaration opposing summary judgment does not create a material factual dispute as a matter of law.

C. Plaintiff Was Not Entitled to Reconsideration of the Order Granting Summary Judgment

Code of Civil Procedure section 1008 (hereafter section 1008) permits a motion for reconsideration of a court's order "based upon new or different facts, circumstances, or law . . . ." (§ 1008, subd. (a).) Courts have construed this provision as requiring " 'not only new evidence but also a satisfactory explanation for the failure to produce that evidence at an earlier time.' " (*Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 689; *Mink v. Superior Court* (1992) 2 Cal.App.4th 1338, 1342.) " ' "[T]he moving party's burden . . . is the same as that of a party seeking [a] new trial on the ground of 'newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.' " ' " (*In re H.S.* (2010) 188 Cal.App.4th 103, 108, italics omitted.)

The first basis for the motion for reconsideration was plaintiff's discovery in her own files of a letter dated December 1, 2006, notifying her Ohio counsel that Berkshire rescinded the disability policy. Plaintiff declared this letter shows she was mistaken in testifying that Berkshire denied her claim in October 2006. Instead, plaintiff first learned that Berkshire denied her claim and rescinded her policy after receiving a copy of the letter sometime after it was sent on December 1, 2006. Accepting as true that plaintiff did not locate the letter in her file until late June 2010, even though it had been there for years, and that plaintiff did not recognize its significance or give it to her counsel until June 2010, these facts did not warrant reconsideration. A letter that had been in plaintiff's possession since before this lawsuit was filed is not "new evidence" that could not have been produced with reasonable diligence within the meaning of section 1008. Plaintiff's explanation that she did not appreciate the significance of this letter in time to oppose the summary judgment motion falls far short of a satisfactory explanation demonstrating she could not have found and produced it with reasonable diligence.

The second basis for the motion for reconsideration fails for the same reason. Plaintiff's counsel alleged recent discovery that Leo had been out of state on personal business enough days to toll the statute of limitations. But Leo's travel outside California on personal business is also a fact that plaintiff could have discovered by deposing Leo again and asking him about it before the summary judgment motion was heard (and plaintiff could have sought a continuance for that purpose if necessary). (Code Civ. Proc., § 437c, subd. (h).)

In *New York Times Co. v. Superior Court* (2005) 135 Cal.App.4th 206, the court held that the trial court abused its discretion in granting a motion for reconsideration of its prior order granting summary judgment to the New York Times, and required the trial court to reinstate its order granting summary judgment. (*Id.* at pp. 208-209.) The court concluded the moving party failed both to show new or different facts, circumstances, or law and to provide a satisfactory explanation for failing to make its showing before the court's order was issued. (*Id.* at p. 208.) The reconsideration motion was based solely on the deposition testimony of two persons. "Although the evidence was new to the trial

court, it was available to [plaintiff] throughout the discovery process and was easily obtainable . . . ." Even if it could be considered new, plaintiff "failed to provide a satisfactory explanation for its failure to present it earlier." (*Id*. at p. 213.) While plaintiff claimed it was unaware of the information possessed by the two persons, and did not have easy access to them, in essence counsel thought the testimony it already had was enough and did not think it was necessary to get anything further. (*Id.* at p. 214.) Also, plaintiff could have moved for a continuance under the summary judgment statute, but "failed to take advantage of this opportunity." (*Id.* at p. 215.) "Because [plaintiff] failed to satisfy the requirements of section 1008, the trial court abused its discretion in granting the motion for reconsideration." (*Ibid.*)

DISPOSITION

We affirm the ruling of the trial court granting summary judgment. Defendants are to recover their costs of appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

GRIMES, J.

WE CONCUR:

FLIER, Acting P. J.

SORTINO, J.*

---

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