Filed 11/29/17 Valdez v. Clarendon Nat. Insurance Co. CA2/2

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

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| ALEJANDRO VALDEZ,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>CLARENDON NATIONAL INSURANCE COMPANY et al.,<br><br>Defendants and Respondents. | B278542<br><br>(Los Angeles County Super. Ct. No. BC606254) |

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

Asvar Law, Christopher A. Asvar, Jonathan J. Perez, and Theresa K. Falter for Plaintiff and Appellant.

Tressler, Mary E. McPherson and Ryan B. Luther for Defendants and Respondents Clarendon National Insurance Company, QBE Americas, Inc., and QBE First Insurance Agency, Inc,

The Morrison Law Group, Edward F. Morrison, Jr. and Larry A. Schwartz for Defendants and Respondents T&T Improvements, Inc. and Tim Tilton.

Plaintiff and appellant Alejandro Valdez (plaintiff) appeals from the judgment dismissing his action against defendants and respondents Clarendon National Insurance Company (Clarendon), QBE Americas, Inc., QBE First Insurance Agency, Inc.,[1] T&T Improvements, Inc. (T&T), and Tim Tilton (Tilton) (collectively, defendants)[2] after the trial court sustained, without leave to amend, defendants' demurrers to all of the causes action asserted against them.

We affirm the judgment.

**BACKGROUND**

Plaintiff is a former employee of T&T. T&T and Tilton are insureds under a worker's compensation insurance policy issued by Clarendon. Plaintiff alleges that one or more of the QBE entities owns or controls Clarendon.

Plaintiff sustained debilitating injuries in November 2006 while working for T&T. He filed a workers' compensation claim under case number ADJ657164. That claim was partially settled on January 23, 2014, pursuant to a stipulation and award in a Workers' Compensation Appeals Board (WCAB) proceeding that found plaintiff to be permanently and totally disabled.

Plaintiff, by and through his guardian ad litem, Veronica Lanuza, commenced this action against defendants in January 2016. As against the insurer entities, plaintiff asserted causes of action for promissory fraud, concealment fraud, negligent misrepresentation, breach of contract, breach of the implied

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[1] QBE Americas, Inc. and QBE First Insurance Agency, Inc. are referred to collectively as the QBE entities.

[2] Plaintiff also named as defendants American All-Risk Loss Administrators, Inc., QBE North America, QBE of California Insurance Services, Inc., and QBE of the Americas. None of these entities are parties to this appeal.

covenant of good faith and fair dealing, dereliction of insurers' duty of care towards a third-party insured (negligence), dereliction of insurers' duty towards a contractually created first-party (negligence), unfair competition, intentional interference with contractual relations, and interference with business relations. As against the T&T entities, plaintiff asserted a single cause of action for negligent failure to maintain adequate insurance coverage.

In his complaint, plaintiff alleges that in December 2013, his counsel and T&T's counsel, Alex Kidd, discussed settlement of plaintiff's claims, including claims for future medical care. Various settlement proposals were exchanged and the parties allegedly reached a verbal agreement on December 18, 2013, for a full and final settlement of all claims.

On January 6, 2014, Kidd sent plaintiff a written settlement proposal, but plaintiff's counsel objected to the schedule of annuity payments outlined in the proposal. Kidd responded on January 8, 2014, stating that he would communicate plaintiff's concerns to the adjuster, who had "final funding authority of the settlement proceeds." Kidd further stated that he would draft a compromise and release for the parties' execution once he received the "final green light."

On January 8, 2014, Kidd responded to an inquiry from plaintiff's counsel regarding Kidd's authority to settle plaintiff's claim by stating that he was "in agreement with the final numbers and structure of the settlement, but defendants are currently awaiting final funding approval from management." On January 10, 2014, Kidd informed plaintiff's counsel that "QBE" had withdrawn settlement authority.

On January 13, 2014, plaintiff's counsel asked Kidd to identify the insurance carrier responsible for plaintiff's claim, and Kidd responded that Clarendon was the responsible insurer.

On January 20, 2014, Kidd informed plaintiff's counsel that his settlement authority was limited to entering into a stipulation and award finding plaintiff to be permanently and totally disabled and entitling plaintiff to a permanent disability award. The parties subsequently entered into a January 23, 2014 stipulation and award that found plaintiff to be 100 percent totally and permanently disabled, but that did not resolve plaintiff's claim for anticipated future medical care.

## DISCUSSION

### I. Standard of review

"On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.]" (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.) "When a demurrer is sustained, we determine whether the complaint states facts sufficient to state a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse." (*Ibid.*) The legal sufficiency of the complaint is reviewed de novo. (*Montclair Parkowners Assn. v. City of Montclair* (1999) 76 Cal.App.4th 784, 790.)

### II. The workers' compensation system

#### *A. The statutory framework*

The Workers' Compensation Act (Lab. Code, § 3201 et seq.)[3] (WCA) is a "comprehensive statutory scheme governing compensation given to California employees for injuries incurred in the course and scope of their employment. (§ 3201 et seq.) [¶]

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[3] All further statutory provisions are to the Labor Code, unless stated otherwise.

Under this statutory scheme, an employee injured in the workplace may request workers' compensation benefits by delivering a claim form to the employer within 30 days of the injury. (See §§ 5400, 5401.) Benefits include compensation for medical treatment and other services 'reasonably required to cure or relieve [the employee] from the effects of the injury.' (§ 4600; see also § 3207.)" (*Charles A. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800, 810 (*Vacanti*).)

The premise underlying the WCA is a presumed "compensation bargain," pursuant to which "'the employer assumes liability for industrial personal injury or death without regard to fault in exchange for limitations on the amount of that liability. The employee is afforded relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury without having to prove fault but, in exchange, gives up the wider range of damages potentially available in tort.' [Citation.]" (*Vacanti, supra,* 24 Cal.4th at p. 811, quoting *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 16.)

***B. The exclusive remedy provisions***

To effectuate the compensation bargain, "the Legislature enacted several provisions limiting the remedies available for injuries covered by the WCA (the exclusive remedy provisions.)" (*Vacanti, supra,* 24 Cal.4th at p. 811.) For example, section 3600, subdivision (a) provides in relevant part: "Liability for the compensation provided by this division, *in lieu of any other liability whatsoever to any person* . . . shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment . . . in those cases where the … conditions of compensation concur." (Italics added.) The "conditions of compensation" include the following: (1) both the employer and employee were subject to the WCA at the time of injury; (2) the

employee was performing service arising out of and incidental to his employment and was acting within the course of his employment; and (3) the injury was proximately caused by the employment. (§ 3600, subd. (a).) When these conditions are met, section 3602, subdivision (a) states that the right to recover compensation under the WCA is "the sole and exclusive remedy of the employee or his or her dependents against the employer." (§ 3602, subd. (a).) Finally, section 5300, subdivision (a) provides that proceedings "[f]or the recovery of compensation, or concerning any right or liability arising out of or incidental thereto" or "[f]or the enforcement against . . . an insurer of any liability for compensation imposed upon the employer . . . in favor of the injured employee" "shall be instituted before the [WCAB] and not elsewhere." (§ 5300, subd. (a).)

"[T]he trigger for workers' compensation exclusivity is a compensable injury. An injury is compensable for exclusivity purposes . . . if the injury arises 'out of and in the course of employment,'" and it causes a "'disability or the need for medical treatment.'" (*Vacanti, supra,* 24 Cal.4th at pp. 813-814.)

"Courts have also consistently held that injuries arising out of and in the course of the workers' compensation claims process fall within the scope of the exclusive remedy provisions because this process is tethered to a compensable injury." (*Vacanti, supra,* 24 Cal.4th at p. 815.) "Insurer activity intrinsic to the workers' compensation claims process is . . . a risk contemplated by the compensation bargain." (*Id.* at p. 821.) Accordingly, courts "have barred all claims based on 'disputes over the delay or discontinuance of [workers' compensation] benefits' [citation], including those claims seeking to recover economic or contractual damages caused by the mishandling of a workers' compensation claim [citation]; *Mottola v. R.L. Kautz & Co.* (1988) 199 Cal.App.3d 98, 109 . . . [barring a breach of contract claim based

on the refusal to pay benefits].)" (*Vacanti*, at p. 815) California courts have also "barred statutory and tort claims alleging that an insurer unreasonably avoided or delayed payment of benefits even though the insurer committed fraud and other misdeeds in the course of doing so." (*Id.* at p. 821, fn. omitted.)

In *Vacanti*, the California Supreme Court set forth certain guiding principles for determining whether the exclusive remedy provisions of the WCA bar a cause of action against an employer or a workers' compensation insurer. If "the alleged injury is 'collateral to or derivative of ' an injury compensable by the exclusive remedies of the WCA, a cause of action predicated on that injury may be subject to the exclusivity bar." (*Vacanti, supra*, 24 Cal.4th at p. 811.)

***C. Exceptions to the exclusive remedy provisions***

Even if a plaintiff's alleged injury comes within the scope of the exclusivity provisions, the plaintiff may still be able to pursue a civil cause of action if the claim fits within the "'narrow exception to the WCAB's jurisdiction'" established by the California Supreme Court in *Unruh v. Truck Ins. Exchange* (1972) 7 Cal.3d 616. (*Vacanti, supra,* 24 Cal.4th at p. 819.) "This exception focuses on the alleged acts or motives that establish the elements of the cause of action and considers whether these acts or motives constitute 'a risk reasonably encompassed within the compensation bargain.' [Citation.] If they do, then the exclusive remedy provisions govern and bar the cause of action. If they do not, then the exclusive remedy provisions are inapplicable because the malfeasor is *no longer* acting as an 'employer' . . . ." (*Vacanti*, at pp. 0819-820.)

In determining whether an exception applies, "courts first determine whether the alleged acts that give rise to the cause of action are 'of the kind that [are] within the compensation bargain.' [Citation.]" (*Vacanti, supra*, 24 Cal.4th at p. 820.)

When the acts are a "normal" part of the employment relationship or the workers' compensation claims process, the cause of action is subject to the exclusive remedy provisions. (*Ibid.*) "Insurer activity intrinsic to the workers' compensation claims process is . . . a risk contemplated by the compensation bargain. (*Id.* at p. 821.) For example, an insurer's denial of or objection to a claim for benefits, misconduct stemming from the delay or discontinuance of benefit payments, and tort claims alleging that an insurer unreasonably avoided or delayed benefit payments as the result of fraud or other misdeeds are all subject to the exclusivity provisions. (*Ibid.*)

Courts have permitted fraud claims against an insurer only in limited circumstances and for actions that are not a normal part of the claims process. (See, e.g., *Jablonski v. Royal Globe Ins. Co.* (1988) 204 Cal.App.3d 379, 391 [insurer denied existence of a workers' compensation insurance policy]; *Teague v. Home Ins. Co.* (1985) 168 Cal.App.3d 1148, 1153 [trespass during course of a claims investigation]; *Unruh supra,* 7 Cal.3d at pp. 627-628 [assault and formation of a romantic relationship with the injured employee].)

Besides the acts themselves, the motive underlying a cause of action may except that cause of action from the exclusive remedy provisions of the WCA. (*Vacanti, supra,* 24 Cal.4th at p. 823.) "This exception to exclusivity, however, is quite limited. . . . [T]he motive element of a cause of action excepts that cause of action from exclusivity *only if* it violates a fundamental public policy of this state." (*Ibid.*)

## III. The demurrer was properly sustained as to all of plaintiff's causes of action

### *A. Plaintiff's claims are subject to the exclusive remedy provisions*

Plaintiff's causes of action against defendants are all based on acts related to the attempted settlement of plaintiff's claim for ongoing and future medical expenses -- acts intrinsic to the workers' compensation claims process. Under long established California law, "the WCAB 'has exclusive jurisdiction over *all* claims for compensation against an employer or insurance carrier involving medical, surgical, and hospital treatment to injured employees . . . .' [Citation.]" (*Vacanti, supra,* 24 Cal.4th at p. 816.)

Plaintiff's cause of action for promissory fraud is based on allegations that T&T's counsel induced plaintiff to enter into the January 2014 stipulation and award by falsely promising to enter into a compromise and release of plaintiff's claims for ongoing and future medical care. Plaintiff's causes of action for fraud and negligent misrepresentation are premised on allegations that Clarendon and the QBE entities concealed or misrepresented "the identity of the true carrier responsible for Plaintiff's workers' compensation claim," that a QBE entity is "directly controlling all essential and pertinent decisions" of Clarendon, and that plaintiff would not have entered into the stipulation and award had these facts been disclosed. Plaintiff's cause of action for breach of contract is based on allegations that the parties entered into an enforceable oral contract to settle all of plaintiff's claims by way of a compromise and release, and that defendants breached that contract. All of the foregoing causes of action are based on conduct that is intrinsic to the worker's compensation claims process.

Plaintiff's remaining causes of action for breach of the implied covenant of good faith and fair dealing, negligence, unfair competition, intentional interference with contractual relations, and interference with business relations are all premised on the same allegations that form the basis for his fraud and breach of contract claims.

Plaintiff concedes "that the underlying source of this lawsuit stems from a workers' compensation matter" that was partially resolved by a stipulation and award in a January 2014 WCAB proceeding. He argues, however, that the causes of action he asserts are "civil actions stemming from the underlying workers' compensation matter, and are thus, outside the jurisdiction of the WCAB." That argument is unavailing. As discussed, section 5300, subdivision (a) broadly provides that proceedings "[f]or the recovery of compensation, or concerning any right or liability arising out of or incidental thereto" "shall be instituted before the [WCAB] and not elsewhere." (§ 5300, subd. (a).) All of the foregoing causes of action arise out of or are incidental to his compensation claim for medical expenses.

Equally unavailing is plaintiff's argument that the WCAB lacks jurisdiction over the QBE entities. In *Marsh & McLennan, Inc. v. Superior Court* (1989) 49 Cal.3d 1 (*Marsh & McLennan*), the California Supreme Court made clear that the WCAB's exclusive jurisdiction over claims arising from workplace injuries is not limited to claims asserted against an employer or the employer's workers' compensation insurer: "The WCAB is an employee's exclusive forum for relief when *any entity* unreasonably delays or refuses to pay his compensation benefits." (*Id.* at p. 10, italics added.) The Supreme Court explained that to hold otherwise "would vitiate the very purpose of the exclusive remedy provisions of the [WCA]." (*Id.* at p. 8, fn. omitted.)

Plaintiff attempts to distinguish *Marsh & McLennan* by arguing that the employer in that case was self-insured, a permissible alternative under the WCA to procuring coverage under a workers' compensation insurance policy. (§ 3700.) That distinction is irrelevant, as the exclusive jurisdiction of the WCAB applies whether an employer is self-insured or insured through a workers' compensation insurer such as Clarendon. (*Marsh & McLennan, supra,* 49 Cal.3d at p. 10; *Hughes v. Argonaut Ins. Co.* (2001) 88 Cal.App.4th 517, 531 (*Hughes*) [WCAB has exclusive jurisdiction over claims against workers' compensation insurer].)

Plaintiff's assertion of alternate theories of recovery, such as conspiring to deprive him of benefits, violating the unfair competition law, and handling his workers' compensation insurance claim without being licensed to do so, does not remove his claims from the exclusive jurisdiction of the WCAB. "The theory of relief asserted by an employee is irrelevant to the WCAB's exclusive jurisdiction over disputes between employees and employers or insurers. . . . An employee cannot hide from the sweep of WCAB jurisdiction merely by alleging that an insurer's conduct violates the UCL or is otherwise tortious." (*Hughes, supra,* 88 Cal.App.4th at p. 531.) All reasonable doubts about WCAB jurisdiction must be resolved in favor of jurisdiction. (*Ibid.; Mitchell v. Scott Wetzel Services, Inc.* (1991) 227 Cal.App.3d 1474, 1480.)

***B. None of the exceptions to WCA exclusivity apply***

Plaintiff fails to establish that any of the limited exceptions to the exclusive remedy provisions and the exclusive jurisdiction of the WCAB apply in this case.

**1. Conspiracy**

Plaintiff argues that his causes of action premised on allegations that Clarendon and the QBE entities conspired to

conceal the identity of the insurer responsible for his workers' compensation claim and conspired to use Clarendon "as a 'shell' or 'straw' corporation through which to operate as an insurance company and/or workers' compensation insurance company in California" in violation of Insurance Code section 700 and Corporations Code section 2203, are excepted from the WCAB's exclusive jurisdiction. He relies on *Vacanti* as support for this position.

In *Vacanti,* a group of medical providers sued several workers' compensation insurance carriers who allegedly conspired to put the plaintiff providers out of business by intentionally mishandling their lien claims before the WCAB. (*Vacanti, supra,* 24 Cal.4th at p. 807.) The plaintiffs asserted claims for violation of the unfair competition law and tortious interference with business relations, among other claims. (*Id.* at p. 808.)

The court in *Vacanti* found that the alleged acts underlying the unfair competition and tortious interference claims fell into two categories: "(1) individual acts of a defendant that establish a pattern or practice of mishandling plaintiffs' lien claims; or (2) acts in furtherance of a conspiracy of defendants to mishandle plaintiffs' lien claims." (*Id.* at p. 828.) The Supreme Court concluded that to the extent the allegations involved acts by the insurers with respect to their own insurance policies, those claims were subject to the exclusivity provisions of the WCA, as "each wrongful act is closely connected to a normal insurer activity." (*Ibid.*) Claims based on the allegation that one insurer conspired with another insurer to defeat a claim that it did not insure, on the other hand, were not barred as those claims were based upon misconduct not "connected to a normal insurer activity." (*Ibid.*)

In the instant case, plaintiff's complaint alleges that the defendant insurance companies conspired to: (1) induce him to enter into the stipulation and award, (2) conceal the identity of the carrier responsible for his workers' compensation claim, and (3) transact the business of insurance in California without a requisite certificate of authority from the commissioner of insurance.

The first category of alleged misconduct is part of the normal claims handling process and is subject to the exclusive jurisdiction of the WCAB. The second and third categories of misconduct, as alleged in plaintiff's complaint, are insufficient to establish the existence of a conspiracy.

The elements of a conspiracy are: "(1) formation and operation of the conspiracy and (2) damage resulting to plaintiff (3) from an act done in furtherance of the common design. [Citation.]" (*Thompson v. California Fair Plan Assn.* (1990) 221 Cal.App.3d 760, 767.) General allegations of the existence and purpose of the conspiracy are insufficient -- the plaintiff must allege specific overt acts in furtherance thereof. (*Chicago Title Ins. Co. v. Great Western Financial Corp.* (1968) 69 Cal.2d 305, 318.)

Plaintiff's allegations that the QBE entities conspired to conceal the identity of the insurer responsible for his workers' compensation claim or to transact the business of insurance in California without the requisite certificate of authority from the commissioner of insurance are insufficient to establish a conspiracy. No facts are alleged as to the formation and operation of this alleged conspiracy, and there is no damage alleged to have resulted from the conspirators' actions. Plaintiff concedes that he continues to receive benefits for his ongoing medical care. He argues, however, that in order to receive such benefits, he must submit to "the draconian review process of the

Utilization Review,[4] through which the insurance company can accept or deny medical care under specious reasoning, with very little recourse left to the injured worker." Plaintiff's allegations that his claims for medical benefits, like all workers' compensation claims for such benefits, are subject to the statutorily mandated utilization review process, are insufficient to establish that he suffered any resulting damage.

**2. Section 3706**

Plaintiff argues that the instant action is outside the jurisdiction of the WCAB because section 3706 authorizes a civil action by an injured employee "[i]f any employer fails to secure the payment of compensation." (§ 3706.)[5] Plaintiff acknowledges that section 3700 provides that an employer may "secure the payment of compensation" within the meaning of section 3706 "[b]y being insured against liability to pay compensation by one or more insurers duly authorized to write compensation insurance in this state." (§ 3700, subd. (a).) Plaintiff admits that Clarendon has a certificate of authority and was authorized to transact workers' compensation insurance in California, that Clarendon is the named insurance carrier on his workers'

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[4] Utilization review is a statutorily mandated process for employers or their workers' compensation insurers to review, approve, modify, delay, or deny an employee's request for medical treatment. (§ 4610; *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (2008) 44 Cal.4th 230, 236.) An employee may challenge a utilization review decision to modify, delay, or deny a medical treatment request by objecting to the decision under section 4062. (§ 4062.)

[5] Section 3706 provides: "If any employer fails to secure the payment of compensation, any injured employee or his dependents may bring an action at law against such employer for damages, as if this division did not apply."

compensation claim, and that Clarendon is the insurer responsible for handling his claim. The WCAB accordingly has jurisdiction over plaintiff's claims. Plaintiff cannot avoid the exclusive jurisdiction of the WCAB by asserting claims against other entities who are not parties to the workers' compensation policy under which his benefits are paid.

**CONCLUSION**

The trial court did not err by sustaining defendants' demurrers to all of the causes action asserted in plaintiff's complaint. Plaintiff fails to suggest how he would amend his complaint to correct the defects noted above. The burden of proving a reasonable possibility of amending the complaint to state a cause of action "is squarely on the plaintiff." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The trial court therefore did not abuse its discretion by sustaining the demurrer without leave to amend.

**DISPOSITION**

The judgment is affirmed. Defendants are awarded their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.*
GOODMAN

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