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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

MARIA OROZCO et al., Plaintiffs and Appellants, v. MERCURY CASUALTY COMPANY, Defendant and Respondent.	B231427 (Los Angeles County Super. Ct. Nos. MC020244 & MC020595)

APPEAL from a judgment of the Superior Court of Los Angeles County, Brian C. Yep, Judge. Affirmed.

diDonato Law Center and Peter R. diDonato for Plaintiffs and Appellants.

Hager & Dowling, Thomas J. Dowling, Alison M. Holman, and Alison Bernal for Defendant and Respondent.

INTRODUCTION

Maria Orozco, individually and as guardian ad litem for Raymond Orozco, Stephanie Orozco, and Valerie Orozco, and as successor in interest to Ramon Orozco (appellants), appeals from a judgment in favor of respondent Mercury Casualty Company (Mercury), following an order granting summary judgment on appellants' complaint against Mercury. Appellants contend there were triable issues of fact as to whether Mercury issued an insurance policy covering the underlying accident involving Ramon Orozco. Finding no triable issues of fact in the record, we affirm the judgment in its entirety.

FACTUAL AND PROCEDURAL HISTORY

The following facts are undisputed: Mercury issued an automobile insurance policy, No. AP06408061, to Michael R. Moss. The policy covered three vehicles: a Dodge truck and two Honda cars. It covered a time period from 12:01 a.m. June 23, 2005 to 12:01 a.m. December 23, 2005. On November 22, 2005, Mercury sent a notice to Moss, which stated as follows:

"EFFECTIVE 12/23/05

Your automobile insurance expires and coverage ceases at 12:01 AM [*sic*] on 12/23/2005. Coverage under this policy will become effective provided the premium is paid as indicated on the enclosed NOTICE OF PREMIUM DUE." The notice also stated that "[c]overage will continue without lapse provided payment is received on or before the due date. There is *no* grace period." The enclosed notice of premium due stated, "DUE DATE: 12/22/2005."

Mercury also sent a reminder notice December 19, 2005. This notice, labeled "Renewal Reminder," stated that "the coverages provided by your Automobile Policy will end at 12:01 A.M. on 12/23/2005. To continue your policy

without a lapse in coverage, your payment must be received on or before 12/22/2005." Moss did not pay the premium by December 22, 2005.

On December 23, 2005, at approximately 9:50 a.m., Moss was involved in an automobile-pedestrian collision, which resulted in the death of the pedestrian, Ramon Orozco. Moss was driving the Dodge truck at the time. On December 26, 2005, Moss reported the incident to his agent. Mercury was informed the next day.

On December 30, 2005, Moss called his insurance agent and paid the premium on insurance policy No. AP06408061. At the same time, he sought to add a Toyota truck and to remove the Dodge truck involved in the accident from the policy. His insurance agent sent Moss a temporary identification (ID) card, labeled "California Evidence of Liability Insurance," showing that Moss and a 2003 Toyota vehicle were covered under a "binder" insurance policy No. AP06408061, from Mercury Casualty Company, with an effective date of December 23, 2005. Subsequently, Mercury sent Moss a new automobile insurance policy, showing an effective policy period of December 31, 2005 to July 1, 2005. This policy covered the Dodge truck and did not mention a Toyota vehicle.

On May 2, 2006, Mercury sent a letter to Moss denying coverage for the December 23, 2005 accident, stating that the incident occurred during a lapse in coverage. On May 4, 2007, Moss tendered to Mercury the defense and indemnification of a wrongful death action filed by appellants against him. Mercury reiterated that it was denying coverage, stating it had "no duty to defend in this matter."

Subsequently, a stipulated judgment for $3,500,000 was entered in the wrongful death action against Moss. Moss agreed to assign his rights against

Mercury in exchange for a stay on the execution of the judgment against him. Appellants then filed the instant action against Mercury.

The parties filed opposing motions for summary judgment. After a hearing on the motions, the trial court issued an order granting Mercury's motion for summary judgment and denying appellants' motion for summary judgment. Judgment in favor of Mercury and against appellants was entered November 19, 2010. Appellants filed a motion for a new trial, which the trial court denied. They timely filed an appeal.

DISCUSSION

"On appeal from the granting of a motion for summary judgment, we examine the record de novo, liberally construing the evidence in support of the party opposing summary judgment and resolving doubts concerning the evidence in favor of that party." (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 460.) Here, appellants contend the trial court erred in granting Mercury's motion for summary judgment because there were triable issues of fact as to whether Moss had insurance coverage for the December 23, 2005 automobile collision. Specifically, appellants contend (1) the temporary ID card issued by Moss's insurance agent indicates Mercury had issued an automobile liability binder to Moss which covered the collision, and (2) Mercury agreed to renew the policy without lapse, waived its right to deny coverage, or was estopped from denying coverage by accepting late payment of the premium and issuing the temporary ID card, by not informing Moss that his policy had lapsed after he reported the collision, and by waiting five months to deny coverage. We address each contention in turn.

A. *Binder*

Appellants contend the temporary ID issued by Moss's insurance agent constituted a binder. "A binder . . . is a 'temporary contract of insurance.'" (*Adams v. Explorer Ins. Co*. (2003) 107 Cal.App.4th 438, 451.) "It is intended to give temporary protection pending the investigation of the risk by the insurer and until issuance of a formal policy or rejection of the insurance application by the insurer." (*Ahern v. Dillenback* (1991) 1 Cal.App.4th 36, 48.)

Under Insurance Code section 382.5, "[a] binder which is issued in accordance with this section shall be deemed an insurance policy for the purpose of proving that the insured has the insurance coverage specified in the binder. [¶] (a) As used in this section, 'binder' means a writing (1) which includes the name and address of the insured and any additional named insureds, mortgagees, or lien-holders, a description of the property insured, if applicable, a description of the nature and amount of coverage and any special exclusions not contained in a standard policy, the identity of the insurer and the agent executing the binder, the effective date of coverage, the binder number or the policy number where applicable to a policy extension, and (2) which temporarily obligates the insurer to provide that insurance coverage pending issuance of the insurance policy."

In *Chicago Title Ins. Co. v. AMZ Ins. Services, Inc.* (2010) 188 Cal.App.4th 401, the court held that as a matter of law, a document entitled, "'Evidence of Property Insurance,'" (EOI) was a binder because "[it] included all of the required elements for a binder under Insurance Code section 382.5, subdivision (a): The EOI identified the insurer . . . , the insureds . . . , the (purported) agent executing the EOI . . . , the effective date of coverage, the binder number, and the address of the insured property." (*Id*. at p. 420.) In addition, the EOI stated, "'[t]his is evidence that insurance as identified below has been issued, is in force, and

conveys all the rights and privileges afforded under the policy.' Under 'Coverage,' the EOI state[d], 'See Supplemental Information Page(s),' which list[ed] the coverages provided [along] with the amounts of insurance and the deductible for each." (*Ibid*.)

In contrast, the temporary ID card sent by Moss's insurance agent does not include all of the required elements of Insurance Code section 382.5. It does not include the names of all the insureds (Moss's family members), a description of all the property insured (the Dodge truck and Honda vehicles), or a description of the nature and amount of coverage, except that the insurance meets the requirements of California Vehicle Code sections 16056 and 16500.5. Thus, as a matter of law, the temporary ID is not a binder. Moreover, even if it were a binder, it does not contain all of the terms of the prior insurance policy. Specifically, the binder would cover only Moss and a 2003 Toyota truck. It would not provide coverage for the underlying collision, which involved a Dodge truck. Accordingly, there are no triable issues of fact as to whether the temporary ID constituted a binder which provided coverage for the December 23, 2005 collision.[1]

B. *Renewal, Waiver and Estoppel*

Appellants also contend that by issuing the temporary ID card with the December 23, 2005 date, Mercury agreed to renew the prior insurance policy without any lapse in coverage. Alternatively, appellants contend that by its

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[1] Appellants also contend Mercury breached its duty to defend Moss because there was a possibility of coverage under the temporary ID card. As we have concluded the ID card does not constitute a binder, there was no possibility of coverage and no duty to defend. (See *Monteleone v. Allstate Ins. Co*. (1996) 51 Cal.App.4th 509, 513 (*Monteleone*) [insurance company "did not breach its contractual duty to its insured by refusing to defend a third party lawsuit [because] [t]he accident or loss occurred during the time the policy had lapsed for nonpayment of premium"].)

conduct, Mercury waived its right to deny coverage or is estopped from denying coverage. We disagree.

Appellants' argument that Mercury agreed to provide coverage without lapse is foreclosed by *Monteleone*. In *Monteleone*, the insurer accepted a late premium payment after an accident involving an insured, collected the entire premium without deduction or offset for a lapse in coverage, and issued an insurance policy showing an effective date prior to the accident with no indication that the policy had lapsed for a portion of the policy period. (*Monteleone, supra*, 51 Cal.App.4th at pp. 513-514.) Nevertheless, the *Monteleone* court held there were no triable issues of fact on the issue of coverage for the accident because, as a matter of law, the policy was reinstated with a lapse in coverage. Here, Mercury issued only a temporary ID card showing an effective date prior to the collision. When Mercury reinstated Moss's policy, it issued a policy with an effective date *after* the date of the collision. Thus, on these facts, Mercury did not agree to reinstate the policy without a lapse in coverage.

Similarly, there were no triable issues of act as to waiver or estoppel. "'"[W]aiver is the intentional relinquishment of a known right after knowledge of the facts." [Citations.] The burden . . . is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and "doubtful cases will be decided against a waiver" [citation].'" (*Waller v. Truck Ins. Exchange, Inc*. (1995) 11 Cal.4th 1, 31.) An insurer waives its right to deny coverage by intentionally relinquishing that right or by acting in a manner "'inconsistent with an intent to enforce the right as to induce a reasonable belief that such right has been relinquished.'" (*Id*. at pp. 33-34.)

Here, Mercury accepted a premium payment and issued a temporary ID card, showing an effective binder date of December 23, 2005. Mercury did not,

however, indicate it would renew the prior insurance policy without lapse or provide retroactive coverage. Rather, Mercury issued a new automobile insurance policy with an effective start date of December 31, 2005, the day after it received payment from Moss. Moreover, there is no evidence that Mercury had previously renewed a policy without lapse despite late payments of premiums. (Cf. *Peterson v. Allstate Ins. Co.* (1958) 164 Cal.App.2d 517 [insurance company waived right to deny coverage based on late payment of premiums because it previously accepted such payments].) Finally, as discussed, the temporary ID card is not significant as it was not a binder, and it did not cover the vehicle involved in the collision.

The fact that Mercury waited until May 2, 2006 to deny coverage does not create a triable issue of fact as to whether Mercury waived its right to deny coverage. The length of time -- approximately four months -- is not so lengthy as to create an inference that Mercury was relinquishing its right to deny coverage. Accordingly, "[t]he doctrine of waiver does not defeat the automatic lapse of the policy for nonpayment of premiums here." (*Monteleone , supra*, 51 Cal.App.4th at p. 517 [insurance company did not waive its right to deny coverage despite issuing a policy showing no lapse and collecting premium because lapse in coverage was automatic and accident occurred prior to payment of premium].)

Similarly, there is no triable issue of fact on the theory of estoppel. "'The doctrine of estoppel . . . is based on the theory that the party estopped has by his declarations or conduct misled another to his prejudice so that it would be inequitable to allow the true facts to be used against the party misled.'" (*Silva v. National American Life Ins. Co.* (1976) 58 Cal.App.3d 609, 615 (*Silva*).) Estoppel requires a showing of detrimental reliance. (*Monteleone, supra*, 51 Cal.App.4th at p.518.) Appellants contend Mercury is estopped from denying coverage because it

misled Moss into believing that his automobile policy had not lapsed at the time of the collision. We disagree.

In *Monteleone,* the appellate court held there could be no detrimental reliance supporting estoppel because appellants were informed in the reinstatement offer that failure to pay the premium would result in a lapse in coverage. (*Monteleone, supra,* 51 Cal.App.4th at p. 518.) Similarly, in *Silva,* the appellate court held that where the insurance policy provides that it would lapse in the event of nonpayment of premiums, "neither of the doctrines of waiver or estoppel [is] available to defeat the automatic lapse of the policy for nonpayment of premiums." (*Silva, supra,* 58 Cal.App.3d at p. 618.)

Here, appellants cannot show that Mercury misled Moss into believing the automobile insurance policy had not lapsed. The November 22, 2005 notice expressly informed Moss that he would not be covered by an automobile insurance policy after 12:01 a.m. December 23, 2005 if he did not pay his premium prior to that date. The notice stated that "[c]overage will continue without lapse provided payment is received on or before the due date." Moss was aware he did not pay his premium by the due date. Thus, there could be no detrimental reliance because a reasonable person would have known the insurance policy lapsed after he failed to timely pay the insurance premium. Finally, Mercury did not have to inform Moss that his policy had lapsed after he reported the collision. (Cf. *Kates v. Workmen's Auto Ins. Co*. (1996) 45 Cal.App.4th 494, 507 [if insurer gives insured notice that policy would renew contingent on payment of premium and insured fails to pay by due date, policy expires and no further notice is required].) Accordingly, appellants cannot show that there were triable issues of fact on the theories of waiver or estoppel.

DISPOSITION

The judgment is affirmed. Costs are awarded to respondent.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.