Filed 10/23/18 Porter v. Decristofaro and Brown and Brown of Sacramento CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

WILLIAM THOMAS PORTER, Plaintiff and Appellant, v. STEVEN MICHAEL DECRISTOFARO and BROWN AND BROWN OF SACRAMENTO, INC., dba POWERS & COMPANY INSURANCE AGENTS AND BROKERS, Defendants and Respondents.	B284157 (Los Angeles County Super. Ct. No. BC488007)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gregory Alarcon, Judge. Reversed.

Herb C. Rubinstein, and Graham & Associates, Bruce N. Graham, for Plaintiff and Appellant.

Murchison & Cumming, Lisa D. Angelo and Nancy N. Potter, for Defendants and Respondents.

INTRODUCTION

Defendants and respondents Brown and Brown of Sacramento, Inc. dba Powers and Company Insurance Agents and Brokers (Brown and Brown) and Steven Michael Decristofaro (collectively, defendants) contend the trial court properly granted their motion for summary judgment because, with the five-year deadline looming, they presented evidence demonstrating plaintiff and appellant William Thomas Porter (plaintiff) could not provide the testimony of a purportedly indispensable witness – Manuel Uribe, the assignor of plaintiff's claims. Defendants argue their evidence shifted the burden to plaintiff to raise a triable issue of fact, which he failed to do. Defendants also contend the judgment should be affirmed because plaintiff's action is time-barred.

We reverse. Even assuming plaintiff cannot present Uribe's testimony at trial, defendants did not carry their initial summary judgment burden. Viewing the evidence in the light most favorable to plaintiff, we conclude a reasonable jury could find that plaintiff asked defendants, and defendants agreed, to "renew" Uribe's existing policy by procuring a new policy with the same or substantially similar coverage, but defendants instead obtained a policy for Uribe which contained a new exclusion that barred coverage for the loss Uribe subsequently suffered.

Likewise, we conclude defendants failed to carry their initial summary judgment burden of showing Uribe suffered an actual injury that triggered the running of the two-year limitations period when his default was taken in February 2009. Instead, the limitations period began to run when default

judgment was entered against Uribe in July 2010, less than two years before plaintiff filed this action as Uribe's assignee.

FACTUAL BACKGROUND[1]

A. Brown and Brown procures a "renewal" policy for Uribe's plumbing contractor business.

Over a period of several years Manuel Uribe, a plumbing contractor, purchased general liability insurance policies for his business using the brokerage services of Brown and Brown.[2] Initially Uribe purchased a policy procured by Brown and Brown that was issued by Lincoln General Insurance Company (Lincoln) for the policy period of May 31, 2003 to May 31, 2004. The policy excluded coverage for work on condominiums, apartments and townhouses involving more than 15 units. Uribe purchased a renewal policy with the same exclusion for the policy year May 31, 2004 to May 31, 2005 (2004-2005 policy).

In February 2005, Brown and Brown sent Uribe a letter, labeled "**IMPORTANT – RENEWAL NOTICE,**" with instructions to provide specified information that Brown and Brown needed to arrange renewal of Uribe's 2004-2005 policy. (Original bold and underlining.) The letter referenced "General

---

[1] Because this case comes before us after the trial court granted a motion for summary judgment, we take the facts from the record that was before the trial court when it ruled on the motion. (See *Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 716-717.)

[2] Brown and Brown was formerly known as Powers & Company Insurance Agents and Brokers.

Liability policy renewing on 05/31/2005" and listed Uribe's policy number. It stated that Brown and Brown "specializes in contractors' insurance . . . ."

A "Renewal Supplemental" form attached to the letter asked Uribe to "List current projects underway or planned for the next year . . . ." Uribe provided the information requested and listed his upcoming work on the "Westmoreland" project.

Steve Decristofaro worked as a producer in the sales department of Brown and Brown. Uribe was one of Decristofaro's clients. Descristofaro was responsible for handling Uribe's request for coverage and getting him a "renewal quote." At his deposition, Decristofaro testified he should have asked Uribe about the Westmoreland project. He said if Uribe had told him the Westmoreland project was a mixed-use, commercial/residential project, Decristofaro would have remarketed the account by calling an underwriter to see if the new exposure was something the underwriter could accept, and if he had found a carrier that would accept that exposure, he would have submitted an application and requested a quote.

After Brown and Brown received Uribe's response to its February 2005 letter, it sent Uribe a supplemental questionnaire for Uribe's signature. One of the questions asked: "Any new construction, including warranty repair work for the builder, of condominiums, townhomes, apartments or tract homes performed by the applicant, or any conversion to residential or commercial condominiums?" The box next to the question was checked no. Uribe signed and returned the form.

With Uribe's paperwork completed, Brown and Brown obtained a "'renewal'" policy from Lincoln for the policy year May 31, 2005 to May 31, 2006 (2005-2006 policy). The policy

continued to exclude coverage for condominiums, townhouses or apartments with more than 15 units.

In addition, however, the 2005-2006 policy contained an endorsement which had not been included in Uribe's previous policies. At the top of the page, the endorsement stated: "**THIS ENDORSEMENT CHANGES THE POLICY – PLEASE READ IT CAREFULLY**." (Original bold and underlining.) The endorsement, titled "EXCLUSION – NEW CONSTRUCTION OF CONDOMINIUM, TOWNHOUSE, APARTMENT, OR MULTIPLE USE RESIDENTIAL/COMMERCIAL BUILDINGS," provided in part: "This exclusion . . . applies to any project which converts all or any part of an existing structure into a 'condominium, townhouse, apartment, or multiple use residential/commercial building project.'" There is no evidence that Uribe asked to have this exclusion included in his policy.

On May 24, 2005, Descristofaro confirmed the issuance of the "renewal" policy, and the policy described itself as a "RENEWAL OF" the 2004-2005 policy. Uribe was invoiced and paid for his 2005-2006 "General Renewal" policy.

Descristofaro does not recall ever telling Uribe that he could or would procure an insurance policy which was the same as or substantially similar to the 2004-2005 policy. Decristofaro's custom and practice in 2005 was that he would not tell any client whether the client's insurance policy would cover a particular type of work.

B. Plaintiff brings suit for injuries sustained while working for Uribe on a construction project.

On March 26, 2006, plaintiff, while working for Uribe, was injured while working on the Westmoreland construction project in Hollywood. The project involved the conversion of an existing building into a mixed use commercial/residential structure.

On March 4, 2008, plaintiff brought a personal injury action against the developer and general contractor of the Westmoreland project (collectively, Creative).

Creative brought an indemnity cross-complaint against Uribe, the project's plumbing subcontractor. In its September 2, 2008 amended cross-complaint, Creative "den[ied] that [it was] liable to Plaintiff or anyone else for any of the damages claimed" in plaintiff's complaint. Creative "allege[d] that there was negligence on the part of Plaintiff in causing the injury to himself, and also that there is a bar to recovery from [Creative] since Plaintiff assumed the risk of doing work at the construction site." "In the event that [Creative was] found to be liable to Plaintiff . . . , which [Creative has] denied or continue[d] to deny, then [Creative] allege[d] that [Uribe] should be liable for those damages . . . ."

C. The insurer declines to defend Uribe, who assigns his claims to plaintiff.

Uribe tendered his defense to Lincoln under his insurance policy. On December 10, 2008, Lincoln denied Uribe a defense based on the 2005-2006 policy's exclusionary endorsement.

On February 24, 2009, Creative took Uribe's default on the cross-complaint. On July 19, 2010, default judgment for $735,103.92 was entered against Uribe on the cross-complaint. Uribe assigned to plaintiff his claims, if any, against defendants.

PROCEDURAL BACKGROUND

On July 9, 2012, plaintiff, as Uribe's assignee, filed a complaint against Lincoln and defendants. Plaintiff asserted claims against Lincoln under Insurance Code section 11580 and for reformation of the policy based on fraud and unilateral mistake. Plaintiff asserted a declaratory relief claim against Lincoln and defendants concerning the existence of coverage under the 2005-2006 policy for plaintiff's injuries.

Plaintiff also asserted claims for negligent failure to procure requested coverage,[3] negligent representation, [4] and breach of fiduciary duty[5] against defendants and Lincoln.

---

[3] Plaintiff's claim for negligent failure to procure requested coverage alleged in part: For a period of years, on a regular annual basis, Uribe had defendants procure renewals of his Lincoln policy. In May 2005, defendants agreed to secure a renewal of Uribe's existing policy on the same terms and conditions as his existing policy. However, the policy that defendants obtained from Lincoln did not provide the same coverage as Uribe's previous policy. Instead, it provided Uribe no coverage for his plumbing business. As a result, Uribe had no coverage for claims which would have been covered but for defendants' failure to procure the coverage they had promised to provide.

[4] Plaintiff's claim for negligent representation alleged in part: For a period of years, on a regular annual basis, Uribe had

defendants procure renewals of his Lincoln policy. In May 2005, defendants represented to Uribe that they would procure replacement coverage for Uribe for the renewal policy on the same terms and conditions as his existing policy. Uribe relied on that representation in paying for the renewal policy. However, the policy that defendants obtained from Lincoln did not provide the same coverage as Uribe's previous policy. Instead, it provided Uribe no coverage for his plumbing business. As a result, Uribe had no coverage for claims which would have been covered but for defendants' failure to procure the coverage they had promised to provide. Uribe did not discover defendants' misrepresentations until a date within 3 years of the filing of this action.

[5] Plaintiff's breach of fiduciary duty claim alleged in part: For a period of several years, defendants held themselves out as experts in the field of insurance and cultivated Uribe's trust and reliance. Defendants came to understand the nature of Uribe's plumbing business and Uribe's need for sufficient liability insurance protection. Defendants also knew Uribe was an unsophisticated insurance consumer who relied on their expertise in recommending and procuring insurance. On a regular annual basis, Uribe had defendants procure renewals of his Lincoln policy. In May 2005, defendants represented to Uribe that they would secure replacement coverage for Uribe for the renewal policy on terms which were at least as broad as the expiring policy and would alert him to any change or limitation of coverage. Uribe relied on that representation in paying for the renewal policy. However, the policy that defendants obtained from Lincoln did not provide the same coverage as Uribe's previous policy. Instead, it provided Uribe no coverage for his plumbing business. As a result, Uribe had no coverage for claims which would have been covered but for defendants' failure to procure the coverage they had promised to provide. Defendants concealed the fact that the renewal policy's coverage was substantially more restrictive than the previous policy's coverage.

In November 2012, defendants filed a demurrer. Plaintiff opposed the demurrer and the trial court overruled it. Defendants then filed an answer.

In 2013, defendants filed a motion for summary judgment or, in the alternative, summary adjudication of issues (the 2013 motion). Lincoln also filed a motion for summary judgment or adjudication.[6] Defendants asserted: (1) plaintiff's claims were time-barred; (2) defendants fulfilled their duty to procure the coverage Uribe requested and had no legal duty to procure more insurance beyond what Uribe requested; as a result, there were no triable issues of material fact concerning plaintiff's claims for declaratory relief, negligent failure to procure requested coverage, negligent representation, and breach of fiduciary duty; and (3) defendants cannot be liable because Lincoln improperly denied coverage and a defense. Plaintiff opposed the motion.

On November 18, 2014, the trial court granted Lincoln's motion but denied defendants' motion, finding, among other things, the statute of limitations did not bar the action and "[t]here are disputes as to whether the brokers failed to obtain a renewal policy as requested . . . ." Plaintiff appealed the summary judgment entered in favor of Lincoln. This court stayed the appeal because Lincoln was in liquidation proceedings.[7] (*Porter v. Decristofaro et al.*, Case No. B263445.)

Uribe did not discover these misrepresentations until a date within 3 years of the filing of this action.

[6] Lincoln's motion and related filings are not included in the record on appeal.

[7] On August 1, 2018, we ordered that the stay would remain in effect and we directed the parties to provide a status report no

In March 2015, plaintiff filed a request for a trial date or, in the alternative, a case management conference. In December 2016, plaintiff applied ex parte for an order setting the case for trial or, in the alternative, for a case management conference to set a trial date to avoid dismissal under the five-year rule. The trial court did not hold a hearing on the ex parte application or issue an order.

On January 4, 2017, plaintiff filed a motion to set the case for trial within the next 120 days. The motion noted that July 10, 2017 would mark five years since the case was filed. Defendants opposed the motion.

On February 1, the trial court granted plaintiff's motion and set the trial for June 8, 2017.

On February 16, defendants filed a motion for summary adjudication (the 2017 motion).[8] The motion asserted defendants were not liable to plaintiff, and would not have been liable to Uribe, "for failure to procure the requested insurance coverage," for negligent misrepresentation, or for breach of fiduciary duty. Defendants denied they were renewing any of the arguments raised in their 2013 motion; instead, they argued, their motion was "based on the fact that now, over two years after the [2013 motion] was heard, and less than six months before the five-year rule will run, Plaintiff has no facts which show or suggest that (1) . . . defendants failed to procure the insurance coverage which

---

later than December 18, 2018. (*Porter v. Decristofaro et al.*, Case No. B263445.)

[8] Although the caption described the motion as one for "Summary Adjudication of Issues," the document's footer described it as a "Motion for Summary Judgment or in the Alternative Summary Adjudication of Issues."

Uribe requested; (2) . . . defendants misrepresented any term, condition or exclusion of the insurance coverage; or (3). . . defendants breached any fiduciary duty owed to Uribe." (Emphasis omitted.)

In their motion, defendants argued Uribe's testimony was necessary to prove: (1) "[Uribe] asked for certain coverage or, specifically, asked that the 2005-06 policy be the same or substantially the same as the 2004-05 policy"; (2) "DeCristofaro or [someone] else at Brown & Brown made misrepresentations to Uribe on which Uribe relied"; and (3) "Uribe relied on Brown & Brown to advise him of his insurance needs." Defendants asserted plaintiff did not possess, and could not reasonably obtain, Uribe's testimony on these points.

In their separate statement of undisputed facts, defendants asserted: "There is no evidence that Uribe reasonably relied on any representations made to him by DeCristofaro [or anyone else employed at Brown & Brown] in 2005." They also argued: "There is no evidence that Brown & Brown cultivated the trust and reliance of Uribe to take care of his insurance needs." To support these assertions, defendants cited evidence that Uribe failed to appear at his deposition and defense counsel's declaration stating: (1) Brown and Brown's file for Uribe's account contained no record of any oral or written communication from Uribe asking that his 2005-2006 policy be the same or substantially the same as his 2004-2005 policy and (2) Uribe did not respond to defense counsel's many attempts to contact him, including 3 letters and about 30 phone calls.

Plaintiff opposed defendants' motion. He argued the motion was essentially the same as defendants' 2013 motion and was barred by Code of Civil Procedure section 437c, subdivision

(f)(2), which prohibits summary judgment motions based on issues asserted in a prior motion for summary adjudication which a court has denied, unless the court finds that newly discovered facts or circumstances or a change of law support the issues reasserted in the summary judgment motion. (Code Civ. Proc., § 437c, subd. (f)(2).) In addition, plaintiff argued defendants failed to carry their summary judgment burden of presenting evidence to show the nonexistence of a material fact issue concerning plaintiff's claims. Plaintiff also filed written objections to defendants' supporting evidence.

In their reply, defendants argued their motion was "not a repeat" of the 2013 motion. They asserted: "While the evidence in the case is the same, that is because in the intervening 2-1/2 years, Plaintiff has not developed the evidence which he will need to prove his case at trial" – namely, Uribe's testimony. Defendants also argued: "[T]here is no evidence that Uribe asked that his 2005-06 policy be identical to his 2004-05 policy. The forms he filled out were not labeled as 'renewal' applications . . . ."

After a hearing, the trial court granted defendants' motion. The court ruled: (1) "As for the moving burden, the Court concludes that the proof sufficiently shows that the custom and practice, here, would not have included any insurance agent conduct or communication supporting a duty to notify of the renewal policy change"; (2) "As for the opposing burden, the Court determines that there are no triable issues of material fact, including as to whether defendants owed any duty to issue a different renewal policy or to disclose differences"; (3) "Specifically, a review of all of the opposing evidence reveals that it is immaterial as to duty, including because of the complete lack

of evidence of ([a]) any agent representations or ([b]) holding out of obligations or expertise, or ([c]) any insured request for different coverage." The court also found defendants satisfied the requirements for filing a renewed summary judgment motion under Code of Civil Procedure section 437c, subdivision (f)(2). The court overruled plaintiff's evidentiary objections which it "deemed material to the disposition."

On June 23, 2017, the court entered judgment in favor of defendants. Plaintiff filed a timely notice of appeal.

STANDARD OF REVIEW

"'We review orders granting summary judgment or summary adjudication de novo. . . .'" (*Taswell v. Regents of University of California* (2018) 23 Cal.App.5th 343, 350.)

"[T]he pleadings determine the scope of relevant issues on a summary judgment motion." (*Nieto v. Blue Shield of California Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 74 (*Nieto*).) "'On review of an order granting or denying summary judgment, we examine the facts presented to the trial court and determine their effect as a matter of law.' [Citation.] We review the entire record, 'considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained.'" (*Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607, 618.)

On appeal from an order granting summary judgment, "a reviewing court must examine the evidence de novo and *should draw reasonable inferences* in favor of the nonmoving party." (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 470, original emphasis.) "In performing our de novo review, we view

the evidence in the light most favorable to plaintiff as the losing party. [Citation.] . . . [W]e liberally construe plaintiff's evidentiary submissions and strictly scrutinize defendant's own evidence, in order to resolve any evidentiary doubts or ambiguities in plaintiff's favor. [Citation.]" (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 64.)

DISCUSSION

I. The trial court did not abuse its discretion by allowing defendants to seek reconsideration of the issues raised in their 2013 motion.

Code of Civil Procedure section 437c, subdivision (f)(2), provides: "A party shall not move for summary judgment based on issues asserted in a prior motion for summary adjudication and denied by the court unless that party establishes, to the satisfaction of the court, newly discovered facts or circumstances or a change of law supporting the issues reasserted in the summary judgment motion." (Code Civ. Proc., § 437c, subd. (f)(2).)

The Legislature added this provision in 1990 "'to make the summary judgment process more efficient and to reduce the opportunities for abuse of the procedure.'" (*Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1098.)

"In contrast to our independent review of the summary judgment motion itself, we review a trial court's decision to allow a party to file a renewed or subsequent motion for summary judgment for abuse of discretion." (*Nieto*, *supra*, 181 Cal.App.4th at p. 72.)

As noted, in granting defendants' 2017 motion, the trial court ruled that defendants satisfied the statutory conditions for filing a renewed motion for summary judgment. The court stated: "[T]he moving parties' proof, including the declarations attached to the motion, sufficiently shows new circumstances justifying reconsideration, including additional discovery efforts, yielding no additional proof in support of any duty, since the time of the additional motion, thus presently inferring that Plaintiff cannot establish an essential element of the claims." The court agreed with plaintiff that the 2017 motion was "based on issues asserted in a prior motion for summary adjudication and denied by the court . . . ." (Code Civ. Proc., § 437c, subd. (f)(2).) The court found, nonetheless, that "newly discovered facts or circumstances . . . support[ed] the issues reasserted in the [2017 motion]." (Code Civ. Proc., § 437c, subd. (f)(2).)

"Although precise definition is difficult, it is generally accepted that the appropriate test of abuse of discretion is whether or not the trial court exceeded the bounds of reason, all of the circumstances before it being considered. [Citations.] . . . [W]hen two or more inferences can reasonably be deduced from the facts, a reviewing court lacks power to substitute its deductions for those of the trial court." (*In re Marriage of Connolly* (1979) 23 Cal.3d 590, 598.)

We cannot say the trial court exceeded the bounds of reason in concluding defendants' evidence showing Uribe failed to attend his deposition and did not respond to defense counsel's letters and phone calls constituted newly discovered facts or circumstances allowing defendants to renew their prior motion for summary judgment or adjudication. Therefore, we hold the

trial court acted within its discretion in considering the 2017 motion.

II. The trial court erred in granting defendants' motion for summary judgment.

A. Summary judgment standard.

Summary judgment is appropriate when all the papers submitted show there is no triable issue of material fact and the moving party is entitled to a judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment has the initial burden of showing, with respect to each cause of action in the complaint, the cause of action is without merit. A defendant meets that burden by showing one or more elements of the cause of action cannot be established, or there is a complete defense to the claim. (Code Civ. Proc., § 437c, subd. (p)(2).) If the defendant makes the required showing, the burden shifts to the plaintiff to produce evidence demonstrating the existence of a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2).)

The defendant may show the plaintiff cannot establish an element of a cause of action by presenting evidence to show that the plaintiff does not possess, and cannot reasonably obtain, needed evidence. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854 (*Aguilar*); see *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 576, 592-593 [defendant carried its initial summary judgment burden by presenting evidence, in the form of plaintiffs' "factually devoid interrogatory answers," that plaintiffs did not possess, and could not reasonably obtain,

needed evidence].) Alternatively, the defendant may attempt to disprove an essential element of the plaintiff's cause of action. (*Leyva v. Garcia* (2018) 20 Cal.App.5th 1095, 1103; *Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1598.)

But "summary judgment cannot be granted when the facts are susceptible to more than one reasonable inference . . . ." (*Husman v. Toyota Motor Credit Corp.* (2017) 12 Cal.App.5th 1168, 1180; accord, *Rosas v. BASF Corp.* (2015) 236 Cal.App.4th 1378, 1392; see *Aguilar*, *supra*, 25 Cal.4th at p. 856 [the court may not grant a defendant's motion for summary judgment "'based on inferences . . . [that are] contradicted by other inferences or evidence, which raise a triable issue as to any material fact'"]; Code Civ. Proc., § 437c, subd. (c).)

B. Duties of insurance brokers and agents.

An insurance agent or broker has an obligation to use reasonable care, diligence, and judgment in procuring the insurance requested by an insured. (*Jones v. Grewe* (1987) 189 Cal.App.3d 950, 954; see *Travelers Property Casualty Co. of America v. Superior Court* (2013) 215 Cal.App.4th 561, 578 (*Travelers*).) "The law is well established in California that an agent's failure to deliver the agreed-upon coverage may constitute actionable negligence and the proximate cause of an injury." (*Butcher v. Truck Ins. Exchange* (2000) 77 Cal.App.4th 1442, 1461 [citing cases].)

An agent or broker may acquire expanded duties if "(a) the agent misrepresents the nature, extent, or scope of the coverage being offered or provided . . . , (b) there is a request or inquiry by the insured for a particular type or extent of coverage . . . , or (c)

the agent . . . 'hold[s] himself out' as having expertise in a given field of insurance being sought by the insured . . . ." (*Travelers*, *supra*, 215 Cal.App.4th at p. 578, internal quotation marks omitted.) "The agent who assumes additional duties . . . by holding himself out as having expertise in the insurance being sought by the insured . . . may be liable to the insured for losses which resulted [from] a breach of that special duty." (*Id*. at pp. 578-579, internal quotation marks omitted.)

"Absent some notice or warning, an insured should be able to rely on an agent's representations of coverage without independently verifying the accuracy of those representations by examining the relevant policy provisions. This is particularly true in view of the understandable reluctance of an insured to commence a study of the policy terms where even the courts have recognized that few if any terms of an insurance policy can be clearly and completely understood by persons untrained in insurance law." (*Clement v. Smith* (1993) 16 Cal.App.4th 39, 45 (*Clement*).)

C. Uribe's lack of participation in the case does not justify summary judgment against plaintiff.

Defendants argue the trial court properly granted summary judgment because plaintiff cannot prove the elements of his claims without Uribe's testimony, and Uribe is not making himself available.[9] Specifically, defendants contend plaintiff

---

[9] As Uribe's assignee, plaintiff is generally subject to defenses which could have been asserted against Uribe. (See *Salaman v. Bolt* (1977) 74 Cal.App.3d 907, 919.)

cannot prevail on any of his claims unless Uribe testifies that: (1) he asked defendants to provide insurance coverage which they did not deliver, and (2) defendants "told him something untrue, which prevented him from getting the coverage he needed."

Even assuming plaintiff cannot present Uribe's testimony at trial, defendants did not carry their initial summary judgment burden because the record contains evidence from which a jury could draw reasonable inferences supporting a verdict for plaintiff. As noted, the record shows that in February 2005, Brown and Brown sent Uribe a letter, labeled "**IMPORTANT – RENEWAL NOTICE,**" to arrange renewal of Uribe's 2004-2005 policy. (Original bold and underlining.) The letter referenced "General Liability policy renewing on 05/31/2005" and listed Uribe's policy number. It stated that Brown and Brown "specializes in contractors' insurance . . . ."

A "Renewal Supplemental" form attached to the letter asked Uribe to "List current projects underway or planned for the next year . . . ." Uribe listed his upcoming work on the "Westmoreland" project.

Decristofaro was responsible for handling Uribe's request for coverage and getting him a "renewal quote." At his deposition, Decristofaro testified he should have asked Uribe about the Westmoreland project. He said if Uribe had told him the Westmoreland project was a mixed-use, commercial/residential project, Decristofaro would have remarketed the account by calling an underwriter to see if the new exposure was something the underwriter could accept, and if he had found a carrier that would accept that exposure, he would have submitted an application and requested a quote.

When Uribe's paperwork was completed, Brown and Brown obtained a "'renewal'" policy from Lincoln for the policy year May 31, 2005 to May 31, 2006. Descristofaro confirmed the issuance of the "renewal" policy, and the policy described itself as a "RENEWAL OF" the 2004-2005 policy. Uribe was invoiced and paid for his 2005-2006 "General Renewal" policy.

But the 2005-2006 policy contained an exclusion which had not been part of Uribe's previous policies. At the top of the page, the endorsement stated: "**THIS ENDORSEMENT CHANGES THE POLICY – PLEASE READ IT CAREFULLY**." (Original bold and underlining.) The endorsement, titled "EXCLUSION – NEW CONSTRUCTION OF CONDOMINIUM, TOWNHOUSE, APARTMENT, OR MULTIPLE USE RESIDENTIAL/COMMERCIAL BUILDINGS," provided in part: "This exclusion . . . applies to any project which converts all or any part of an existing structure into a 'condominium, townhouse, apartment, or multiple use residential/commercial building project.'" There is no evidence that Uribe asked to have this exclusion included in his policy.

Drawing inferences from this evidence in favor of plaintiff, we conclude a reasonable jury could find that: (1) defendants offered to "renew" Uribe's 2004-2005 policy by procuring a new policy with the same or substantially similar coverage[10]; (2) Uribe accepted the offer, and asked defendants to obtain a "renewal" of

---

[10] See *Borders v. Great Falls Yosemite Ins. Co.* (1977) 72 Cal.App.3d 86, 94-95 (renewal of an insurance policy means making the same coverage available on the same terms for an additional period); cf. *Clement*, *supra*, 16 Cal.App.4th at p. 46 ("In the absence of later disclosures an insured can reasonably rely on prior coverage representations by his agent when he or she decides to renew an insurance policy").

his 2004-2005 policy with the same or substantially similar coverage, by signing and returning the "renewal" paperwork defendants sent him; (3) defendants misrepresented the 2005-2006 policy to Uribe as the "renewal" policy he had requested even though it contained an exclusion not contained in the 2004-2005 policy; (4) defendants did not advise Uribe of the existence of the new exclusion; (5) Uribe reasonably relied on defendants' misrepresentation or failure to disclose in accepting and paying for the 2005-2006 policy; and (6) by sending Uribe a form stating that Brown and Brown "specializes in contractors' insurance," defendants held themselves out as experts in the kind of insurance Uribe sought, giving defendants expanded duties and exposure to "liab[ility] to the insured for losses which resulted [from] a breach of that special duty." (*Travelers*, *supra*, 215 Cal.App.4th at p. 578.)

Uribe's testimony is not essential for any of these findings. Therefore, defendants did not carry their initial summary judgment burden by presenting evidence that Uribe has not made himself available to counsel.[11]

D. Defendants did not carry their initial summary judgment burden of showing the statute of limitations bars plaintiff's claims.

Defendants ask us to affirm the judgment by reversing the trial court's 2014 ruling (on defendants' 2013 motion) that the statute of limitations does not bar the action. As a general rule, a respondent who has not appealed from the judgment may not urge error on appeal. (*Estate of Powell* (2000) 83 Cal.App.4th

---

[11] In light of our conclusion, we do not address plaintiff's other assertions of error.

1434, 1439.) Code of Civil Procedure section 906 provides a limited exception "'to allow a respondent to assert a legal theory which may result in affirmance of the judgment.'" (*Ibid*.)

Because the relevant facts are not in dispute, the application of the statute of limitations may be decided as a question of law. (*Lederer v. Gursey Schneider LLP* (2018) 22 Cal.App.5th 508, 521 (*Lederer*).)

The parties agree that plaintiff had two years from accrual of his claims to file suit against defendants. (Code Civ. Proc., § 339.) "Generally speaking, a cause of action accrues at the time when the cause of action is complete with all of its elements." (*Lederer*, *supra*, 22 Cal.App.5th at p. 521, internal quotation marks omitted.) "Thus, '[t]he statute begins to run when (1) the aggrieved party discovers the negligent conduct causing the loss or damage and (2) the aggrieved party has suffered actual injury as a result of the negligent conduct.'" (*Ibid*.; see *Hydro-Mill Co., Inc. v. Hayward, Tilton & Rolapp Ins. Associates, Inc.* (2004) 115 Cal.App.4th 1145, 1160.)

Defendants argue, and we agree, that plaintiff discovered defendants' allegedly negligent conduct when Lincoln denied coverage on December 10, 2008.

But we do not agree that defendants have met their initial summary judgment burden of showing plaintiff suffered actual injury more than two years before he filed suit. (See *Lederer*, *supra*, 22 Cal.App.5th at p. 521 [although plaintiffs discovered shortly after accident that defendant failed to secure insurance coverage plaintiffs requested, case did not turn on delayed discovery doctrine; instead, question was when plaintiffs incurred actual injury].)

Defendants argue plaintiff's claims accrued no later than February 24, 2009, when Creative took Uribe's default because he did not file an answer to the indemnity cross-complaint. At that point, defendants contend, "damage was certain, even if the amount had not yet been determined." Defendants assert the damage Uribe suffered as a result of the default triggered the running of the limitations period, making plaintiff's complaint filed on July 9, 2012 – more than two years later – untimely.

Plaintiff argues his action is timely because his claims did not accrue until default judgment for $735,103.92 was entered against Uribe on July 19, 2010. According to plaintiff, that is when "Uribe in fact suffered actual and certain damage . . . ."

The trial court denied defendants' motion for summary judgment, ruling defendants "have not shifted the burden as to the two-year Statute of Limitations, because the accrual date evident is the date of the judgment . . . ."

To support its ruling, the court cited *Williams v. Hilb, Rogal & Hobbs Ins. Services of California, Inc.* (2009) 177 Cal.App.4th 624 (*Williams*). In *Williams*, a company bought an insurance package that its insurance agency specifically designed for the company. After a worker was injured in a workplace fire, the company's owners discovered that the insurance package included a $1 million general commercial liability policy, but did not include any workers' compensation insurance. The employee sued the company, and a jury found the company liable. (Id. at pp. 628-630.) The company then sued the insurance agency, which asserted the statute of limitations barred the action. The insurance agency argued the two-year limitations period began to run when the employee was injured, because that is when the company incurred liability to the employee that was

"inescapable" and only the amount, rather than the fact, of liability remained to be determined. (*Id*. at p. 641.)

Rejecting the agency's argument, the Court of Appeal stated that although the company knew of potential liability when the employee was injured, "no actual injury occurred until judgment was entered" against the company that exceeded the limits of the general liability policy. (*Williams*, *supra*, 177 Cal.App.4th at pp. 641-642.) "Until judgment was entered against [the company] in excess of that amount, other litigation results were possible: a settlement or verdict under the $1 million policy limit, greater comparative liability on codefendant Rhino USA, or a defense verdict. Thus until the judgment was entered, [the company] sustained no appreciable harm from the lack of workers' compensation insurance coverage." (*Id*. at p. 642.)

Similarly here, defendants failed to present evidence in the summary judgment proceedings showing that, *when Creative took Uribe's default on February 24, 2009*, a judgment or other resolution had been reached in plaintiff's underlying personal injury case against Creative that required Uribe to indemnify Creative.[12] Instead, the record contained Creative's indemnity cross-complaint, in which Creative "den[ied] that [it was] liable to Plaintiff or anyone else for any of the damages claimed" in plaintiff's complaint and "allege[d] that there was negligence on

---

[12] The record on appeal contains a May 1, 2012 declaration by plaintiff's counsel stating: "As part of the settlement which [plaintiff] reached with [Creative], the rights of [Creative] against Uribe were assigned to [plaintiff]." Counsel cited a May 2012 assignment of claims from Creative to plaintiff to support his declaration. Neither the declaration nor the assignment supports a conclusion that Uribe suffered actual injury when his default was taken on February 24, 2009.

the part of Plaintiff in causing the injury to himself, and also that there is a bar to recovery from [Creative] since Plaintiff assumed the risk of doing work at the construction site." Thus, the trial court had no evidence showing that, at the time of Uribe's February 24, 2009 default, a resolution of plaintiff's personal injury case against Creative triggered Uribe's obligation to indemnify Creative. Construing the evidence in the light most favorable to plaintiff, we conclude that when Creative took Uribe's default, "other litigation results were possible," including a defense verdict for Creative and no indemnity obligation for Uribe.

Therefore, based on the summary judgment record, it was not until July 19, 2010, when default judgment for $735,103.92 was entered against Uribe on the indemnity cross-complaint, that Uribe suffered actual injury as a result of defendants' allegedly negligent conduct. (*Lederer*, *supra*, 22 Cal.App.5th at p. 521.) Plaintiff filed his complaint within two years, on July 9, 2012. Accordingly, the trial court properly denied defendants' 2013 motion for summary judgment based on the statute of limitations.

DISPOSITION

The judgment is reversed. Plaintiff is to recover his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

JASKOL, J.*

We concur:

BAKER, Acting P. J.

MOOR, J.

---

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