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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

TOMASA MUNOZ,

Plaintiff and Appellant,

v.

STATE FARM GENERAL
INSURANCE COMPANY,

Defendant and Respondent.

B279830

(Los Angeles County
Super. Ct. No. VC064574)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lori Ann Fournier, Judge. Affirmed.

Law Offices of Kenneth M. Stern, Kenneth M. Stern, for Plaintiff and Appellant.

Pacific Law Partners, Michael J. McGuire, Anne M. Master, and Matthew Batezel for Defendant and Respondent.

INTRODUCTION

The trial court granted summary judgment for an insurer that denied a claim during the pendency of the insured's lawsuit for breach of contract and of the duty of good faith and fair dealing based on the insured's declining to participate in a second examination under oath. The insured appeals. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Tomasa Munoz insured her vacant commercial property in Bellflower through State Farm General Insurance Company (State Farm, defendant). In the event of loss, one condition of coverage was that the insured, "if requested, permit [State Farm] to question you under oath at such times as may be reasonably required about any matter relating to this insurance of your claim, including your books and records." The policy also provided: "No one may bring legal action against us under this insurance unless: [¶] a. there has been full compliance with all of the terms of this insurance"

A September 22, 2013 fire damaged plaintiff's property. Plaintiff had owned the property for almost five months at that point, and her son, Usbaldo Munoz, an erstwhile general contractor, was renovating it. There were three units in the building. Plaintiff intended to open her own barbershop in one and lease the other two spaces. Plaintiff promptly reported the loss and submitted a claim. Defendant retained Advanced Analysis to determine the origin and cause of the fire.

On October 11, 2013, Advanced Analysis Fire Inspector Dan Bonelli issued a fire investigation report. He concluded "it was highly likely that the fire was contributed to by an unknown individual." Information obtained during his investigation

suggested “the fire was suspicious in nature and potentially incendiary.” The Los Angeles County Sheriff’s fire investigation unit concurred to the extent the investigator determined the fire was “likely caused due to human occupancy (possible squatters).”

On October 15, 2013, defendant reassigned the claim to its Special Investigation Unit.

On November 6, 2013, defendant took recorded statements from plaintiff and Munoz. Plaintiff designated Munoz as her representative for making the insurance claim “as she had little understanding of the location or property or construction, and [did] not speak or write English well.” Munoz advised he was alone on a Carnival cruise in Mexican waters at the time of the fire and unable to use his cell phone while on the ship. He learned of the fire when he used the ship’s phone to retrieve messages.

In January 2014, defendant requested plaintiff’s examination under oath (EUO) and Munoz’s statement under oath (SUO). It also asked plaintiff to produce certain documents. Also in January, Bonelli issued his final origin and cause report. He concluded the probable cause of the fire was “incendiary” and detailed evidence that “may have suggested the involvement of Plaintiff or her representatives in the ignition of the fire.”

Plaintiff’s EUO and Munoz’s SUO took place on March 26, 2014. At her EUO, plaintiff reiterated her son was “responsible for everything” with respect to the property and she had given him “total authority to do or take any decisions regarding any business related to [her].” She authorized Munoz to make the

fire loss claim. At his SUO, Munoz said he did not have cell phone reception during his cruise.¹

After the SUO, State Farm asked Munoz to provide additional documents concerning the condition of the building at the time of the fire, the status of the renovations, the number and types of complaints about squatters in the building, and the anticipated lease with a restaurant tenant, “James.” In April 14, 2014, at defendant’s request, Munoz signed an authorization to permit defendant to access his cell phone records. Defendant received Munoz’s cell phone records in August 2014. The call logs showed Munoz’s cell phone was used while Munoz was on the cruise.

Over the next nine months, State Farm communicated regularly with plaintiff and Munoz. The insurer sought additional information and documentation to support—as well as to fill some gaps in—Munoz’s SUO testimony. Munoz responded that some of the documentation did not exist or had been lost. Determining it needed a supplemental EUO and SUO to document Munoz’s responses under oath, State Farm sent plaintiff a letter on January 8, 2015, advising her a second EUO and SUO were necessary.

Within days, an attorney representing the insured contacted State Farm to advise of his representation. State Farm renewed its request for a supplemental EUO and SUO in a letter to counsel.

¹ Several years later, in his declaration in opposition to defendant’s summary judgment motion, Munoz’s position was even stronger: “There was no signal whatsoever the entire weekend and I did not use my cell phone that entire weekend.”

Plaintiff filed this complaint against defendant on January 30, 2015. On February 10, 2015, defendant sent a letter to plaintiff's attorney unilaterally scheduling plaintiff's EUO and Munoz's SUO for February 25, 2015. Plaintiff's attorney responded on February 23, 2015, that due to the pending litigation, he would prefer to have plaintiff and Munoz submit to depositions. Neither plaintiff nor Munoz appeared for their respective examinations on February 25, 2015.

On March 6, March 27, and April 17, 2015, defendant sent letters to plaintiff in care of her attorney. The letters requested plaintiff and Munoz reconsider their positions and appear for the requested supplemental EUO and SUO.

On May 1, 2015, defendant denied plaintiff's claim for the fire loss. The denial was based on the failure of plaintiff and Munoz to submit to a supplemental EUO and SUO, respectively, and to provide requested documents and other supporting information.

After the denial of the fire loss claim, plaintiff filed a first amended complaint asserting causes of action for breach of contract, breach of the duty of good faith and fair dealing, and fraud. Plaintiff also sought punitive damages. Defendant's demurrer to the fraud cause of action was sustained without leave to amend.²

Defendant then moved for summary judgment or, in the alternative, summary adjudication. Defendant asserted plaintiff failed to satisfy a condition precedent to coverage, i.e., her submission to a reasonable request for a second EUO and SUO. Without coverage under the policy, as a matter of law plaintiff

² Plaintiff has not challenged that ruling on appeal.

could not prevail on her causes of action for breach of contract and the covenant of good faith and fair dealing. Further, without a basis for general damages, plaintiff could not recover punitive damages. The trial court granted the motion.

DISCUSSION

I. Standard of Review

Our review of a summary judgment is governed by well-established principles. We independently review the trial court's decision; defendant has the burden to demonstrate that plaintiff cannot establish the elements of her causes of action and punitive damages claim; and we liberally construe plaintiff's evidence and resolve any evidentiary doubts in plaintiffs' favor. (See generally, *State of California v. Allstate Ins. Co.* (2009) 45 Cal.4th 1008, 1017-1018.) Summary judgment will be defeated "based on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact." ([Code Civ. Proc.], § 437c, subd. (c).)" (*McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1530, fn. 14.)

II. Analysis

A. Supplemental EUO and SUO

Almost 100 years ago, our Supreme Court recognized that EUO provisions in insurance policies are "universal[]" and require "the insured as often as demanded to submit to an examination under oath touching all matters material to the adjustment of the loss, and provisions of that character are held to be reasonable and valid." (*Hickman v. London Assurance Corp.* (1920) 184 Cal. 524, 530.)

More recently, this court held, “An insured’s compliance with a policy requirement to submit to an examination under oath is a prerequisite to the right to receive benefits under the policy.” (*Brizuela v. CalFarm Ins. Co.* (2004) 116 Cal.App.4th 578, 587 (*Brizuela*).) We reiterated the right to demand an EUO must be exercised reasonably, but the issue of reasonableness may be determined as a matter of law: “The reasonableness of an insurer’s conduct in processing a claim may be a question of fact. But when the evidence is undisputed and only one reasonable inference can be drawn from the evidence, the issue of reasonableness is a question of law.” (*Id.* at p. 588.)

Plaintiff contends a triable issue of fact exists as to the reasonableness of defendant’s requests for a supplemental EUO and SUO. She asserts the trial court simply relied on the policy’s language that required EUO’s without considering whether the request for a supplemental EUO and SUO was reasonable. Succumbing to a bit of exaggeration, plaintiff maintains in her opening brief that she and her son “gave multiple Statements under Oath, Examinations under Oath, and Record Statements, in connection with State Farm’s investigation. Mr. Munoz repeatedly provided every document, in his possession, he could obtain or locate, to State Farm. State Farm acknowledged receipt of the vast majority of the documents requested.” The undisputed facts are that plaintiff and her son each gave one recorded statement; plaintiff sat for one EUO and Munoz for one SUO; and Munoz’s explanations during the investigation period for missing documents were sometimes conflicting but, in any event, not given under oath.

Considering the undisputed facts, we find no triable issues of material fact as to the reasonableness of defendant’s request

for the supplemental examinations of the insured and her designated representative.

Plaintiff's reliance on the Sheriff's Department fire report and defendant's claim file notes do not alter this determination. In the report, a fire arson captain is quoted as stating the fire was likely caused by an occupant but "it was still not certain as to the exact cause." Thus, the captain requested a "routine arson investigation." The claim file notes cited by plaintiff appear to concern a third-party claim by the owner of the neighboring building for damage to his property as a result of the fire set in plaintiff's building. Plaintiff has not suggested how those notes affect the analysis or the existence of any triable issues of material fact.

Neither the fire report nor the claim file notes absolved plaintiff or Munoz of involvement in setting the fire. But the requests for a supplemental EUO and SUO were not based solely on responsibility for causing the fire—defendant also had unanswered questions concerning expenses Munoz incurred both before and after the fire that impacted the value of the claim. Plaintiff offered no evidence in opposition to the summary judgment motion that raised a triable issue of fact as to the reasonableness of defendant's request for a supplemental EUO and SUO.

It was also undisputed that plaintiff and Munoz refused to sit for supplemental examinations. The trial court ruled those refusals were "fatal": "It is not up to the trier of fact, as plaintiff suggests, to determine whether *plaintiff's* conduct was reasonable. The policy requires submission to examination under oath as a condition precedent to any claim being paid." (Italics added.) The trial court's explanation was correct. The issue was

the reasonableness of defendant's request for supplemental information, not the reasonableness of plaintiff's refusal. (*Brizuela, supra*, 116 Cal.App.4th at p. 587.)

B. Insurance Code Section 2071.1³ Notice

Plaintiff contends defendant did not have the right to deny her claim based on her and Munoz's failure to submit to a supplemental EUO and SUO because the supplemental requests failed to comply with the notice requirement in section 2071.1 subdivision (a)(1). We disagree.

That provision requires insurers to include a copy of section 2071.1 in a request for an EUO. Defendant's December 16, 2013 request for plaintiff's first EUO included the statutory notification. The purpose of the notice requirement in section 2071.1 is largely to advise insureds of their rights when an insurer requests an EUO. Defendant's December 16, 2013

³ Undesignated references refer to the Insurance Code. Section 2017.1 sets forth an insured's rights when the "insurer determines it will conduct an examination under oath." (§ 2017, subd. (a)(1).) Those rights include, inter alia, reasonable notice the EUO will be conducted at a reasonably convenient location for a reasonable period of time, representation by counsel, recording the proceeding, and making any objections one could make under state or federal law. The insurer's notice to the insured that an EUO will be conducted must "include a copy of this section in the notification." (*Ibid.*)

request was sufficient to advise plaintiff of her rights as to the initial and any subsequent EUO and SUO.⁴

C. Depositions in Lieu of an EUO and SUO

Relying on section 2071.1, subdivision (a)(6), plaintiff contends “there is no difference between a deposition and an examination under oath.” Thus, “there is no rational reason a deposition cannot take the place of an examination under oath.”

This court rejected that precise argument in *Brizuela*, *supra*, 116 Cal.App.4th 578. In *Brizuela*, the insured appealed from the summary judgment in favor of his insurer. In affirming, “we [held], as a matter of law, that Brizuela violated the requirement of the insurance policy that he submit to an examination under oath; that the insurer could on that basis deny his claim without a showing of prejudice; that the availability of a deposition in litigation does not excuse his breach of the examination under oath requirement; that he had no valid bad faith claim; and that the court properly dismissed his action.” (*Id.* at p. 582.)

Plaintiff attempts to distinguish *Brizuela*, arguing the insured there had not previously given a recorded statement or an initial EUO, defendant’s lengthy investigation was a sham, and defendant knew plaintiff and Munoz were not involved in starting the fire when it requested a supplemental EUO and SUO. But our analysis in *Brizuela* addressed the differences

⁴ Based on plaintiff’s designation of Munoz as her representative, we assume, without deciding, the request for his SUO is the functional and legal equivalent of a request for an EUO.

between EUO's and depositions generally and did not depend on the facts of that case.

D. Plaintiff's "Several Other" Alleged Breaches

Plaintiff contends defendant "breached its duties, as an insurer" to her in "various ways" including the failure to properly investigate her claim, conducting an investigation designed to deny a claim, failure to comply with Insurance Code statutes and regulations, failure to obtain the Sheriff's Department fire report in a timely manner, and denying her claim after litigation ensued when it knew she and Munoz did not set the fire. Because plaintiff's compliance with the policy's requirement of submitting to a reasonably requested EUO was a prerequisite to benefits under the policy, these alleged breaches were not a basis for defeating defendant's summary judgment motion. (*Brizuela, supra*, 116 Cal.App.4th at p. 587.)

E. Punitive Damages

Plaintiff's contention that triable issues of fact exist to support an award punitive damages fails. Without a viable cause of action to support an award of general damages, punitive damages may not be awarded: "In California, as at common law, actual damages are an absolute predicate for an award of exemplary or punitive damages." (*Kizer v. County of San Mateo* (1991) 53 Cal.3d 139, 147.)

DISPOSITION

The judgment is affirmed. Defendant is awarded its costs on appeal.

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DUNNING, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

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