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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

HAROUTYAN ALAJAYAN et al., Plaintiffs and Appellants, v. FEDERAL INSURANCE COMPANY et al., Defendants and Respondents.	B263203 (Los Angeles County Super. Ct. No. BC479467)

APPEAL from a judgment of the Superior Court of Los Angeles County, Malcolm H. Mackey, Judge. Affirmed.

Gary Rand & Suzanne E. Rand-Lewis, Suzanne E. Rand-Lewis for Plaintiffs sand Appellants.

Seltzer Caplan McMahon Vitek, Robert M. Traylor, for Defendant and Respondent Federal Insurance Company.

Gordon & Rees, Matthew G. Kleiner, Angela Flood, Kerri Samuel, for Defendant and Respondent Hygiene Technologies International, Inc.

This case arises from an insurance dispute. Plaintiffs and appellants Haroutyan and Eliza Alajajyan[1] submitted a claim to their insurer, defendant and respondent Federal Insurance Company (Federal), for damage caused to their home by smoke, ash, and soot from the 2009 Station Fire. Federal retained defendant and respondent Hygiene Technologies International, Inc. (Hygiene) to inspect the Alajajyans' home and recommend a cleaning protocol. Federal then obtained an estimate for the cost of the recommended cleaning from a third party contractor, which valued the Alajajyans' claim as less than their $50,000 insurance deductible. Federal subsequently denied the Alajajyans' claim.

The Alajajyans sued Federal, Hygiene, and others, alleging various causes of action. The Alajajyans contend the trial court erred by: (1) sustaining Federal's demurrers as to their causes of action under the Consumer Legal Remedies Act (the CLRA) (Civ. Code, § 1750 et seq.)[2] and Unruh Civil Rights Act (the Unruh Act) (§ 51, et seq.);[3] (2) granting Federal's motion for summary judgment as to the remaining causes of action; (3) granting Hygiene's motion for summary judgment; and (4) denying in part their motion to tax costs as to Hygiene. We affirm the judgment and the court's post-judgment order granting in part and denying in part the Alajajyans' motion to tax costs.

PROCEDURAL HISTORY

Allegations

[1] Haroutyan and Eliza Alajajyan brought suit individually and as the trustees of the Haroutyan and Eliza Alajajyan Family Trust.

[2] All further references are to the Civil Code unless otherwise stated.

[3] The Alajajyans do not challenge the order sustaining the demurrer as to their breach of fiduciary duties claim against Federal.

The Alajajyans filed their original complaint on February 23, 2012, their first amended complaint on November 20, 2012, and their seconded amended complaint on March 4, 2013. The complaints uniformly alleged the following.

Prior to the Station Fire, the Alajajyans obtained insurance for their home under Federal's "'Masterpiece Policy.'" The policy provided coverage against "'all risk of physical loss,'" subject to a $50,000 deductible. The Alajajyans were induced to purchase the Masterpiece Policy based on Federal's promises of extensive coverage and superior customer service. They began to "notice[] soot and ash as well as an odor that began to permeate the house and its furnishings, especially carpet, linens, drapery, bedding" soon after the wildfire was extinguished in October of 2009, but because they were not initially aware that their insurance policy covered smoke, soot, and ash damage, they did not present a claim to Federal until early February 2010.

On February 8, 2010, the Alajajyans received a letter from Federal's senior property claims representative Willie Mack, advising that Federal "'believed a portion of the claim might not be covered due to . . . failure to report this claim in a reasonable time. . . [which] may prevent us from determining whether or not a covered event took place. . . .'"[4] The letter stated Federal would investigate the claim and contact the Alajajyans when its investigation was complete. Federal engaged Hygiene to assess the damage to the Alajajyans' home.

On March 2, 2010, the Alajajyans received a second letter from Federal enclosing a report from Hygiene, which "confirm[ed] minor exposure to combustible material related to a brush fire incident." According to the report, Hygiene conducted a "limited surface carbonized particulate survey," and not a full inspection. It recommended specialty cleaning of the interior surfaces and the HVAC system. The report did not include an assessment of the damage to the exterior of the property or the pool. The letter from Federal made no mention of such damages.

Federal retained A.J.T. Construction to inspect the Alajajyans' home and prepare a

[4] Federal's brief states that the Alajajyans presented their claim on January 7, 2010, and that Federal first responded by letter on January 8, 2010.

cleaning estimate based on Hygiene's recommendations. On March 25, 2010, Federal denied the Alajajyans' claim because A.J.T. Construction's damage estimate of $43,939.04 did not exceed the Alajajyans' $50,000 insurance deductible.

The Alajajyans employed their own contractor to provide an estimate, which they submitted to Federal. The estimate included items identified in Hygiene's report, as well as other costs. The Alajajyans estimated the cost to be $47,029.95 greater than A.J.T. Construction's estimation. Federal refused to reevaluate its original determination. It responded that its decision was "'based on the cleaning protocol from Hygiene . . . and is all inclusive of the damage identified.'"

The Alajajyans directed a CLRA letter to Federal by certified mail with return receipt requested, notifying it of its deceptive practices in violation of section 1770, subdivisions (a)(2), (4), (5), (7), (9), (14), (18), and (19). When Federal failed to respond, the Alajajyans initiated the instant lawsuit.

The Complaints alleged Federal and Hygiene conspired to wrongly deny their claim, in part due to the Alajajyans' Armenian ethnicity, which representatives of Hygiene observed in their inspection of the property. Federal and Hygiene colluded to prevent the Alajajyans from collecting under their policy, by falsely deflating their estimates through various means, including conducting a "patently inadequate and incomplete" inspection of the Alajajyans' property. Federal's estimate did not include the costs of cleaning and repair of the exterior of the property or pool, although photographs in Federal's possession, which Hygiene employees likely took during the inspection, showed exterior damage. Federal never took a statement from the Alajajyans or any other witnesses, and never sent its own representative to investigate or assess the damage, despite the Alajajyans' requests. Federal did not provide the Alajajyans with a copy of Insurance Code section 790.03, as required by law.[5] Federal defrauded the

[5] Insurance Code, section 790.034, subdivision (b)(1), provides: "Upon receiving notice of a claim, every insurer shall immediately, but no more than 15 calendar days after receipt of the claim, provide the insured with a legible reproduction of subdivisions (h) and (i) of Section 790.03 . . . ."

Alajajyans for its own benefit, and Hygiene worked with Federal in order to maintain its ongoing mutually lucrative business relationship with the insurance company.

Complaint

The original complaint contained claims against Federal including: breach of contract; breach of the covenant of good faith and fair dealing; breach of fiduciary duties; violation of the Unfair Competition Law (UCL) (Bus. & Prof. Code, § 17200 et seq.); conspiracy; professional negligence; intentional infliction of emotional distress; fraud, negligent misrepresentation, and concealment; violation of the CLRA; and violation of the Unruh Act. As to Hygiene, the Alajajyans alleged: (1) violation of the UCL; (2) conspiracy; (3) professional negligence; (4) intentional infliction of emotional distress; (5) violation of CLRA; and (6) violation of the Unruh Act.

Federal's Demurrer to the Complaint

Federal demurred to the Alajajyans' breach of fiduciary duty, intentional infliction of emotional distress, CLRA, and Unruh Act causes of action.

The trial court overruled the demurrer as to the Alajajyans' intentional infliction of emotional distress cause of action, sustained the demurrer with leave to amend as to their Unruh Act cause of action, and sustained without leave to amend the demurrer as to their breach of fiduciary duties and CLRA causes of action.

First Amended Complaint

The Alajajyans filed their first amended complaint on November 20, 2012, omitting their previous claims against Federal for breach of fiduciary duties, conspiracy, and the CLRA. With respect to their Unruh Act cause of action, the Alajajyans additionally alleged that Federal had a list of "'suspect'" insureds, and that the majority

of the individuals had "'foreign'" surnames, which were predominantly Armenian. They alleged that Federal used a "'threshold measure,'" which had no scientific support, to systematically deny the "'suspect'" claims.

Federal's Demurrer to the First Amended Complaint

Federal demurred to the Alajajyans' Unruh Act cause of action in the first amended complaint. The trial court sustained the demurrer without leave to amend.

Discovery Sanctions

The Alajajyans were uncooperative throughout the discovery process, which led to several of the defendants filing motions to compel discovery and requesting sanctions. On February 14, 2013, after the Alajajyans failed to comply with the trial court's order that they respond to Federal's written discovery, the trial court granted Federal's motion for sanctions, and ruled that the truth of the matters specified in Federal's first set of requests for admissions propounded against the Alajajyans be deemed established against them for all purposes of the action. Among other things, the Alajajyans were deemed to have admitted that: (1) they did not clean or make any repairs to their home as a result of damages caused by the Station Fire; (2) their residence did not sustain insurable damages to their home in excess of $50,000; and (3) they did not provide Federal with any invoices for cleaning or repair expenses they allegedly incurred as a result of the fire.[6]

Second Amended Complaint

[6] The Alajajyans made no mention of the motion for sanctions or the court's order that their admissions be deemed true in their opening brief. Counsel is reminded that an opening brief must "provide a summary of the significant facts," pursuant to California Rules of Court, rule 8.204 (a)(2)(C).

The Alajajyans filed their seconded amended complaint, which omitted their Unruh Act cause of action as to Federal, on March 4, 2013.

Federal's Motion for Summary Judgment / Summary Adjudication

Federal filed a motion for summary judgment or alternatively, summary adjudication, as to each of the causes of action against it on March 13, 2014. It concurrently filed: a separate statement of undisputed material facts; the declaration of Willie Mack; the declaration of Federal's counsel, David H. Lichtenstein; a request for judicial notice that included the notice of entry of order granting Federal's motion to compel discovery and request for sanctions in which the court deemed established Federal's requests for admissions; and notice of lodgment of numerous exhibits, including the Alajajyans' insurance policy.

Federal argued that the Alajajyans' admission that they did not sustain damages in excess of their deductible was fatal to all of their remaining causes of action. Federal did not breach the contract because the policy specified that Federal would only reimburse the Alajajyans if a claim exceeded $50,000. Federal did not breach the implied covenant of good faith and fair dealing because it did not breach the terms of the insurance policy. The Alajajyans' bad faith cause of action could not succeed because Federal's coverage decision relied on expert opinions, establishing that there was a genuine dispute. Federal could not have acted with professional negligence, because an insured who is not entitled to benefits under an insurance policy cannot recover for negligence. The Alajajyans' could not show violation of the UCL because they could not establish standing or reliance on any misrepresentation. Federal made no representations to the Alajajyans that would support allegations of fraud, negligent misrepresentation, or concealment. The Alajajyans could not demonstrate intentional infliction of emotional distress, because neither delay nor denial of an insurance claim is outrageous conduct, and the Alajajyans did not suffer severe or extreme emotional distress.

The Alajajyans did not oppose Federal's Motion for summary judgment. The trial

court granted the motion in full. It found that in the absence of an opposition an inference arose that the motion was meritorious, and that the evidence presented by Federal was sufficient to shift the burden of proof to the Alajajyans.

Hygiene's Motion for Summary Judgment

Hygiene filed a motion for summary judgment or alternatively, summary adjudication, as to each of the causes of action against it on May 15, 2014. It concurrently filed: a separate statement of undisputed material facts; the declaration of Angela Deptolla, Hygiene's counsel; the declaration of Brian Daly, Hygiene's president, attaching Hygiene's report; the declaration of Alex Ramirez, the hygienist who inspected the Alajajyans' property; a request for judicial notice that included the notice of entry of order granting Federal's motion to compel discovery and request for sanctions in which the court deemed established Federal's requests for admissions; and notice of lodgment of numerous exhibits, including transcripts of the Alajajyans' depositions.

Hygiene also argued that the Alajajyans' admissions that they suffered no damages covered under their insurance policy in an amount over $50,000 disposed of all the claims against it. Additionally, the Alajajyans could not establish their UCL claim because there was no evidence that they engaged in an unlawful, unfair, or fraudulent business practice. With respect to the Alajajyans' professional negligence cause of action, Hygiene was not employed by the Alajajyans and owed them no duty of care. The Alajajyans did not present any evidence of wrongful conduct by Hygiene. The evidence Hygiene submitted indicated that it conducted the inspection in a professional manner that would refute the Alajajyans' claim of intentional infliction of emotional distress. Additionally, the Alajajyans did not demonstrate that they suffered severe emotional distress. Hygiene provided no goods or services to the Alajajyans that would support their UCL cause of action, because it was employed by Federal. With respect to the Unruh Act cause of action, Hygiene had not provided the Alajajyans with any goods or services, and made no recommendations to cover or deny their insurance claim. Alex

Ramirez, who performed the inspection, never even met the Alajajyans. Finally, the Alajajyans failed to support their requests for punitive and/or exemplary damages.

The Alajajyans did not oppose Hygiene's Motion for summary judgment. The trial court granted the motion in full. It found that in the absence of an opposition an inference arose that the motion was meritorious, and that the evidence presented by Hygiene was sufficient to shift the burden of proof to the Alajajyans.

The Alajajyans' Motion to Strike or Tax Costs

Hygiene served its memorandum of costs on March 3, 2013, claiming costs in the total amount of $7,767.65. The Alajajyans moved to strike or tax the memorandum of costs on March 23, 2015, on the bases that Hygiene failed to submit proper documentation of the costs and failed to establish they were permitted by statute, either expressly, or as reasonable and necessary costs of litigation. Hygiene opposed the motion to strike or tax, arguing that the costs incurred were reasonable, necessary, and permitted by statute. The Alajajyans replied on May 18, 2015.

The trial court granted in part and denied in part the motion to strike or tax the memorandum of costs. It awarded $7,099.85 in total costs, striking $667.80 in costs for legal research and travel to and from the court.

DISCUSSION

Inadequate Record

We ordered the parties to brief "the issue of whether plaintiff's failure to provide a reporter's transcript or a suitable substitute of the relevant hearings warranted affirmance based on the inadequacy of the record." The Alajajyans assert that reporter's transcripts are not required because the standard of review is de novo. We agree that the record is sufficient for us to review the trial court's grants of summary judgment and its orders

sustaining Federal's demurrers on its CLRA and Unruh Act causes of action. The standard of review for the grant of a motion for summary judgment is de novo (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 60 (*Buss*)), as is the standard of review for determining whether a demurrer was sustained in error (*Montclair Parkowners Ass'n v. City of Montclair* (1999) 76 Cal.App.4th 784, 790 (*Montclair*)).[7] The record contains the parties' motions, the Alajajyans' oppositions to the demurrers, Federal's replies to the demurrer oppositions, minute orders pertaining to the relevant hearings, and the court's orders, which supply us with adequate information to conduct an independent review.

The same is not true of the Alajajyans' motion to strike or tax costs. Code of Civil Procedure section 1033.5 lists allowable and prohibited costs, and also provides that: "Items not mentioned in this section and items assessed upon application may be allowed or denied in the court's discretion." (*Id.* subd. (c)(4).) "Allowable costs shall be reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation" and "reasonable in amount." (*Id.* subd. (c)(2)-(3).) "Whether a cost item was reasonably necessary to the litigation presents a question of fact for the trial court and its decision is reviewed for abuse of discretion." (*Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 774.) "Whether a cost is statutorily authorized is a question of law we review de novo." (*Naser v. Lakeridge Athletic Club* (2014) 227 Cal.App.4th 571, 576.)

Hygiene's allowed costs included filing and motion fees, deposition costs, service of process, courtcall fees, and fees for a court-ordered discovery referee. Our de novo review is limited to the question of whether such costs are authorized by the statute. As none of the costs are expressly prohibited, we conclude that they were authorized, either

[7] The Alajajyans oppose the trial court's orders sustaining the demurrers on the basis that the complaint and first amended complaint stated causes of action under CLRA and the Unruh Act. They do not argue that the trial court's denial of leave to amend was in error. Such determinations are reviewed for abuse of discretion. (*Montclair, supra*, 76 Cal.App.4th at p. 790.)

expressly, or as an exercise of the court's discretion.[8] The remaining questions of whether the expressly authorized costs were "reasonably necessary to the litigation" and whether the court was arbitrary or capricious in allowing costs not expressly authorized or prohibited, require us to determine whether the court abused its discretion.[9] (*Citizens for Responsible Development v. City of West Hollywood* (1995) 39 Cal.App.4th 490, 506.)

"As the party challenging a fee award, [the Alajajyans] ha[ve] an affirmative obligation to provide an adequate record so that we may assess whether the trial court abused its discretion. [Citations.] We cannot presume the trial court has erred. The Court of Appeal has held: '"A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent. . . ." [Citation.]' [Citations.]" (*Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 447; accord, *Pellegrino v. Robert Half Internat., Inc*. (2010) 182 Cal.App.4th 278, 289-290.)

Here, the record includes the motion to strike or tax costs, the opposition, the reply, the minute order relating to the hearing, and the trial court's ruling. The ruling states only that Hygiene's requests for $370 in legal research fees and $297.80 for travel and parking to and from the court are taxed, resulting in a total of $7,099.85 in allowable costs. The minute order provides no greater detail. Without the reporter's transcript or a suitable substitute, we have no means to evaluate the reasoning behind the trial court's decision. "Because they failed to furnish an adequate record of the . . . proceedings, [their] claim must be resolved against them." (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296.)

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[8] Code of Civil Procedure section 1033.5, subdivision (b) provides: "The following items are not allowable as costs, except when expressly authorized by law: (1) Fees of experts not ordered by the court. (2) Investigation expenses in preparing the case for trial. (3) Postage, telephone, and photocopying charges, except for exhibits. (4) Costs in investigation of jurors or in preparation for voir dire. (5) Transcripts of court proceedings not ordered by the court."

[9] The Alajajyans do not argue that the de novo standard applies.

Federal's Demurrers

The Alajajyans contend that the trial court erred by sustaining Federal's demurrers to their causes of action for violation of the CLRA and the Unruh Act. We reject these contentions.

"'A demurrer tests the legal sufficiency of the complaint, . . .' [Citations.] On appeal from an order of dismissal after an order sustaining a demurrer, our standard of review is de novo, i.e., we exercise our independent judgment about whether the complaint states a cause of action as a matter of law. [Citation.] We deem to be true all material facts properly pled [citation] and those facts that may be implied or inferred from those expressly alleged [citation]." (*Montclair, supra,* 76 Cal.App.4th at p. 790.)

The CLRA Cause of Action

The CLRA prohibits certain "unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer . . . ." (§ 1770, subd. (a).) The Alajajyans alleged that Federal violated the CLRA in numerous ways arising from the purchase and sale of their homeowners insurance policy and Federal's handling of their insurance claim. Federal demurred on the ground that claims involving insurance are not subject to the CLRA. Relying on *Fairbanks v. Superior Court* (2009) 46 Cal.4th 56 (*Fairbanks*), Federal argued that insurance contracts are not subject to the CLRA. We agree.

In *Fairbanks,* the plaintiffs alleged that the defendant insurance company violated the CLRA by engaging in various deceptive and unfair practices in the marketing and administration of certain life insurance policies. (*Fairbanks, supra,* 46 Cal.4th at p. 60.) Our Supreme Court held that life insurance is not subject to the protections of the CLRA. "Life insurance," the Court explained, "is a contract of indemnity under which, in

exchange for the payment of premiums, the insurer promises to pay a sum of money to the designated beneficiary upon the death of the named insured." (*Id*. at p. 61.) It is neither a "good" nor a "service" as these terms are defined in the CLRA.[10] (*Ibid*.)

The *Fairbanks* Court observed that the CLRA was adapted from a model law that specifically defined "'services'" to include "'insurance.'" (*Fairbanks*, *supra*, 46 Cal.4th at p. 61, quoting National Consumer Act (Nat. Consumer L. Center 1970) § 1.301, subd. (37), pp. 23-24, italics omitted.) In the CLRA, however, the Legislature omitted insurance from the definition of services, "thereby indicating its intent *not* to treat all insurance as a service under the [CLRA]." (*Fairbanks*, *supra*, 46 Cal.4th at p. 61.) The *Fairbanks* Court "further confirmed" this intent by comparing the definition of "services" in the CLRA to the definition of "services" in the previously-enacted Unruh Act. Although the two definitions are similar, "services" under the Unruh Act expressly included the provision of insurance. (*Fairbanks*, *supra*, at p. 62, citing § 1802.2.) "The use of differing language in otherwise parallel provisions," the Court reasoned, "supports an inference that a difference in meaning was intended" and "provides additional evidence that the Legislature did not consider insurance itself to be a service for purposes of consumer protection legislation." (*Id*. at p. 62.) Finally, although the Court acknowledged that the CLRA is to be "'liberally construed and applied to promote'" its consumer protection purposes, a liberal construction mandate cannot be invoked when, as here, the meaning of the statutory language is clear. (*Fairbanks*, *supra*, at p. 64.)

The Alajajyans point out that the *Fairbanks* opinion states that the Court was "focus[ed] only on life insurance," and not insurance generally. (*Fairbanks*, *supra*, 46 Cal.4th at p. 60, fn. 1.) The Alajajyans do not, however, offer any basis why the Court's

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[10] "'Goods'" are defined in the CLRA as "tangible chattels bought or leased for use primarily for personal, family, or household purposes, including certificates or coupons exchangeable for these goods, and including goods that, at the time of the sale or subsequently, are to be so affixed to real property as to become a part of real property, whether or not they are severable from the real property." (§ 1761, subd. (a).)

"'Services' means work, labor, and services for other than a commercial or business use, including services furnished in connection with the sale or repair of goods." (§ 1761, subd. (b).)

reasoning in *Fairbanks* should not apply here. Homeowners insurance, like life insurance, "is a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from a contingent or unknown event." (Ins. Code, § 22.) In the case of life insurance, the contingent or unknown event is "the death of the named insured" (*Fairbanks, supra*, 46 Cal.4th at p. 61); in the case of property insurance under a homeowners policy, the event is a covered loss to insured property (*Garvey v. State Farm Fire & Casualty Co*. (1989) 48 Cal.3d 395, 406). The different triggering event in a homeowners policy does not make that contract of indemnity any more of a good or service than a life insurance policy. We conclude that homeowners insurance is not a good or service subject to CLRA. The trial court did not err in sustaining the demurrer.[11]

Unruh Act

The Unruh Act ensures all persons "full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever" without regard to, among other matters, "race, color, religion, ancestry, [or] national origin." (§ 51, subd. (b).) To establish a claim for violation of the Unruh Act, with an exception not here relevant, a plaintiff must prove intentional discrimination. (*Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 664-665.)

The Alajajyans point to the following "specific allegations of specific discriminatory animus" in the first amended complaint to support their claim: "[Federal] utilized a limited retention because [Federal] had a list of insureds whose claims they had

[11] The Alajajyans rely on *Broughton v. CIGNA Healthplans* (1999) 21 Cal.4th 1066 (*Broughton*), which involved a claim under the CLRA that the defendant health plan had deceptively and misleadingly advertised the quality of medical services provided under the plan. (*Broughton, supra*, at p. 1072.) The issue in *Broughton*, however, was whether a claim brought under the CLRA may be subject to arbitration. (*Ibid*.) The court did not decide or even consider whether the claim stated a cause of action under the CLRA. The case is not, therefore, relevant here. (See *McWilliams v. City of Long Beach* (2013) 56 Cal.4th 613, 626 [cases are not authority for propositions not considered].)

predetermined were 'suspect' and would not pay, that list contained, in the majority individuals with 'foreign' surnames, predominantly of Armenian derivation." "[Federal] utilized the unsupported 'threshold measure' to deny claims they predetermined were 'suspect' and would not pay, claims that, in the majority were made by individuals with 'foreign' surnames, predominantly of Armenian derivation." "[O]ne of the basis [*sic*] for the denial by [Federal] of Plaintiffs' claim is because of Plaintiffs' ethnic background. The claims representative and adjuster were a different ethnicity and religion and were prejudiced against and stereotyped Plaintiffs due to their ethnic background."

Federal demurred on the basis that these allegations in the first amended complaint were not sufficient to state a cause of action. We agree. The Alajajyans failed to plead facts sufficient to establish intentional discrimination. The first amended complaint made the conclusory statement that the claims representative and adjuster were prejudiced against the Alajajyans and stereotyped them. It provided no factual basis for this conclusion. The fact that the claims representative and adjustor's ethnic and religious backgrounds differed from the Alajajyans is not sufficient to support the inference that Federal intentionally discriminated against them. The second amended complaint made no connection between the claims representative and adjuster's alleged discriminatory animus and their actions or Federal's actions relating to the Alajajyans. The second amended complaint alleges that Federal and Hygiene colluded to deny claims by applying a scientifically unfounded "threshold" of five percent damages, below which Federal would not pay claims. It does not state that the claims representative and adjuster determined the Alajajyans suffered less than the threshold percentage of damage because of their ethnicity or religion. Nor does it allege Federal placed Armenians on their "'suspect'" list because of their ethnicity, or that the Alajajyans were placed on the list on the basis of their ethnic or religious background, only that a list existed, and that the majority of the names on it were of Armenian origin. The trial court did not err in sustaining the demurrer.

Unopposed Motions for Summary Judgment

We review a grant of summary judgment de novo. (*Buss, supra*, 16 Cal.4th at p. 60.) A defendant moving for summary judgment bears the initial burden of showing that one or more elements of a cause of action cannot be established, or that there is a complete defense to the cause of action. (Code Civ. Proc., § 437c, subd. (o)(2); see *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 583.) Once this burden is met, the burden shifts to the plaintiff to show that there is a triable issue of material fact as to the cause of action, supported by reference to specific facts and not mere allegations of the pleadings. (Code Civ. Proc., § 437c, subd. (o)(2).)

Where, as here, a plaintiff fails to file an opposition to a summary judgment motion, the court is entitled to accept as true the facts submitted by the defendant, so long as they are properly in evidence before the court. (See *Lyons v. Security Pacific Nat. Bank* (1995) 40 Cal.App.4th 1001, 1014; *Melorich Builders, Inc. v. Superior Court* (1984) 160 Cal.App.3d 931, 935.) A court may grant a defendant's unopposed motion for summary judgment so long as the defendant's evidence overcomes the burden established in the Code of Civil Procedure section 437c, subdivision (o)(2). (See *Thatcher v. Lucky Stores, Inc.* (2000) 79 Cal.App.4th 1081, 1084-1087.)

"The rule is established '[t]he admissions of a party receive an unusual deference in summary judgment proceedings. An admission is binding unless there is a credible explanation for the inconsistent positions taken by a party. [Citations.]' [Citation.] Further, '. . . the nonmoving party's admissions may be used to establish that no material factual issues remain to be resolved by trial. [Citation.]' [Citation.]" (*Le Bourgeois v. Fireplace Manufacturers, Inc.* (1998) 68 Cal.App.4th 1049, 1060, fn. 12.)

The Alajajyans contend that it was unnecessary for them to oppose Federal and Hygiene's motions for summary judgment, because neither defendant put forth undisputed facts establishing either a complete defense or showing that there was no factual basis for relief on any theory reasonably contemplated by the second amended complaint, so the burden of proof never shifted.

Federal and Hygiene both respond that the Alajajyans' admissions that the damage they suffered due to the Station Fire did not exceed $50,000 dispose of all of their causes of action, and that in any case, other facts presented in the motions support the trial court's ruling.

We conclude that Federal and Hygiene satisfied their initial burdens of demonstrating the Alajajyans could not establish necessary elements of their causes of action. The burden having shifted, the Alajajyans' failure to oppose the motion was fatal to their case. Because the majority of the claims against Hygiene overlap with the causes of action against Federal, we discuss them together.

Breach of Contract (Federal)

To establish breach of contract, the insured must show that: (1) he performed his duties under the insurance policy, (2) the defendant did not perform its obligations under the policy, and (3) the insured was damaged as a result of the breach. "'"If the insured cannot bring himself within the terms and conditions of the policy he cannot recover. The terms of the policy constitute the measure of the insurer's liability."' . . . [Citations.]" (*Brizuela v. CalFarm Ins. Co.* (2004) 116 Cal.App.4th 578, 587.) The Alajajyans were deemed to have admitted that their damages did not exceed $50,000. The terms of the policy provided for a $50,000 deductible, such that Federal was not required to pay for a covered loss less than that amount. Having failed to set forth facts sufficient to establish that they had a right to payment under the insurance policy, the Alajajyans cannot demonstrate that Federal failed to perform under the contract. Their breach of contract claim necessarily fails.

Implied Covenant of Good Faith and Fair Dealing (Federal)

The implied covenant of good faith and fair dealing cannot exist absent a contractual right. (See *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 36 ["the

implied covenant . . . 'should not be endowed with an existence independent of its contractual underpinnings'"]; see also *Kransco v. American Empire Surplus Lines Ins. Co.* (2000) 23 Cal.4th 390, 408.) Because the Alajajyans had no contractual right to payment, their implied covenant of good faith and fair dealing cause of action also fails.

Bad Faith (Federal)

The Alajajyans also cannot show that Federal acted in bad faith. Bad faith in refusing to pay insurance benefits requires a showing that the refusal to pay was "'unreasonable'" and "'without proper cause.'" (*Opsal v. United Services Auto. Assn.* (1991) 2 Cal.App.4th 1197, 1205.) Federal had no contractual obligation to pay the Alajajyans' claim because it was less than their deductible. Refusing to pay a claim where there is no obligation is not an unreasonable action or an action taken without proper cause. Even if the Alajajyans had not admitted their loss did not exceed $50,000, "bad faith liability cannot be imposed where there "exist[s] a genuine issue as to [the insurer's] liability under California law." (*Id.* at pp. 1205-1206; *Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1072.) Federal's determination relied on the expert opinions of Hygiene and A.J.T. Construction, evidence which established that there was a genuine issue as to whether payment should be made. (*Fraley v. Allstate Ins. Co*. (2000) 81 Cal.App.4th 1282, 1292 ["the 'genuine dispute' doctrine may be applied where the insurer denies a claim based on the opinions of experts"].) Moreover, the Alajajyans submitted their claim several months after the alleged damage, and did not provide any documentation of the repairs and cleaning they alleged had been completed. The insurance policy required that the loss be reported within 60 days, and that proof of the loss be provided. The Alajajyans did not comply with either of these terms of the policy. Without a basis for evaluating damage that no longer existed, it would not be unreasonable for Federal to refuse to pay the claim, nor could it be said that there was no issue as to whether payment should be made.

Professional Negligence (Federal & Hygiene)

The Alajajyans' professional negligence cause of action against Federal fails because they admitted that their damages did not exceed their deductible. "[I]n the absence of benefits due under the insuring contract . . . there is no tort liability for improperly investigating a first-party insurance claim whether the insurer's conduct is characterized as an implied covenant breach or negligence." (*Benavides v. State Farm General Ins. Co*. (2006) 136 Cal.App.4th 1241, 1250.) "The insured who is not entitled to insurance proceeds has suffered no injury as a result of the manner in which the insurer's investigation was conducted." (*Id*. at p. 1251.) The Alajajyans cannot demonstrate that they suffered damages.

With respect to Hygiene, "[a] determination that defendants owe plaintiff no duty of care [] negate[s] an essential element of plaintiff's cause of action for negligence and [] constitute[s] a complete defense. Whether a duty of care exists is a question of law for the court and is reviewable de novo." (*Nichols v. Keller* (1993) 15 Cal.App.4th 1672, 1685.) Hygiene had no duty to investigate the Alajajyans' claim. Federal hired Hygiene to determine whether cleaning and/or repairs were necessary and make recommendations as to protocols. Hygiene was not involved in determining whether the damages were covered under the insurance policy. Any duty that Hygiene had to properly inspect and test the Alajajyans' property was owed to Federal, with whom it had a contractual relationship. There is no support for the Alajajyans' professional negligence claim.

UCL (Federal & Hygiene), Fraud (Federal), and Negligent Misrepresentation (Federal)

The Alajajyans' UCL, fraud, and negligent misrepresentation causes of action against Federal, and their UCL cause of action against Hygiene fail because they cannot demonstrate that they relied on either defendants' misrepresentations or that they suffered damages as a result. (See *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 326 [under the

UCL's fraud prong, "a plaintiff must show that the defendant's misrepresentation . . . was 'an immediate cause' of the injury-producing conduct"]; *West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 792 ["The elements of fraud are (1) the defendant made a false representation as to a past or existing material fact; (2) the defendant knew the representation was false at the time it was made; (3) in making the representation, the defendant intended to deceive the plaintiff; (4) the plaintiff justifiably relied on the representation; and (5) the plaintiff suffered resulting damages."]; *Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 196 ["The elements of negligent misrepresentation are (1) a misrepresentation of a past or existing material fact, (2) made without reasonable ground for believing it to be true, (3) made with the intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage."].)

The complaints stated that the Alajajyans' insurance policy had a deductible of $50,000, and both Haroutyan and Eliza Alajajyan stated that they were aware of the deductible and understood the function of a deductible in their depositions, so they could not have justifiably relied on Federal to pay a claim below that amount. Hygiene produced declarations affirming that there was no agreement between it and Federal to limit its inspection or testing to minimize the Alajajyans' damages and deny their claims. No evidence was presented that Federal or Hygiene engaged in unlawful, unfair, or fraudulent business practices. Nor can the Alajajyans show that they suffered damages with respect to their claims against either Federal or Hygiene. The Alajajyans' admissions establish they were not entitled to benefits.

Intentional Infliction of Emotional Distress (Federal & Hygiene)

The Alajajyans did not present facts sufficient to support their causes of action for intentional infliction of emotional distress. "'The elements of a prima facie case for the tort of intentional infliction of emotional distress are: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the

probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. [Citations.] . . . Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community.' [Citation.]" (*Wilson v. Hynek* (2012) 207 Cal.App.4th 999, 1009.)

Federal's denial of the Alajajyans' claim, which was less than their deductible, was not outrageous conduct. (See *Coleman v. Republic Indemnetiy Ins. Co.* (2005) 132 Cal.App.4th 403, 417 ["California courts have held that delay or denial of insurance claims is not sufficiently outrageous to state a cause of action for intentional infliction of emotional distress."].) Hygiene did not engage in any wrongful actions according to its declarations, let alone outrageous actions.

Nor did the Alajajyans set forth facts to establish that they suffered "severe emotional distress," which has been defined as "'"'emotional distress of such substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to endure it.'" [Citations.]' [Citations.]" (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1376.) Eliza Alajajyan complained that she suffered "pressure and stress," "anxiety," difficulty communicating with her husband, and "headaches." Haroutyan Alajajyan stated that he felt "stressed out" and "angry." These are not symptoms of a substantial and enduring quality that no reasonable person should be expected to endure. (See *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1051 ["discomfort, worry, anxiety, upset stomach, concern, and agitation" did not comprise severe emotional distress].)

The CLRA (Hygiene)

As we discussed, the CLRA prohibits certain "unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer . . . ." (§ 1770, subd. (a).) There was no transaction between Hygiene and the Alajajyans.

Federal hired Hygiene to inspect and report on the Alajajyans' property. Hygiene never contracted to provide goods or services to them, and is therefore not subject to the CLRA as to the Alajajyans.

The Unruh Act (Hygiene)

The Unruh Act ensures all persons "full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever" without regard to, among other matters, "race, color, religion, ancestry, [or] national origin." (§ 51, subd. (b).) To establish a claim for violation of the Unruh Act, with an exception not here relevant, a plaintiff must prove intentional discrimination. (*Munson v. Del Taco, Inc.*, *supra*, 46 Cal.4th at pp. 664-665.)

The Alajajyans did not allege any specific facts in the second amended complaint that could serve as a basis for their claim that Hygiene discriminated against them based on their ethnicity/religion. Their allegations stated that Hygiene colluded with Federal to minimize their damages and deny their claim, but they did not state that Hygiene did so on the basis of ethnicity/religion. The declaration of Alex Ramirez demonstrated that Hygiene inspected the Alajajyans' property as it would any other, without regard to the Alajajyans' personal characteristics.

DISPOSITION

The judgment and the court's post judgment order granting in part and denying in part the Alajajyans' motion to tax costs are affirmed. Costs on appeal are awarded to Federal Insurance Company and Hygiene Technologies International, Inc.

KRIEGLER, J.

We concur:

TURNER, P.J.

RAPHAEL, J.*

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