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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

EARL MORGAN, Plaintiff and Appellant, v. PACIFIC SPECIALTY INSURANCE COMPANY et al., Defendants and Respondents.	B225793 (Los Angeles County Super. Ct. No. BC394142)

APPEAL from a judgment and an order of the Superior Court of Los Angeles County, Michael Solner, Judge. Affirmed.

Brentwood Legal Services and Steven L. Zelig for Plaintiff and Appellant.

Shoecraft ♦ Burton and Michelle L. Burton for Defendants and Respondents.

INTRODUCTION

Plaintiff Earl Morgan appeals from a judgment of nonsuit (Code Civ. Proc., § 581c) entered after completion of the presentation of plaintiff's case in chief to a jury. Plaintiff also appeals from a postjudgment order denying his motion to tax costs. We affirm.

FACTS

This case arises out of a fire at plaintiff's house, which was insured by defendants. In March 2000, plaintiff purchased a house at 1001 W. 130th Street in Compton. Plaintiff obtained a Preferred Homeowners Policy from defendant Pacific Specialty Insurance Company (PSIC) through agent Christie Cummins (Cummins). The policy was administered by defendant The McGraw Group.[1]

The policy listed plaintiff as the named insured; plaintiff's was the only name Cummins provided to PSIC. Plaintiff told Cummins that he was the sole owner of the property; his wife, Clara Morgan (Clara), was not on the deed or the loan. One of the questions on the application for the policy was: "Is there a thermostatically controlled heating system? If no, prohibited." Plaintiff checked the box marked "yes."

Under the Definitions section of the policy, "insured" was defined as both the named insured "and residents of your household who are: [¶] a. Your relatives." (Definitions, para. 4.a.) The policy provided coverage for losses to a dwelling (Coverage A), other structures (Coverage B), and personal property (Coverage C).

The insurance provided: "Covered property losses are settled as follows: [¶] . . . [¶] b. Buildings under Coverage A or B at replacement cost without deduction for depreciation, subject to the following:

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[1] The McGraw Group was erroneously sued as McGraw Group of Affiliated Companies and McGraw Insurance Services.

"(1) If, at the time of loss, the amount of insurance in this policy on the damaged building is 80% or more of the full replacement cost of the building immediately before the loss, we will pay the cost to repair or replace, after application of the deductible and without deduction for depreciation, but not more than the least of the following amounts:

"(a) The limit of liability under this policy that applies to the building;

"(b) The replacement cost of that part of the building damaged for like construction and [illegible] on the same premises; or

"(c) The necessary amount actually spent to repair or replace the damaged building.

"(2) If, at the time of loss, the amount of insurance in this policy on the damaged building is less than 80% of the full replacement cost of the building immediately before the loss, we will pay the greater of the following amounts, but not more than the limit of liability under this policy that applies to the building:

"(a) The actual cash value of that part of the building damaged; or

"(b) That portion of the cost to repair or replace, after application of deductible and without deduction for depreciation, that part of the building damaged, which the total amount of insurance in this policy on that damaged building bears to 80% of the replacement cost of the building. [¶] . . . [¶]

"(4) We will pay no more than the actual cash value of the damage unless:

"(a) Actual repair or replacement is complete; . . . [¶] . . . [¶]

"(5) You may disregard the replacement cost loss settlement provisions and make claim under this policy for loss or damage to buildings on an actual cash value basis. You may then make claim within 180 days after loss for any additional liability on a replacement cost basis."

Endorsement No. PM 17 deleted paragraph b.(5) above and replaced it with the following: "(5) You may disregard the replacement cost loss settlement provisions and make claim under this policy for loss or damage to the buildings on an actual cash value basis. You may then make claim within 12 months from the date that the first payment

toward actual cash value is made for any additional liability on a replacement cost basis. . . ."

The policy defines "actual cash value" as "the replacement cost for the like kind and quality, less depreciation assessed at the time of loss."

Plaintiff's policy was renewed annually through 2007-2008.

Plaintiff filed for dissolution of marriage on September 1, 2006. He no longer was living in the W. 130th Street house by July 2007, although he still had possessions in the house. Clara and the couple's children remained in the house.

On August 3, 2007, a fire occurred caused by a dryer in the garage, resulting in significant damage to the property. Clara's adult daughter notified PSIC. The claim was assigned to Claims Examiner Nicole Scerbo (Scerbo).

On August 3, Scerbo wrote to plaintiff at the W. 130th Street address, notifying him that an independent appraiser had been hired to inspect the property and requesting information about the claim. The independent appraiser was employed by defendant DRA Claim Service (DRA). Scerbo sent a copy of the letter to plaintiff at his post office box on August 7. Both letters contained the advisement: "If you have replacement cost coverage on your policy for your dwelling or personal property, then you have 12 months from the date the first payment is made toward actual cash value to collect the full replacement costs."

On August 6, Scerbo spoke to a woman who identified herself as Clara's daughter, Jackie, and said that plaintiff and Clara were going through dissolution proceedings and plaintiff could not be located. Scerbo requested papers showing that Clara had full rights to the W. 130th Street house. The following day, Scerbo spoke to plaintiff, who confirmed the dissolution proceedings; he said he had moved out of the house and it was for sale.

Because Clara was not a named insured on the policy, Scerbo believed there was a coverage issue. She nonetheless arranged for temporary housing for Clara and the children.

Scerbo received a contractor's estimate on August 13 which disclosed that the house had a manually operated floor heater. She contacted DRA, which confirmed that the house did not have thermostatically controlled heating. DRA also provided an initial estimate of the damage in the amount of $55,243.58. Plaintiff thought this amount was too low, but he did not tell Scerbo that.

Scerbo requested from plaintiff permission to speak directly to Clara during the claims process. He gave his permission.

Scerbo submitted the file to the claims committee for review on October 18, 2007. The committee decided to continue processing the claim under a reservation of rights due to coverage issues.

On October 31, Cummins contacted Scerbo and said that Clara's attorney had contacted her requesting that Clara be added to the policy. Scerbo reported the conversation to the claims committee the following day, and the committee decided to process the claim and pay benefits regardless of the coverage issues.

Scerbo received a call from Clara's attorney on November 9, informing her that Clara had filed a lawsuit against PSIC. That same day, Scerbo processed payments for repairs, testing and cleaning and storage in the amount of $59,406.69.

Plaintiff retained a public adjuster, Twarowski, who told plaintiff that he estimated that repairs would cost in excess of $90,000. Plaintiff never followed up to make sure the adjuster submitted his estimate to PSIC.

PSIC paid $55,243.00 for the actual cash value estimate plus an additional $630.00 for asbestos testing under Coverage A on November 9, 2007. It paid $455.00 for testing on May 28, 2008. It made further payments of $2,123.00, $1,802.43, and $25,573.28 on November 5, 2008. Total payments for repairs to the home under Coverage A were $85,826.71.

PSIC also paid $6,600 under Coverage B on February 26, 2008 for the cost of storing personal property. Under Coverage C, PSIC paid plaintiff $1,380.06 on November 27, 2007 for personal property pursuant to the personal property inventory list he submitted on that date. It paid $33,533.69 on November 9, 2007 for cleaning personal

property in the home. Another personal property inventory list was submitted on April 17, 2008, and PSIC paid $39,933.94 on April 25, 2008.

ThreeCohens Construction (ThreeCohens) prepared an estimate for restoration of the property on October 21, 2008. The estimate identified plaintiff as the client. The total estimated cost for the restoration was $87,864.10. This amount did not include hidden damages or building code upgrades.

Jason Buchanan (Buchanan), who worked in the contractors section of PSIC's claims department, examined the claim file in October 2008. He compared the ThreeCohens estimate with the DRA estimate and approved the ThreeCohens estimate with "some minor deductions." He approved payment of $82,619.29 for the restoration, and ThreeCohens agreed to the amount.[2]

Since PSIC had already paid $55,243.58 for the restoration work, Buchanan approved a supplemental payment of $25,273.28. PSIC issued the check, and plaintiff endorsed it. With Buchanan's approval, PSIC issued additional checks of $2,123 for lead, mold and asbestos testing and $4,940 for lead and asbestos removal. Plaintiff also endorsed these checks.

Plaintiff did not begin restoration work after the initial payment by PSIC because he had received a notice from the city that he had to correct an unpermitted addition before he could begin making repairs. He had stopped making mortgage payments in July 2008 because of cutbacks at his job. On June 11, 2009, a foreclosure sale was held and the property sold.

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[2] In opposition to a motion for summary adjudication, plaintiff submitted a declaration by David Spiegel containing an estimate of $202,844.27 in repair costs based on an April 9, 2009 inspection of the property.

PROCEDURAL BACKGROUND

Plaintiff filed this action against PSIC, The McGraw Group, Mike McGraw, Cummins, and Mid-Century Insurance on July 9, 2008, alleging six causes of action for breach of contract (PSIC, The McGraw Group); breach of the implied covenant of good faith and fair dealing (PSIC, The McGraw Group, Mike McGraw); violation of the Unruh Civil Rights Act (Civ. Code, § 51 et seq.) (PSIC, The McGraw Group, Mike McGraw); discrimination in violation of the Civil Rights Act (42 USC § 1981 et seq.) (PSIC); intentional infliction of emotional distress (PSIC, The McGraw Group, Mike McGraw); and professional negligence (Cummins).[3]

PSIC, The McGraw Group and Mike McGraw filed demurrers on September 17, 2008. In conjunction with the demurrers, they filed a request for judicial notice of Clara's second amended complaint in *Morgan v. PSIC* (Super. Ct. L.A.County, No. BC380402).[4] Before the trial court could rule on the demurrers, plaintiff filed notice of intent to amend his complaint. The trial court therefore ordered the hearing on the demurrers off calendar.

Plaintiff's first amended complaint, filed on December 1, 2008, deleted Mid-Century Insurance and Mike McGraw as defendants and added DRA as a defendant. It contained 13 causes of action: breach of contract (PSIC, The McGraw Group); breach of the implied covenant of good faith and fair dealing (PSIC, The McGraw Group); violation of the Unruh Civil Rights Act (PSIC, The McGraw Group); discrimination in violation of the federal Civil Rights Act (PSIC, The McGraw Group); intentional infliction of emotional distress (all defendants); negligence (PSIC, The McGraw Group,

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[3] Although Mid-Century Insurance was listed in the caption, the complaint contained no causes of action against it. Cummins was the owner of Mid-Century Insurance.

[4] Clara's action was filed on November 7, 2007, individually and as guardian ad litem for her children, against PSIC, The McGraw Group, Mike McGraw and QRS Contents Restoration, Inc.

Cummins); breach of contract by insurance agent (PSIC, The McGraw Group, Cummins); fraud (all defendants); negligent misrepresentation (all defendants); intentional interference with contract (The McGraw Group, Cummins, DRA); negligent interference with contract (The McGraw Group, Cummins, DRA); violation of Insurance Code section 10103.5 (PSIC, The McGraw Group, Cummins); and negligence (PSIC, The McGraw Group).

PSIC, The McGraw Group and DRA (collectively defendants) filed their demurrer on January 5, 2009. The demurrer was as to all causes of action except breach of contract and breach of the implied covenant of good faith and fair dealing. At the same time, they filed a motion to strike allegations of the complaint that they believed were irrelevant or unsupported legal assertions.

Plaintiff filed opposition to the demurrer and motion to strike. Defendants filed replies, as well as an objection and motion to strike plaintiff's opposition to the demurrer for failure to comply with the California Rules of Court. Plaintiff then filed a supplemental opposition to the demurrer, requesting that the court consider it. Defendants filed an objection and motion to strike on the ground the supplemental opposition was not permitted by the Code of Civil Procedure or California Rules of Court.

At the hearing on the demurrer, the trial court sustained the demurrer without leave to amend as to the causes of action for violation of the federal Civil Rights Act, intentional infliction of emotional distress, negligence, breach of contract by insurance agent, negligent interference with contract, violation of Insurance Code section 10103.5 and negligence. It sustained the demurrer with leave to amend as to the causes of action for fraud and negligent misrepresentation. It overruled the demurrer as to the causes of action for violation of the Unruh Civil Rights Act and intentional interference with contract.

Plaintiff was given 15 days in which to file a second amended complaint. He did not do so.

Plaintiff's action was consolidated with Clara's. On March 4, 2009, defendants filed an answer to plaintiff's first amended complaint, which now included causes of action for breach of contract (PSIC, The McGraw Group); breach of the implied covenant of good faith and fair dealing (PSIC, The McGraw Group); violation of the Unruh Civil Rights Act (PSIC, The McGraw Group); and intentional interference with contract (The McGraw Group, Cummins, DRA).

Defendants then filed a motion for summary judgment/adjudication as to both actions. They sought summary adjudication in plaintiff's action in favor of PSIC and The McGraw Group on the causes of action for breach of the implied covenant of good faith and fair dealing and violation of the Unruh Civil Rights Act, and in favor of DRA on the intentional interference with contract cause of action. They also sought summary adjudication of three of Clara's causes of action.[5]

Before the summary judgment/adjudication motion was heard, plaintiff moved for leave to file a second amended complaint, adding causes of action against PSIC for unfair competition (Bus. & Prof. Code, § 17200 et seq.) and unjust enrichment, both of which would be a class action.

On October 13, 2009, the trial court granted summary judgment in favor of DRA on the intentional interference with contract cause of action. It found that plaintiff failed to raise a triable issue of material fact as to whether DRA intended to interfere with the contract or knew that interference was reasonably likely to occur.

The court granted summary adjudication in favor of PSIC and The McGraw Group on plaintiff's and Clara's causes of action for breach of the implied covenant of good faith and fair dealing. It explained that there is bad faith liability for failure to pay policy benefits only if the insurer acts without proper cause. If there is a genuine dispute as to whether policy benefits are owed, the insurer is not liable for bad faith. Here, there was no triable issue of fact as to bad faith "when there is a statement of a thermostatically

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[5] Cummins filed her own summary judgment/adjudication motion which was granted in part and denied in part.

controlled heating system. Moreover, the evidence before the court was that defendants actually made payment to [plaintiff and Clara] beginning in November 2007."

The court denied summary adjudication of plaintiff's and Clara's Unruh Civil Rights Act causes of action. It found a triable issue of material fact existed as to whether defendants were aware of plaintiff's and Clara's "race based on where the insured property was located, and whether defendants [had] a policy of treating minority insureds differently or arbitrarily."[6]

On October 27, 2009, the trial court denied plaintiff's motion for leave to file a second amended complaint, ruling that it was untimely and the allegations were insufficient.

On October 30, PSIC and The McGraw Group filed a motion for summary adjudication of plaintiff's and Clara's causes of action for breach of contract. The trial court denied the motion on January 15, 2010, finding a triable issue of material fact as to actual cash value.

At some point, defendants settled with Clara. A jury trial on plaintiff's remaining causes of action began on May 4, 2010. On May 11, plaintiff's motion for mistrial was denied.

On May 12, the trial court granted defendants' oral motion for nonsuit. Judgment was entered on June 25. On July 12, plaintiff filed a notice of appeal from the judgment, as well as from the orders granting summary adjudication in favor of PSIC and The McGraw Group, granting summary judgment in favor of DRA, denying his motion for leave to file a second amended complaint "and any subsequent judgment thereon, including 'reconsideration,'" and "all prior and subsequent appealable and non-appealable judgments and orders." Plaintiff filed an amended notice of appeal on July 14, adding the order granting defendants' demurrer.

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6 Plaintiff's motion for reconsideration of the trial court's rulings on the summary judgment/adjudication motions under Code of Civil Procedure section 1008, subdivision (a), was denied for lack of new or different facts, circumstances or law.

Defendants filed a memorandum of costs on July 9, seeking $140,053.58 in total costs. Plaintiff filed a motion to strike or tax costs, which also requested that PSIC produce a copy of the settlement agreement with Clara and requested an order to show cause against PSIC and its counsel "for submission of a misrepresentative cost bill."

Defendants filed opposition to the motion, characterizing it as "simply the latest act, and hopefully the last, in a blundering comedy of errors that has wasted the time and resources of this Court, of PSIC, and of the twelve jurors forced to sit through the truncated performance that was the trial. It is time to bring the curtain down."

Following a hearing, the trial court granted plaintiff's motion in part, awarding defendants two-thirds of their claimed costs, $93,369.05. Plaintiff filed a notice of appeal from the order and from the "amended judgment" awarding costs."

DISCUSSION

A. *Appealable Judgments and Orders*

It is fundamental that an appeal may be taken only from an appealable judgment or order. (*Jacobs-Zorne v. Superior Court* (1996) 46 Cal.App.4th 1064, 1070; see also *Giorgianni v. Crowley* (2011) 197 Cal.App.4th 1462, 1470.) A final judgment is appealable, and a postjudgment order awarding attorney's fees is separately appealable. (Code Civ. Proc., § 904.1, subds. (a)(1), (a)(2).)

Both an order sustaining a demurrer without leave to amend (*Hill v. City of Long Beach* (1995) 33 Cal.App.4th 1684, 1695; *Yancey v. Fink* (1991) 226 Cal.App.3d 1334, 1342) and an order granting summary adjudication (*Barth-Wittmore Ins. v. H. R. Murphy Enterprises, Inc.* (1985) 169 Cal.App.3d 124, 136; cf. *Stolz v. Wong Communications Limited Partnership* (1994) 25 Cal.App.4th 1811, 1816) are interlocutory orders which are not appealable. The propriety of these interlocutory orders are reviewable on appeal from the final judgment, however.

B. *Demurrer*

1. Standard of Review

A demurrer tests the sufficiency of the plaintiff's complaint, i.e., whether it states facts sufficient to constitute a cause of action upon which relief may be based. (Code Civ. Proc., § 430.10, subd. (e); *Friedland v. City of Long Beach* (1998) 62 Cal.App.4th 835, 841-842.) We review the sustaining of a demurrer de novo. (*Williams v. Housing Authority of Los Angeles* (2004) 121 Cal.App.4th 708, 718-719; *Montclair Parkowners Assn. v. City of Montclair* (1999) 76 Cal.App.4th 784, 790.) In determining whether the complaint states facts sufficient to constitute a cause of action, "'"'[w]e treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.]"'" (*Ulta Salon, Cosmetics & Fragrance, Inc. v. Travelers Property Casualty Co. of America* (2011) 197 Cal.App.4th 424, 431.) We do not consider the available evidence, the plaintiff's ability to prove the allegations in the complaint or other extrinsic matters. (*Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, 922; see *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 459.)

We review the denial of leave to amend for abuse of discretion. (*Williams v. Housing Authority of Los Angeles, supra*, 121 Cal.App.4th at p. 719; *Montclair Parkowners Assn. v. City of Montclair*, *supra*, 76 Cal.App.4th at p. 790.) A demurrer should not be sustained without leave to amend if the complaint, liberally construed, can state a cause of action under any theory or if there is a reasonable possibility the defect can be cured by amendment. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967; *Jager v. County of Alameda* (1992) 8 Cal.App.4th 294, 297.) If there is a reasonable possibility that the defect in the complaint can be cured by amendment, it is an abuse of discretion to deny leave to amend. (*Ulta Salon, Cosmetics & Fragrance, Inc. v. Travelers Property Casualty Co. of America*, *supra*, 197 Cal.App.4th at p. 431.)

Plaintiff bears the burden of demonstrating the trial court erred in sustaining the demurrer or abused its discretion in denying leave to amend. (*Ulta Salon, Cosmetics &*

Fragrance, Inc. v. Travelers Property Casualty Co. of America, supra, 197 Cal.App.4th at p. 431; *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, *supra*, 68 Cal.App.4th at p. 459.) To show abuse of discretion, plaintiff must show in what manner the complaint could be amended and how the amendment would change the legal effect of the complaint, i.e., state a cause of action. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349; *J.B. Aguerre, Inc. v. American Guarantee & Liability Ins. Co.* (1997) 59 Cal.App.4th 6, 18.)

2. Federal Civil Rights Act

Plaintiff alleged that PSIC and McGraw discriminated against him on the basis of race. Plaintiff is African American. The trial court sustained defendants' demurrer to plaintiff's cause of action for violation of the federal Civil Rights Act (42 U.S.C. § 1981 et seq.) on the ground "[p]laintiff does not allege anywhere that anyone was acting under color of any statute and [42 United States Code section 1983] requires action under color of state law and says, 'Every person who under color of any statute, ordinance, regulation, custom of any state subjects or causes to be subjected' — et cetera, et cetera, et cetera."

Plaintiff relies on 42 United States Code section 1981 (section 1981), which provides in pertinent part that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts." (*Id.*, subd. (a).) It further provides that, "[f]or purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." (*Id.*, subd. (b).) Subdivision (c) of section 1981 provides: "The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law."

Section 1981 applies to private acts of racial discrimination. (*Runyon v. McCrary* (1976) 427 U.S. 160, 174-175; *Pittman v. Oregon Employment Dept.* (9th Cir. 2007) 509

F.3d 1065 1067-1068.) Thus, defendants need not have been acting under color of state law.

However, as defendants point out, the trial court granted a nonsuit on plaintiff's claim of violation of the Unruh Civil Rights Act, which protects against unequal treatment on the basis of race (Civ. Code, § 51, subd. (b)). Plaintiff does not contend this ruling was erroneous, and in his reply brief he does not address this issue. In light of plaintiff's inability to prove racial discrimination, he cannot show that he has been prejudiced by any error in sustaining the demurrer to his federal Civil Rights Act cause of action. (*Superior Dispatch, Inc. v. Insurance Corp. of New York* (2010) 181 Cal.App.4th 175, 194-195.)

3. Intentional Infliction of Emotional Distress

In sustaining defendants' demurrer without leave to amend, the trial court relied on *Coleman v. Republic Indemnity Ins. Co.* (2005) 132 Cal.App.4th 403, which observes at page 417 that "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." Nothing in plaintiff's briefs suggests that this rule should not apply to the instant case.

4. Negligence and Breach of Contract By an Insurance Agent

In his negligence cause of action, plaintiff alleged that defendants negligently failed to include Clara as a named insured in the policy. In sustaining defendants' demurrer without leave to amend, the trial court stated that "[n]egligence is not among the theories of recovery generally available against insurers. And although plaintiff is arguing it's distinguishable because the claim is based on the negligence of procuring the policy . . . I don't see any distinguishing characteristics there."

In his cause of action for breach of contract by an insurance agent, plaintiff alleged that defendants breached their "express[] oral[] . . . promise[] to procure appropriate coverage for Plaintiffs, and to continue monitoring the account at all points during its

pendency." The trial court sustained the demurrer without leave to amend as to this cause of action based on the statute of frauds.

In order to establish negligence, it must be shown that: (1) the defendant owes the plaintiff a legal duty; (2) the defendant breached the duty; (3) there is a causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulted from the breach of the duty of care. (*Carrera v. Maurice J. Sopp & Son* (2009) 177 Cal.App.4th 366, 377.) Plaintiff does not explain how the failure to designate Clara as a named insured resulted in actual loss or damage to him, especially since PSIC ultimately paid benefits under the policy despite this failure, and thus how the sustaining of the demurrer was erroneous. (*Ulta Salon, Cosmetics & Fragrance, Inc. v. Travelers Property Casualty Co. of America*, *supra*, 197 Cal.App.4th at p. 431; *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, *supra*, 68 Cal.App.4th at p. 459.)

Plaintiff also claims negligence in the failure to reveal that "PSIC was one of the worst rated insurers in the State, and that PSIC had a pattern and practice of discriminating against minorities and African Americans in particular . . . ." In *Williams v. Hilb, Rogal & Hobbs Ins. Services of California, Inc.* (2009) 177 Cal.App.4th 624, the court observed that "the general rule on insurance agent negligence" is that "'an insurance agent does not have a duty to volunteer to an insured that the latter should procure additional or different insurance coverage.' [Citation.]" (*Id*. at p. 635; *Fitzpatrick v. Hayes* (1997) 57 Cal.App.4th 916, 927.) In any event, since, as discussed above, plaintiff cannot prove racial discrimination, any abuse of discretion in denying him leave to amend on this basis is not prejudicial. (*Superior Dispatch, Inc. v. Insurance Corp. of New York*, *supra*, 181 Cal.App.4th at pp. 194-195.)

Finally, plaintiff claims negligence in the failure to tell him that he would be denied coverage based on an "alleged discrepancy" in the insurance application regarding the floor heater. Inasmuch as PSIC paid the claim despite the "alleged discrepancy," he was not damaged by this failure and thus cannot state a cause of action for negligence. (*Carrera v. Maurice J. Sopp & Son*, *supra*, 177 Cal.App.4th at p. 377.)

5. Fraud and Negligent Misrepresentation

Although plaintiff was granted leave to amend his causes of action for fraud and misrepresentation, he failed to do so. In such a case, "'strict construction of the complaint is required and it must be presumed that the plaintiff has stated as strong a case as he can.' [Citations.] In these circumstances, we will affirm the judgment if the complaint is objectionable on any ground raised in the demurrer. [Citations.]" (*Drum v. San Fernando Valley Bar Assn.* (2010) 182 Cal.App.4th 247, 251.)

The trial court sustained defendants' demurrer with leave to amend as to fraud and negligent misrepresentation due to lack of specificity, explaining that "it's not real clear from the first amended complaint who made any misrepresentations or failed to make representations they should have or where or when."

In general, to plead a cause of action for fraud, a plaintiff must allege a representation, its falsity, defendant's knowledge of that falsity, intent to deceive, and plaintiff's reliance on the representation and resulting damage. (*Winn v. McCulloch Corp.* (1976) 60 Cal.App.3d 663, 670; 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 710, p. 125.) Because fraud actions are considered "'disfavored,'" they "are subject to strict requirements of particularity in pleading. The idea seems to be that because allegations of fraud involve a serious attack on character, fairness requires that the defendant receive the fullest possible details of the charge to prepare a defense." (5 Witkin, Cal. Procedure, *supra*, Pleading, § 711, pp. 126-127; accord, *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 216.)

Accordingly, every element of the cause of action must be factually and specifically pleaded. (*Committee on Children's Television, Inc. v. General Foods Corp., supra*, 35 Cal.3d at p. 216; 5 Witkin, Cal. Procedure, *supra*, Pleading, § 711, pp. 126-127.) This requires that the plaintiff plead facts showing how, when, where, by whom, and to whom the representations were made. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645; *Alfaro v. Community Housing Improvement System & Planning Assn., Inc.* (2009) 171 Cal.App.4th 1356, 1384.)

Plaintiff's cause of action for fraud incorporated most of the first 150 paragraphs of the first amended complaint. He alleged that, "[a]s more fully set forth in the extended and highly detailed chronology incorporated herein at paragraphs 22 through 109, inclusive, Defendants against whom this Cause of Action is alleged asserted misrepresented material facts and/or conversely concealed material fact." Presumably, defendants and the court are supposed to comb through 88 paragraphs and determine which defendants made which misrepresentations that plaintiff contends support a fraud cause of action. This does not provide "'notice to the defendant[s], to "furnish the defendant[s] with certain definite charges which can be intelligently met."'" (*Alfaro v. Community Housing Improvement System & Planning Assn., Inc.*, *supra*, 171 Cal.App.4th at p. 1384, quoting from *Committee on Children's Television, Inc. v. General Foods Corp.*, *supra*, 35 Cal.3d at p. 216.)

Plaintiff's briefs provide no greater specificity. He states that "many facts were pled supporting the necessary elements of a claim of fraud," and he cites some of those facts, but he does not tie those facts to the elements of the fraud cause of action on which he is suing. For example, he states that he "alleged that when he applied for insurance and on each subsequent renewal he was charged and paid an inspection fee, but the inspections were never performed. . . . In essence, PSIC took [plaintiff's] money for a services [*sic*] which they never performed. That is fraud." No, that is breach of contract. Where are the allegations of a specific false representation, defendant's knowledge of the falsity, intent to deceive, and plaintiff's reliance on the representation and resulting damage? (*Winn v. McCulloch Corp.*, *supra*, 60 Cal.App.3d at p. 670.)

In sum, plaintiff has failed to show that he pled fraud with the requisite specificity. Accordingly, he has failed to meet his burden of proving the trial court erred in sustaining the demurrer as to the fraud cause of action. (*Ulta Salon, Cosmetics & Fragrance, Inc. v. Travelers Property Casualty Co. of America*, *supra*, 197 Cal.App.4th at p. 431; *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, *supra*, 68 Cal.App.4th at p. 459.)

Plaintiff's negligent misrepresentation cause of action incorporates most of paragraphs 1 through 155 of the first amended complaint and merely states that he "alternatively alleges that the representations and concealment of material facts set forth above were done negligently, proximately resulting in injuries and damages to PLAINTIFF herein, as more fully set forth above."

Aside from noting that the elements of a cause of action for negligent misrepresentation are the same as that for fraud, except for the element of scienter (see *Gagne v. Bertran* (1954) 43 Cal.2d 481, 487, fn. 4), plaintiff's briefs are devoid of argument or authority on the issue of whether he stated a cause of action for negligent misrepresentation. Accordingly, any contention in that regard is forfeited. (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545-546.)

6. Violation of Insurance Code Section 10103.5

Insurance Code section 10103.5 provides in subdivision (a) that: "Every California Residential Property Insurance Disclosure shall be accompanied by a California Residential Property Insurance Bill of Rights. If the insurer provides the insured with an electronic copy of a policy, the bill of rights may also be transmitted electronically." Subdivision (b) sets forth the required contents of the bill of rights. Subdivision (c)(1) requires that the bill of rights "be distributed by all insurers licensed to sell residential insurance in this state."

The trial court sustained the demurrer without leave to amend as to this cause of action on the ground Insurance Code section 10103.5 does not provide for a private right of action. In general, violations of the Insurance Code by an insurer do not create a private right of action but are punished by the Insurance Commissioner. (See *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 304-305.) An insured may sue on traditional tort or breach of contract theories. (*Ibid*.)

The only authority plaintiff cites to the contrary is *South Bay Building Enterprises, Inc. v. Riviera Lend-Lease, Inc.* (1999) 72 Cal.App.4th 1111, 1123, which states: "'A tort in essence is the breach of a nonconsensual duty owed another. Violation of a statutory

duty to another may therefore be a tort and violation of a statute embodying a public policy is generally actionable even though no specific civil remedy is provided in the statute itself. Any injured member of the public for whose benefit the statute was enacted may bring the action. [Citations.]' [Citations.]"

As noted in *Lu v. Hawaiian Gardens Casino, Inc.* (2010) 50 Cal.4th 592 at page 596, "A violation of a state statute does not necessarily give rise to a private cause of action. [Citation.] Instead, whether a party has a right to sue depends on whether the Legislature has 'manifested an intent to create such a private cause of action' under the statute. [Citations.]" Nothing in the language of Insurance Code section 10103.5 manifests a legislative intent to create a private right of action.

In any event, as defendants point out, plaintiff is not complaining that defendants violated Insurance Code section 10103.5. Rather, plaintiff is complaining that defendants violated his rights as set forth in the bill of rights. Inasmuch as Insurance Code section 10103.5 merely sets forth the required contents of the bill of rights to be provided to the insured but does not establish those rights itself, the statute cannot be read as creating a private right of action for violation of the bill of rights. (Cf. *Lu v. Hawaiian Gardens Casino, Inc.*, *supra*, 50 Cal.4th at pp. 596-597; *Moradi-Shalal v. Fireman's Fund Ins. Companies*, *supra*, 46 Cal.3d at p. 305.)

7. Negligence

Plaintiff's negligence cause of action was based on PSIC's failure to conduct inspections of his property. The trial court reiterated, "Again, negligence cannot be asserted against insurers. We're dealing with the breach of contract, so I would sustain without leave [to amend]."

Plaintiff's only authority in support of his contention the trial court erred in sustaining defendants' demurrer to the negligence cause of action without leave to amend is a case reciting the elements of the cause of action. This does not meet plaintiff's burden of demonstrating error. (*Ulta Salon, Cosmetics & Fragrance, Inc. v. Travelers*

Property Casualty Co. of America, *supra*, 197 Cal.App.4th at p. 431; *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, *supra*, 68 Cal.App.4th at p. 459.)

In any event, plaintiff argues that had PSIC inspected the property, it could not have used the "tiny inaccuracy in the application" regarding the lack of a thermostatically controlled heater to deny his claim. Since PSIC did not deny his claim on this basis, there are no damages and thus no negligence. (*Carrera v. Maurice J. Sopp & Son*, *supra*, 177 Cal.App.4th at p. 377.)

8. Negligent Interference with Contract by DRA

Plaintiff's cause of action for negligent interference with contract is virtually unintelligible. After incorporating the majority of the first 164 paragraphs of the first amended complaint, "PLAINTIFF hereby elects to exercise the right to plead in the alternative. PLAINTIFF accordingly adopt [*sic*] in the alternative the position that [PSIC] has and continues to take, i.e., that DRA is not an agent or employee of [PSIC], but are completely independent and separate entity. [¶] . . . In the alternative to the proceeding [*sic*] Cause of Action which states that the interference with contract by Defendants was intentional, PLAINTIFF alternatively alleges that said interference was the result of negligence."

In the preceding cause of action for intentional interference with contract, plaintiff alleged defendants "specifically and intentionally interfered with PLAINTIFF's receipt of monies and benefits under the subject insurance policy" by "falsely document[ing] the claim file" which "resulted in both a delay in providing and the ultimate provision of monies and benefits due under the insurance policy" "[a]s more fully set forth in paragraphs 22 through 109, inclusive," and "[i]n various other ways according to proof."

The trial court sustained defendants' demurrer without leave to amend on the ground "[t]his type of cause of action is to be included within the broad cause of action of negligent interference with prospective economic advantage. The first amended complaint does not allege interference with prospective economic advantage."

As the trial court stated, "In California there is no cause of action for *negligent* interference with contractual relations. While there exists a cause of action for negligent interference with *prospective* economic advantage [citation], the California Supreme Court in *Fifield Manor v. Finston* (1960) 54 Cal.2d 632 . . . , has rejected a cause of action for negligent interference with contract." (*Davis v. Nadrich* (2009) 174 Cal.App.4th 1, 9.)

Plaintiff cites *Woods v. Fox Broadcasting Sub., Inc.* (2005) 129 Cal.App.4th 344 at page 350 for the proposition that a cause of action for negligent interference with contract exists. The statement in *Woods* that such a cause of action exists is supported by a citation to *SCEcorp. v. Superior Court* (1992) 3 Cal.App.4th 673, 677. The trial court relied on *SCEcorp.* in making its ruling. In fact, *SCEcorp.* did not state that such a cause of action exists. Rather, it stated that, "For purposes of this opinion, we consider this cause of action to be included within the broad cause of action of negligent interference with prospective economic advantage . . . ." (*Ibid.*)

Thus, the question before us is whether the first amended complaint stated or can state a cause of action for negligent interference with prospective economic advantage. (*Aubry v. Tri-City Hospital Dist.*, *supra*, 2 Cal.4th at p. 967 [demurrer should not be sustained without leave to amend if the complaint, liberally construed, can state a cause of action under any theory or if there is a reasonable possibility the defect can be cured by amendment]; *Jager v. County of Alameda*, *supra*, 8 Cal.App.4th at p. 297.)

Plaintiff does not discuss the elements of a cause of action for negligent interference with prospective economic advantage. Rather, he points out that the trial court overruled defendants' demurrer to his cause of action for intentional interference with prospective economic advantage and recites the allegations of that cause of action. This is insufficient to meet his burden of demonstrating error, however.

Liability for negligent interference with prospective economic advantage may be imposed only when the defendant owes a duty of care to the plaintiff based on the relationship between the two. (*LiMandri v Judkins* (1997) 52 Cal.App.4th 326, 348-349; *Stolz v. Wong Communications Limited Partnership*, *supra*, 25 Cal.App.4th at p. 1825.)

Plaintiff points to no allegations of a relationship between him and DRA supporting the imposition of a duty of care. Thus, he has not met his burden of demonstrating error. (*Ulta Salon, Cosmetics & Fragrance, Inc. v. Travelers Property Casualty Co. of America*, *supra*, 197 Cal.App.4th at p. 431; *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, *supra*, 68 Cal.App.4th at p. 459.)

C. *Affirmative Defenses*

Plaintiff states that in PSIC's answer to his first amended complaint, there were 21 affirmative defenses, none of which alleged anything to the effect that repairs on the property had to be completed within one year of PSIC's first payment to plaintiff. He argues: "At trial, PSIC invented the [Insurance Code] Section 2051.5[7] defense. It was **never** an issue during the claim, and **never** referenced during the course of the litigation."

It is well established that "[w]e discuss those arguments that are sufficiently developed to be cognizable. To the extent defendant perfunctorily asserts other claims, without development and, indeed, without a clear indication that they are intended to be discrete contentions, they are not properly made, and are rejected on that basis." (*People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19; *In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830.)

D. *Summary Adjudication*

1. Standard of Review

"Since a motion for summary judgment or summary adjudication involves only questions of law, the standard of review is de novo. [Citation.] First, we review the motion to determine whether the defendant has met its initial burden to establish that one

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7 Insurance Code section 2051.5 addresses the measure of indemnity under an open policy. It provides in pertinent part that "no time limit of less than 12 months from the date that the first payment toward the actual cash value is made shall be placed upon an insured in order to collect the full replacement cost of the loss, subject to the policy limit." (*Id.*, subd. (b)(1).)

or more causes of action in the complaint has no merit, by showing that one or more elements of the cause of action cannot be established, or that there is a complete defense thereto. [Citation.] Second, if the defendant has met this initial burden, we examine whether plaintiff has shown, by setting forth specific facts, that a triable issue of fact exists as to that cause of action or defense. [Citations.]" (*West Shield Investigations & Security Consultants v. Superior Court* (2000) 82 Cal.App.4th 935, 946.)

The "'[s]ummary [adjudication] will be upheld when, viewing the evidence in a light most favorable to the [defendant], the evidentiary submissions conclusively negate a necessary element of plaintiff['s] cause of action, or show that under no hypothesis is there a material issue of fact requiring the process of a trial. [Citation.]' [Citation.]" (*County of Los Angeles v. Superior Court* (2009) 181 Cal.App.4th 218, 226.) In determining the propriety of summary adjudication, the issues to be addressed are framed by the pleadings. (*Ibid*.)

2. Whether PSIC Met Its Initial Burden

Plaintiff first points out that the trial court when considering a motion for summary adjudication has the duty to rule on evidentiary objections. (*Vineyard Springs Estates v. Superior Court* (2004) 120 Cal.App.4th 633, 642.) He then points out that he objected to certain evidence, which he claims is hearsay. He does not, however, point us to any portion of the record which shows whether or not the trial court ruled on his objections and, if so, what those rulings were. In addition, his discussion of the claimed hearsay evidence is no more than a series of conclusory statements with no reasoned analysis supported by pertinent authority.

"It is well settled, of course, that a party challenging a judgment has the burden of showing reversible error by an adequate record." (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574; *Robbins v. Los Angeles Unified School Dist.* (1992) 3 Cal.App.4th 313, 318.) Meeting this burden requires citations to the record to direct the court to the pertinent evidence or other matters in the record which demonstrate reversible error. (Cal. Rules of Court, rule 8.204(a)(1); *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115;

Culbertson v. R. D. Werner Co., Inc. (1987) 190 Cal.App.3d 704, 710.) It also requires citation to relevant authority and argument. (*Mansell v. Board of Administration*, *supra*, 30 Cal.App.4th at pp. 545-546; *People v. Dougherty* (1982) 138 Cal.App.3d 278, 282.) It is not our responsibility to comb the appellate record for facts, or to conduct legal research in search of authority, to support the contentions on appeal. (*Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768; see also *Annod Corp. v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286, 1301.) The failure to meet this burden forfeits the issues on appeal. (*Mansell*, *supra*, at pp. 545-546; *Dougherty*, *supra*, at p. 282.) Hence, any issue regarding the challenged evidence is forfeited.

The remainder of plaintiff's argument is that "PSIC did not address all issues raised by the [first amended complaint], ignoring paragraphs 1, 2, 10, 14, 20-122. . . . Therefore, per [*Hufft v. Horowitz*] (1992) 4 Cal.App.4th 8, 13, summary adjudication was improper."[8]

Nothing in the foregoing is a demonstration that PSIC failed to meet its initial burden on its motion for summary adjudication. Plaintiff's claim must be deemed forfeited. (*Mansell v. Board of Administration*, *supra*, 30 Cal.App.4th at pp. 545-546.)

3. Bad Faith

In granting summary adjudication as to plaintiff's cause of action for breach of the implied covenant of good faith and fair dealing, the trial court observed that "the ultimate test of bad faith liability in first party cases is whether the refusal to pay policy benefits is unreasonable. In order for an insurer to have acted tortuously, it must have done so without proper cause. Where there is a genuine dispute as to the insure[r]'s liability under the policy, there can be no bad faith liability imposed on the insurer for advancing its side of the dispute. A genuine dispute exists where the insurer's position is maintained in good faith and on reasonable grounds."

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[8] *Hufft* merely sets forth the parties' burdens on a motion for summary judgment.

The trial court found that "[h]ere, there is no triable issue of material fact as to the reasonableness of defendants' action when there is a statement of a thermostatically controlled heating system. Moreover, the evidence before the court was that defendants actually made payments to plaintiffs beginning in November of 2007."

The implied covenant of good faith and fair dealing requires a party to a contract to refrain from doing anything to injure the right of the other party to receive the benefits of the contract. (*Hightower v. Farmers Ins. Exchange* (1995) 38 Cal.App.4th 853, 862.) An insurance company may breach the implied covenant "by refusing, without proper cause, to compensate the insured for a loss covered by the policy [citation], or by unreasonably delaying payments due under the policy [citation]." (*Waters v. United Services Auto. Assn.* (1996) 41 Cal.App.4th 1063, 1070; see also *Love v. Fire Ins. Exchange* (1990) 221 Cal.App.3d 1136, 1148.)

As explained in *Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co.* (2001) 90 Cal.App.4th 335, "'"[T]he ultimate test of [bad faith] liability in the first party cases is whether the refusal to pay policy benefits [or the alleged delay in paying] was *unreasonable*."' [Citations.] While the reasonableness of an insurer's claims-handling conduct is ordinarily a question of fact, it becomes a question of law where the evidence is undisputed and only one reasonable inference can be drawn from the evidence. [Citation.]" (*Id*. at p. 346.)

If there is "'a legitimate dispute as to the insurer's liability'" under the policy, then the insurer is not subject to bad faith liability. (*Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co., supra*, 90 Cal.App.4th at pp. 346-347.) "Without more, such a denial [or withholding] of benefits is merely a breach of contract. Moreover, the reasonableness of the insurer's decisions and actions must be evaluated as of the time that they were made; the evaluation cannot fairly be made in the light of subsequent events that may provide evidence of the insurer's errors. [Citation.]" (*Id*. at p. 347.)

Thus, "where there is a *genuine issue* as to the insurer's liability under the policy for the claim asserted by the insured, there can be no bad faith liability imposed on the insurer for advancing its side of that dispute." (*Chateau Chamberay Homeowners Assn.*

v. Associated Internat. Ins. Co., supra, 90 Cal.App.4th at p. 347.) Any liability for erroneous denial or delay of benefits in such a case is for breach of contract. (*Ibid*.)

"It is equally clear that this issue may be resolved as a matter of law in a proper case. '"[A] court can conclude as a matter of law that an insurer's denial of a claim is not unreasonable, so long as there existed a genuine issue as to the insurer's liability." [Citation.]'" (*Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co., supra,* 90 Cal.App.4th at p. 347.) The "genuine dispute" may involve either legal or factual questions. (*Id*. at p. 348.)

Turning to the facts of the instant case, it is clear there was a genuine dispute as to coverage. As the trial court pointed out, the application stated that the house had a thermostatically controlled heater, while in actuality it had a manually operated floor heater. Additionally, plaintiff was the only named insured. However, plaintiff was no longer living in the house at the time of the fire. Clara, who was not a named insured, was living in the house and dissolution proceedings had been initiated. These facts created a genuine coverage issue (cf. *LA Sound USA, Inc. v. St. Paul Fire & Marine Ins. Co.* (2007) 156 Cal.App.4th 1259, 1269-1270), precluding bad faith liability as a matter of law (*Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co., supra*, 90 Cal.App.4th at pp. 346-347).

Plaintiff's claim that the "genuine dispute" rule is no longer viable is not supported by the authorities he cites. In *Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, the Supreme Court clarified the rule as set forth in *Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co., supra*, 90 Cal.App.4th at page 347. It stated that "[t]he genuine dispute rule does not relieve an insurer from its obligation to thoroughly and fairly investigate, process and evaluate the insured's claim. A *genuine* dispute exists only where the insurer's position is maintained in good faith and on reasonable grounds." (*Wilson, supra,* at p. 723, citing *Chateau Chamberay Homeowners Assn., supra,* at pp. 348-349.) *McCoy v. Progressive West Ins. Co.* (2009) 171 Cal.App.4th 785, 794 and *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225,

1238 say the same thing. Here, defendants continued to investigate and ultimately decided to pay the claim despite the question as to coverage.

Moreover, in light of the subsequent nonsuit as to plaintiff's breach of contract and Unruh Civil Rights Act causes of action, it is clear that plaintiff was not prejudiced by summary adjudication of his bad faith claim. (*Minich v. Allstate Ins. Co.* (2011) 193 Cal.App.4th 477, 493 [no bad faith in the absence of breach of contract].) No different result would have been obtained had it gone to trial.

E. *Summary Judgment in Favor of DRA*

Plaintiff argues that summary judgment should not have been granted as to DRA, because DRA did not provide a declaration by the person who prepared its estimate, and the estimate provided by plaintiff created a triable issue of material fact. This is the extent of his argument, and he does not refer to any of the other evidence submitted on the motion or cite any authority. In the absence of any real attempt to address this claim of error, we reject it. (*People v. Turner*, *supra*, 8 Cal.4th at p. 214, fn. 19; *In re Marriage of Falcone & Fyke*, *supra*, 164 Cal.App.4th at p. 830.)

F. *Denial of Leave to Amend*

Plaintiff's contention that the trial court abused its discretion in denying him leave to amend his complaint to include class causes of action suffers from the same infirmity as the previous claim of error. He merely informs us that he filed his motion for leave to amend approximately six months prior to the date set for trial and cites *Record v. Reason* (1999) 73 Cal.App.4th 472, 486 for the proposition that review of the denial of leave to amend is governed by the abuse of discretion standard. He makes no argument and cites no authority demonstrating that the denial of leave to amend was an abuse of discretion considering the facts of this case. He does not even mention or discuss the trial court's stated basis for denying his motion. Again, we reject his claim of error. (*People v. Turner*, *supra*, 8 Cal.4th at p. 214, fn. 19; *In re Marriage of Falcone & Fyke*, *supra*, 164 Cal.App.4th at p. 830.)

G. *Limitation of Issues to be Adjudicated at Trial*

In denying defendants' motion for summary adjudication of plaintiff's breach of contract cause of action, the court found a triable issue of material fact as to the actual cash value of the damage. Plaintiff states that this ruling "would become very significant," because at trial, "PSIC talked the Court into an order to the effect that [plaintiff's] only claim against PSIC was on dwelling coverage and that he could **not** make claim for losses to (1) personal property; (2) damaged trees and shrubs; (3) other structures; and (4) other coverages."

Defendants' first motion in limine was for an order excluding evidence or argument that defendants were liable to plaintiff under the policy for any coverages other than actual cash value of the damages to the house and other structures under Coverage A and Coverage B. This was based on the trial court's ruling on the summary adjudication motion as to plaintiff's breach of contract cause of action.

The trial court granted the motion in limine based on its previous ruling. Plaintiff's counsel argued the ruling "doesn't say that there is no triable issue as to contents. No triable issue as to the number of other coverages. And it's my understanding under the law that if you find one triable issue as to a cause of action, the cause of action is intact."

Defendants' third motion in limine was for an order to exclude evidence of matters summarily adjudicated in defendants' favor. This was based on the summary adjudication of plaintiff's cause of action for breach of the implied covenant of good faith and fair dealing.

As plaintiff points out, summary adjudication is available to adjudicate causes of action, not to resolve factual issues. (*Raghavan v. Boeing Co.* (2005) 133 Cal.App.4th 1120, 1134-1136.)[9] Thus, the trial court erred in limiting trial of plaintiff's breach of

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[9] Code of Civil Procedure section 437c, subdivision (n)(2), specifically provides that "[i]n the trial of the action, the fact that a motion for summary adjudication is granted as to one or more causes of action . . . shall not operate to bar any cause of action . . . as to which summary adjudication was either not sought or denied."

contract cause of action to the single issue as to which it found a triable issue of material fact.

However, it is plaintiff's burden to demonstrate both error in the trial court's ruling and prejudice resulting therefrom. (*Ballard v. Uribe*, *supra*, 41 Cal.3d at p. 574; *Robbins v. Los Angeles Unified School Dist.*, *supra*, 3 Cal.App.4th at p. 318.) Plaintiff fails to meet this burden.

Plaintiff argues: "For example, [plaintiff] contended that he was not paid for some of his personal property that was damaged and that PSIC intentionally failed to include his name on the personal property payment made to Clara." This argument is unsupported by any citation to evidence submitted in opposition to the summary adjudication motion showing that PSIC failed to pay him for his damaged property. The evidence defendants submitted in support of their summary adjudication motion showed that both plaintiff and Clara submitted claims for personal property lost in the fire, and PSIC paid those claims. Where is the evidence plaintiff submitted claims that were not paid, or that Clara's claims included his property and he requested the payment for those losses be paid to both Clara and himself? Plaintiff points to none. Plaintiff fails to demonstrate that he had evidence supporting his contention as to personal property, such that he had a reasonable probability of prevailing at trial. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Plaintiff makes no argument and cites nothing in the record regarding any "claims for . . . trees and shrubs" which he contends the trial court erroneously eliminated from the action. Again, this falls far short of the requisite demonstration of prejudice resulting from the trial court's error. (*Ballard v. Uribe*, *supra*, 41 Cal.3d at p. 574; *Robbins v. Los Angeles Unified School Dist.*, *supra*, 3 Cal.App.4th at p. 318.)

H. *Evidentiary Rulings*

1. Exclusion of Testimony by Sydnie Bauer

In opposition to the first summary adjudication motion, plaintiff submitted the declaration of Sydnie Bauer (Bauer), a former PSIC employee, regarding PSIC's and

McGraw's treatment of minorities. Bauer at the time was suing PSIC and was represented by plaintiff's counsel, Steven L. Zelig (Zelig). Several months before Bauer's declaration was submitted in the instant action, Zelig had written to PSIC's counsel requesting that counsel "make sure . . . [t]hat [PSIC] and all related entities make no effort to contact [Bauer] or to communicate with her in any way."

Defendants in their fourth motion in limine sought to exclude Bauer from testifying at trial. They explained that after seeing Bauer's declaration, which appeared to be the only evidence which supported plaintiff's Unruh Civil Rights Act cause of action, they sought to depose Bauer. Zelig "flatly refused to produce Bauer for deposition over the course of the ensuing six-month period, variously asserting she would appear and then offering excuses at the last possible moment." Defendants had again served Bauer and scheduled a deposition for February 5, 2010, the discovery date cut-off. Late on the afternoon of February 4, 2010, defense counsel received a handwritten note from Zelig's office stating: "Unfortunately, we can not do Ms. Bauer tomorrow. [¶] [Plaintiff] is withdrawing Ms. Bauer as a 'percipient expert.' [¶] If you believe you are still entitled to her deposition, we will not [illegible] or expect you to [illegible] a 'non-appearance.' This letter can be used by you and have the same force and effect of a 'certificate of non-appearance.'"

Plaintiff opposed the motion on several grounds, including that the motion was not supported by a declaration or copies of the subpoenas, that defendants never filed a motion to compel her deposition, and that plaintiff had no obligation to produce "a non-retained percipient witness."

At the hearing on the motions in limine, the trial court requested from defendants' counsel "some documentation to back up your allegations that you did try to take [Bauer's] deposition and that Mr. Zelig represented to your partner that she would not be called at all is what I understand you to have said."

Defendants filed a declaration by one of their attorneys documenting the efforts to depose Bauer, as well as copies of the deposition subpoenas and proofs of service. Plaintiff filed a supplemental brief and declaration by Zelig. Plaintiff argued that the trial

court had no authority to preclude Bauer from testifying. Zelig stated that he would ask Bauer to make herself available for deposition.

At a hearing on the matter, counsel for both sides discussed the attempts to subpoena Bauer for a deposition and argued their positions. The trial court then ruled it was going to exclude Bauer's testimony. It found that "the defense has been hamstrung here. They've made many efforts to take the deposition to no avail."

On appeal, plaintiff reiterates his position that the trial court could not exclude Bauer's testimony because neither she nor plaintiff violated a court order. Plaintiff relies on *Saxena v. Goffney* (2008) 159 Cal.App.4th 316. *Saxena* involved the exclusion of a witness's testimony due to the failure to identify the witness in answers to interrogatories. (*Id*. at pp. 330-331.) The court observed that under authority which predated the Civil Discovery Act, "[p]recluding a witness from testifying at trial is proper where a party willfully and falsely withholds or conceals a witness's name in response to an interrogatory. [Citation.]" (*Id*. at p. 332, italics omitted.) This rule did not apply to evasive or incomplete discovery responses, under either the prior law or the Civil Discovery Act. (*Id*. at pp. 332-333.)

The court noted that the authority on which the trial court had relied "involved conduct not specifically covered by the Civil Discovery Act—serving a willfully false answer to an interrogatory. Giving a willfully false answer is not even included in the Civil Discovery Act's definitions of a 'misuse of discovery,' unless the prohibition against causing 'unwarranted annoyance, embarrassment, or oppression, or undue burden and expense' ([Code Civ. Proc.,] § 2030.090, subd. (b)) is broadly construed. (See [*id*.,] § 2023.010, subd. (c).)" (*Saxena v. Goffney*, *supra*, 159 Cal.App.4th at p. 333.) The court stated that under current law, "the imposition of an evidence sanction is now conditioned upon the violation of an order compelling the response ([Code Civ. Proc.,] §§ 2023.030, 2030.290, subd. (c)). Thus, current law has replaced the former requirement for the imposition of an evidence sanction—that the failure to respond was 'willful'—with the requirement that the responding party violated an order compelling the response." (*Saxena*, *supra*, at pp. 333-334.)

Saxena dealt with a specific type of conduct and the circumstance under which an evidentiary sanction could be imposed for that conduct—when it violated a court order compelling discovery. Code of Civil Procedure section 2023.010 lists conduct constituting misuse of the discovery process for which sanctions may be imposed. "Disobeying a court order to provide discovery" is but one of the listed misuses of the discovery process for which sanctions may be imposed. (*Id*., subd. (g).) Another is "[f]ailing to respond or to submit to an authorized method of discovery." (*Id*., subd. (d).) In addition, the list of misuses of the discovery process in Code of Civil Procedure section 2023.010 for which sanctions may be imposed in not exhaustive. Manifestly, violation of a motion to compel is not a prerequisite for imposition of sanctions for misuse of the discovery process.

The evidence supports a conclusion that plaintiff's counsel misused the discovery process by preventing the defense from deposing Bauer. The trial court therefore did not abuse its discretion (*Saxena v. Goffney*, *supra*, 159 Cal.App.4th at p. 332) in excluding Bauer's testimony.

2. Repair Cost Estimates by ThreeCohens and David Spiegel

Plaintiff contends the trial court abused its discretion in excluding the estimate of repair costs by David Spiegel (Spiegel) and in refusing to allow Spiegel to testify. He also contends an abuse of discretion in the admission of the ThreeCohens estimate.

Defense counsel, Michelle L. Burton (Burton), questioned Buchanan about reviewing the ThreeCohens estimate before preparing his notes on additional payments to be made under the policy. Zelig objected that Burton was "attempting to introduce hearsay without foundation." The trial court overruled the objection.

Buchanan then testified that the ThreeCohens estimate stayed in PSIC's claims file, which was maintained in the ordinary course of business. Burton requested that the estimate be admitted into evidence. Zelig objected: "It's hearsay. It's without foundation. It calls for the opinion of someone who's not in court, and it calls for an

opinion of someone who was not hired or authorized by [plaintiff] to do anything." The trial court overruled the objection and admitted it into evidence.

Zelig elicited testimony from Scerbo that she had reviewed the Spiegel estimate. He requested that it be admitted into evidence and defendants objected based on lack of foundation. The court stated, "We'll hold off admitting it." Scerbo then testified that she first saw the Spiegel estimate recently, when reviewing the file for trial.

Zelig later examined Debbie Ashmore (Ashmore), a property administrator and special investigation unit coordinator for PSIC. Ashmore testified that she had seen the estimate before. Zelig then asked her, "Do you know if PSIC paid for this estimate as part of its obligation to fully and completely investigate?" Defendants' objection to this question was sustained. Zelig requested that the estimate be admitted into evidence. Defendants objected that it lacked foundation and was hearsay. The trial court ruled that the objection was "[s]ustained at this time."

Zelig later asked Ashmore if she asked for a bid comparison after receiving the Spiegel estimate, and she said she did. Zelig again requested that the estimate be received into evidence, defendants objected based on lack of foundation, and the trial court sustained the objection. The following colloquy then took place:

"Mr. Zelig: It's no different than the Three Cohens [estimate], your Honor.

"The Court: All Right. You want to trade places? You want to come up here and make rulings and have people ignore them?

"Mr. Zelig: Your Honor, I wouldn't mind trading places, but it's not the same thing. One of them is in, the other one is not being received.

"The Court: We'll talk about that later.

"Mr. Zelig: I don't understand.

"The Court: I'm not putting [it] in now."

The court then asked if Ashmore could be excused. Zelig responded, "I need to know about the foundation for the Spiegel estimate. Until the court makes a ruling on that, I'd be happy to excuse her." The court responded that it wanted to see Zelig at sidebar. After an unreported sidebar conference, Ashmore was excused.

Plaintiff's claim that "the Court engaged in clear error by not admitting Spiegel's estimate" is not supported by citation to a single authority or cogent argument based on that authority. He has thus failed to meet his burden of demonstrating error in the trial court's ruling. (*In re Marriage of Falcone & Fyke*, *supra*, 164 Cal.App.4th at p. 830; *Mansell v. Board of Administration*, *supra*, 30 Cal.App.4th at pp. 545-546.)

Plaintiff cites *Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757 in support of his claim that the ThreeCohens estimate should not have been admitted. He does not cite to a particular page of that 66-page opinion or the principle or principles for which the case stands which he believes are relevant to this appeal, much less argue the applicability of those principles. "'"Instead of a fair and sincere effort to show that the trial court was wrong, [plaintiff's] brief is a mere challenge to [defendants] to prove that the court was right. And it is an attempt to place upon the court the burden of discovering without assistance from [plaintiff] any weakness in the arguments of the [defendants]. An appellant is not permitted to evade or shift his responsibility in this manner."'" (*People v. Dougherty*, *supra*, 138 Cal.App.3d at p. 283.)

3. Exclusion of Testimony by Spiegel and Public Adjuster Twarowski

Plaintiff cites no authority and makes no argument as to the exclusion of Spiegel's testimony. We reject his claim of error in that regard. (*People v. Turner*, *supra*, 8 Cal.4th at p. 214, fn. 19; *In re Marriage of Falcone & Fyke*, *supra*, 164 Cal.App.4th at p. 830.)

In support of his claim that the trial court erred in excluding Twarowski from testifying, plaintiff merely states that Twarowski never violated a court order and *Saxena* "is directly on point." As discussed above, *Saxena* does not hold that evidentiary sanctions may never be imposed absent violation of a court order, and the discovery statutes do not impose such a requirement. Plaintiff has failed to meet his burden of demonstrating error in the trial court's ruling. (*In re Marriage of Falcone & Fyke*, *supra*, 164 Cal.App.4th at p. 830; *Mansell v. Board of Administration*, *supra*, 30 Cal.App.4th at pp. 545-546.)

4. Exclusion of Testimony by Attorney Olivia Bissell

In going over the witnesses who Zelig had scheduled to testify, Zelig stated that he was calling attorney Olivia Bissell (Bissell) "because she represented [Clara], indeed, as a lawyer, but not only in the lawsuit, but on the claim. And she represented [Clara] on the claim on the dwelling, which is equally [plaintiff]. Okay. There were joint checks issued. The dwelling claim as to [Clara] is the dwelling claim as to [plaintiff]. She also saw the property. She also interacted with PSIC relative to some of these issues. She brought out the fact that they had not gone into smoke damage, asbestos, and things of this nature and it all goes to the [actual cash value] issue.

"So, you know, it's just inappropriate to consider the idea of just wiping her out because she's an attorney. She was also on the claim at the property and interacted with PSIC on the dwelling claim, the exact issue."

Burton responded that Bissell filed a lawsuit against defendants in October 2007, before she did anything else. Therefore, "everything she did would be protected under [Civil Code section 47, subdivision (b)], the litigation privilege. Again, she shouldn't be able to . . . get up on the stand and testify about what she saw and what she did and how my client's a bad guy on the [actual cash value] and all of this." Burton added that both plaintiff and Clara had hired public adjusters who could testify on the issue of actual cash value.[10] In addition, defendants had by that time settled with Clara, and so the "claim is about [plaintiff], what [plaintiff] did, what he submitted to the insurance company and how they treated him. Not Clara."

The trial court expressed concern about putting an attorney who was involved in the case on the witness stand. It believed plaintiff could prove the actual cash value issue "through other methods without Ms. Bissell's testimony. I don't think it hamstrings you in terms of your proof at all. What it does is murks up the water — muddies them up to

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[10] Burton noted, however, that there was a motion for sanctions under submission as to testimony by plaintiff's public adjuster, Twarowski, because defendants had been unable to take his deposition.

put her on the stand, because then we get into Clara's claim and then what happened to that and that's settled and we're into a can of worms . . . ."

Zelig insisted that he had a "paper that disproves virtually everything Ms. Burton said." Additionally, he could question Bissell about the relevant issue without "infect[ing] the proceedings with things that happened to Clara." He believed that Bissell "has nice, ripe knowledge of the issues, your Honor. I think it would be appropriate to summarily eliminate her as a witness."

The court then ruled that it was "going to exclude her as a witness. It's too dicey and there are . . . other ways in which you can still prove your case. So not having her as a witness doesn't mean you're going to fail in any element of your proof."

At the end of trial, when counsel were arguing defendants' nonsuit motion, Zelig cited *Superior Dispatch, Inc. v. Insurance Corp. of New York*, *supra*, 181 Cal.App.4th 175 for the proposition "that the failure of the insurer to advise of a statute of limitations affirmatively at the time it occurred was enough to create an estoppel. I mean, how could they argue that when they're doing bid comps two and a half years down the road that [plaintiff] was precluded a year later from asking for anything more? Their position is exactly contrary to what they did. . . . [¶] If you would let Ms. Bissell testify, she said she was negotiating with them the whole time and they always contended the claim was open."

Burton responded that Ashmore testified that PSIC has "to process anything that comes in the door. She didn't say that they were going to pay that estimate. Okay. It's straight out of the policy language. [Plaintiff] was notified in the policy via the endorsements of the one time loss. He was also notified [by] the claims confirmation letter. He was represented by counsel the entire time Clara Morgan's claim has settled and has been resolved. [Plaintiff] received over $87,000 to repair the property. The evidence is he didn't do anything to repair or replace. He doesn't own the property anymore. There is nothing to go out and repair and replace."

After further argument, Zelig stated that he still wanted to call Bissell as a witness. He requested that the court "rethink its exclusion because the reason for her exclusion is

no longer there. Now she becomes very significant." The court, however, did not change its ruling.

Superior Dispatch, Inc. v. Insurance Corp. of New York, *supra*, 181 Cal.App.4th 175 reiterates the well established principle that "[a] defendant may be equitably estopped from asserting a statutory or contractual limitations period as a defense if the defendant's act or omission caused the plaintiff to refrain from filing a timely suit and the plaintiff's reliance on the defendant's conduct was reasonable. [Citations.]" (*Id*. at p. 186.) Plaintiff argues that "Bissell would have testified that she continued to interact with PSIC after the 12 months had run from the first payment relative to resolving the structure claim, and that she received letters from PSIC concerning the claim, in which Earl was designated as the 'named insured' and PSIC did not take the position the claim was closed." (Italics omitted.) However, plaintiff fails to indicate how Bissell's testimony would prove that PSIC's actions caused *him* to refrain from taking action within one year of PSIC's payment of the actual cash value of the damage, stopping PSIC from refusing to pay additional amounts on plaintiff's claim.

Only relevant evidence is admissible at trial. (Evid. Code, § 350.) Relevant evidence is that which has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (*Id*., § 210.) The trial court has the duty to determine the relevance and thus the admissibility of evidence before it can be admitted. (*Id*., §§ 400, 402.) The trial court is vested with broad discretion in performing this duty. (*People v. Harris* (2005) 37 Cal.4th 310, 337.) We review the trial court's determination as to admissibility that turns on relevance for abuse of discretion. (*Ibid*.)

Inasmuch as plaintiff has failed to show that Bissell's testimony was relevant to an issue at trial, he has not shown that the trial court abused its discretion in excluding the testimony. He has not met his burden of demonstrating reversible error. (*Ballard v. Uribe*, *supra*, 41 Cal.3d at p. 574; *Robbins v. Los Angeles Unified School Dist.*, *supra*, 3 Cal.App.4th at p. 318.)

5. Testimony by Scerbo Regarding Claims Handling

Zelig made an "offer of proof that, when Ms. Scerbo's deposition was taken, she was questioned about how often she attempted to rescind claims. And what she said was, in her career at [PSIC], which insures property all over the state, she suggested rescission 100 times, and 50 of those were out of Compton, which is an extraordinarily high statistic. And I think it goes very strongly to the fact that there was special treatment here for these individuals who were disenfranchised in the Compton area and that there's already evidence that there's a high demographic percentage of African-Americans and other minorities there. And it goes exactly to my claim. That's all I was going to talk about on the rescission."

Burton objected on the ground the policy was not rescinded and the court had already determined there was a genuine dispute as to coverage. The trial court agreed, explaining that "there can be any number of other reasons [for rescission]. I'm sure we would hear those and we'd be in trial for the next year or so. The fact is, there was no attempt to rescind this. The allegation is that he was treated badly because of his race. Let's . . . stick with that."

Zelig argued that the evidence was "statistically significant, . . . just on its face." The trial court refused to change its ruling.

The evidence that 50 percent of the rescissions Scerbo recommended were in Compton, and PSIC insures property all over the state, without more, was not statistically significant. Without evidence as to whether Scerbo handled claims from all over the state or the reasons for the rescissions, the statistics were meaningless.

Evidence Code section 352 gives the trial court the discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." "'In general, the trial court is vested with wide discretion in determining relevance and in weighing the prejudicial effect of proffered evidence against its probative value.'" (*People v. Valencia* (2008) 43 Cal.4th 268, 286.) We find no abuse of discretion in exclusion of the proffered evidence

on the ground its marginal relevance was outweighed by the probability its admission would necessitate an undue consumption of time.

I. *Violation of Court Orders*

Plaintiff contends the trial court erred in allowing defendants "to violate in limine orders." The trial court made evidentiary rulings on motions in limine, and plaintiff claims defendants sought to introduce evidence in violation of those rulings.

Before a party is entitled to reversal of a verdict or judgment based on the erroneous admission of evidence, it must be shown by the record that there was "an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion" and "[t]he court which passes upon the effect of the error or errors [must be] of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice." (Evid. Code, § 353, subds. (a) & (b).) There has been a miscarriage of justice if, but for the error or errors complained of, the party making the complaint would have obtained a more favorable result. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

In addition to his laundry list of alleged violations of the court's evidentiary rulings, plaintiff gives us one example in which Burton asked plaintiff a question about his divorce proceeding. Zelig objected, the trial court sustained his objection and ordered the jury to disregard the question. Clearly, the trial court did not allow defendant to violate its evidentiary ruling but enforced that ruling.

Missing from plaintiff's discussion of this issue is the question of prejudice, particularly necessary here in light of the fact that the case did not proceed to a jury verdict but was resolved by nonsuit. Plaintiff has failed to meet his burden of demonstrating reversible error. (Evid. Code, § 353; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

J. *Nonsuit*

On appeal from a judgment of nonsuit, the question is whether plaintiff presented any substantial evidence which would support a judgment in his favor. (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291; accord, *Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1124-1125.) In reviewing the evidence, we give plaintiff's evidence all the value to which it is legally entitled, drawing all reasonable inferences in his favor. (*Nally*, *supra*, at p. 291; *Kidron v. Movie Acquisition Corp*. (1995) 40 Cal.App.4th 1571, 1580.) We will not draw inferences based on speculation or conjecture, however. (*Kidron*, *supra*, at pp. 1580-1581.) In order to reverse a nonsuit, we must find substantial evidence which would support a judgment in plaintiff's favor under a tenable theory of liability. (*Wolf*, *supra*, at pp. 1124-1125; *Kidron*, *supra*, at p. 1580.)

In granting a nonsuit as to plaintiff's breach of contract cause of action, the court ruled that looking at the terms of the policy and the requirement that an insured "is obligated to understand the terms of the policy and the evidence showing that the property was not repaired, rebuilt or replaced within one year and the evidence as to the payment on November 13th of the $55,000 and the further fact that the property was foreclosed upon and [plaintiff] has no insurable interest at this point — he did for the [actual cash value] of the loss, the loss was August 3rd, he . . . and whoever the bank and I think Mr. Twarowski and Clara were compensated for that. That's the value of the loss, the actual cash value as of the date of the payment. And nothing was done within the one year time period. I think [Insurance Code section 2051.5] is clear. I think the policy is not as clear as the statute is, but it is there. And I think the evidence supports the granting of a non-suit on the breach of contract claim."

Insurance Code section 2051.5 (section 2051.5) provides: "(a) Under an open policy that requires payment of the replacement cost for a loss, the measure of indemnity is the amount that it would cost the insured to repair, rebuild, or replace the thing lost or injured, without a deduction for physical depreciation, or the policy limit, whichever is less.

"If the policy requires the insured to repair, rebuild, or replace the damaged property in order to collect the full replacement cost, the insurer shall pay the actual cash value of the damaged property . . . until the damaged property is repaired, rebuilt, or replaced. Once the property is repaired, rebuilt, or replaced, the insurer shall pay the difference between the actual cash value payment made and the full replacement cost reasonably paid to replace the damaged property, up to the limits stated in the policy.

(b)(1) . . . [N]o time limit of less than 12 months from the date that the first payment toward the actual cash value is made shall be placed upon an insured in order to collect the full replacement cost of the loss, subject to the policy limit. . . ."

Consistent with the foregoing, the policy here provided: "We will pay no more than the actual cash value of the damage unless: [¶] (a) Actual repair or replacement is complete . . . ." After the fire, Scerbo sent plaintiff a letter advising him: "If you have replacement cost coverage on your policy for your dwelling or personal property, then you have 12 months from the date the first payment is made toward actual cash value to collect the full replacement costs."

A cause of action for breach of contract requires a contract, plaintiff's performance, defendants' breach, and resulting damages to plaintiff. (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388.) There is no issue here as to the existence of a contract and plaintiff's performance. The question is whether plaintiff proved breach and damages.

In support of his contention that the trial court erred in granting a nonsuit as to his breach of contract cause of action, plaintiff presents us with about 15 pages of facts supported by record references, some relevant and some completely irrelevant, as well as references to evidence not admitted and commentary on the evidence. To the extent he is inviting us to wade through his discussion and distill from it the relevant admitted evidence and make a determination, without benefit of citation to authority or cogent argument, as to whether the trial court erred in granting the nonsuit, we decline to do so. (*In re Marriage of Falcone & Fyke*, *supra*, 164 Cal.App.4th at p. 830; *Mansell v. Board*

of Administration, supra, 30 Cal.App.4th at pp. 545-546; *People v. Dougherty, supra*, 138 Cal.App.3d at p. 283.)

At the end of his discussion, plaintiff lists six facts supported by the evidence which he claims demonstrate that PSIC breached the insurance contract by failing to pay him the actual cash value of the loss. These include that PSIC originally paid plaintiff $55,000, which did not include code upgrades or environmental issues, and plaintiff could not rebuild for that amount and communicated that fact to PSIC. PSIC then paid an additional $25,000, "again without regard to environmental issues, code upgrades or hidden damage. Hence, the evidence was absolutely clear that PSIC initially underpaid the loss by more than 30%."

Plaintiff further states "[t]he proper payment should have been around $200,000," and "[i]f the court had allowed Spiegel to testify and lay the foundation for his estimate, the evidence would have been that the original payment of PSIC was slightly less than **400%** below what should have been paid. It was clear evidence of breach of insurance contract." Spiegel did not testify, however, and his estimate was not admitted into evidence. Thus, there was no evidence of this claimed breach of contract.

Plaintiff also asserts that the trial court misapplied section 2051.5. Plaintiff claims, relying on Scerbo's testimony, that since the initial $55,243.58 payment was an "RCV" (replacement cost) payment, rather than an "ACV" (actual cash value) payment, section 2051.5 did not apply. Plaintiff cites Scerbo's testimony that since PSIC did not take depreciation, the payment was an RCV payment.

Zelig had previously tried to get Scerbo to identify the payment as either an ACV or an RCV payment. She attempted to say it was neither, and when asked "[s]o what else is there under this policy? Pick one," she explained, "Well, it was paid under — it's an actual cash value policy because the depreciation was $122, it was very minimal, we just went ahead and paid the RCV of it." Zelig then had Scerbo confirm that the $55,243.58 was an RCV payment.

The policy provided that PSIC "will pay no more than the actual cash value of the damage unless . . . [a]ctual repair or replacement is complete." The insured could

"disregard the replacement cost loss settlement provisions and make claim under this policy for loss or damage to the buildings on an actual cash value basis," meaning that the insured could accept the ACV payment but "make claim within 12 months from the date that the first payment toward actual cash value is made for any additional liability on a replacement cost basis." In context, it is clear that Scerbo was testifying that the $55,243.58 payment was "the first payment toward actual cash value," but because depreciation was minimal, PSIC paid the replacement cost amount. Her testimony does not support plaintiff's position that PSIC never made a payment toward actual cash value of the damage, triggering the running of the 12-month period in the policy and section 2051.5.

As defendants point out, under both the policy and section 2051.5, plaintiff was required to repair or replace the damaged property within 12 months in order to recover more than actual cash value of the damage. (*Minich v. Allstate Ins. Co.*, *supra,* 193 Cal.App.4th at p. 493; see also *Fraley v. Allstate Ins. Co.* (2000) 81 Cal.App.4th 1282, 1289-1290.) Plaintiff argues that there was good cause to extend the 12-month period, based on PSIC payment of over $25,000 almost 12 months after the initial payment, suggesting that the initial payment was not a "good faith" ACV payment. Even if that were the case, plaintiff did not repair or replace the damaged property within 12 months after that second payment; he lost the property through foreclosure.

Plaintiff's assertion that he did not lose the right to make a claim for replacement cost after foreclosure is not well taken. First, the law is to the contrary. (See *Minich v. Allstate Ins. Co.*, *supra,* 193 Cal.App.4th at p. 493.) Second, the basis of his assertion is that PSIC changed its position after settling with Clara as to whether the policy "runs with the land." PSIC's position was never that the policy "runs with the land." PSIC's initial position that Clara's claim was not covered was based on the fact that plaintiff was the only "named insured" in the policy.

PSIC's position that plaintiff was not entitled to replacement cost was not based on the policy "running with the land." It was based on the facts that plaintiff had not completed repairs to the property and, in view of the loss of the property through

foreclosure could not complete the repairs, "so the extended replacement cost wouldn't be owed under the terms of the policy."

Insurance Code section 301, on which plaintiff relies, does not compel a different result. It merely states that "[a] change of interest in a subject insured, after the occurrence of an injury which results in a loss, does not affect the right of the insured to indemnity for the loss." Plaintiff received indemnity for his loss under the policy—the ACV payment. He was entitled to nothing more unless he repaired or replaced the damaged property.

Plaintiff has failed to demonstrate the existence of substantial evidence which would support a judgment in his favor on his breach of contract cause of action under any tenable theory of liability.[11] The judgment of nonsuit therefore must be upheld. (*Wolf v. Walt Disney Pictures & Television*, *supra*, 162 Cal.App.4th at pp. 1124-1125; *Kidron v. Movie Acquisition Corp.*, *supra*, 40 Cal.App.4th at p. 1580.)

K. *Cost Bill*

Defendants filed their memorandum of costs, seeking total costs of $140,053.58. This amount included $90,040.51 in witness fees and $44,498.75 in deposition costs.

Plaintiff filed a motion to tax/strike the memorandum of costs. As part of that motion, he sought production of defendants' settlement agreement with Clara and an accounting of defendants' costs pertaining to that case, and also an order to show cause against PSIC and Burton re submission of a misrepresentative cost bill. The main bases of the motion were that defendants included in their memorandum of costs those costs relating to Clara's litigation, and defendants' failure to comply with Code of Civil Procedure section 998.

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[11] Inasmuch as plaintiff makes no contention with respect to the nonsuit on his Unruh Civil Rights Act cause of action, any such contention is forfeited. (*Christoff v. Union Pacific Railroad Co.* (2005) 134 Cal.App.4th 118, 125.)

At the hearing on the motion, the trial court acknowledged that "part of the motion is well taken. We had two cases . . . that involved the same defense firm. One of the cases settled. The other went to trial. Now the defense firm is trying to collect its costs and the plaintiff is saying, 'Well, some of those costs are associated with the other case.' And I think that's true to a certain extent."

Counsel for defendants noted that since the claims were the same in both cases, "it's basically the exact same case. What we had here was $90,000 in expert witness fees. All of those experts were identified as experts for both cases. And, in fact, all the testimony, all the depositions, those were all — that's all expert testimony. And those are all depositions that would have had to have been taken whether or not Clara Morgan was a party to this litigation. The witnesses in this case were exactly the same."

Defendants' counsel noted that plaintiff in his moving papers "doesn't suggest any single one cost item that he believes was incurred exclusively to Clara Morgan's case. There is no real way to apportion a case like this. . . . [¶] All of this discovery was necessary and it would have had to have gone forward whether or not Clara Morgan was a party to this case."

The trial court agreed with defendants' counsel but did not think it "should put the entire burden on [plaintiff] for the work that was done on Clara's case. [¶] So I do think that the bulk of the work, though, was for both. So, while at first I had thought about maybe splitting it, I don't think that's quite fair. And so what I've come to in my own mind is a one-third/two-thirds evaluation where two-thirds of the work was necessary to get the case into and in the course of the trial that we went through, whatever that was."

Plaintiff's counsel responded by "bring[ing] to the court's attention . . . that we've asked for a reduction of certain items . . . that appear to be unreasonable regardless of the allocation issue. . . . [¶] And with respect to the allocation issue, I just want to point out some very specific particulars that show that, indeed, the defense position is overbroad as to whether or not everything was spent in defense of both cases. Specifically, they've got deposition-related costs for Olivia Bissell. That's counsel for Clara Morgan and her children. There is no way she would have been deposed if this case had been brought

[solely] by Earl Morgan." Additionally, "probably 90 percent of [the cost of deposing Clara and Monique Morgan] would have been unnecessary had they not been plaintiff's in their own case."

The trial court still believed that the fairest way to allocate costs was two-thirds as to plaintiff and one-third as to Clara. It granted plaintiff's motion in part and denied it in part, awarding defendants two-thirds of their claimed costs, $93,369.05. It denied plaintiff's request for an order to show cause.

In *Seever v. Copley Press, Inc.* (2006) 141 Cal.App.4th 1550, cited by plaintiff, this court explained that the standard of review for an award of costs is abuse of discretion. (*Id*. at pp. 1556-1557.) "'If the items on a verified cost bill appear proper charges, they are prima facie evidence that the costs, expenses and services therein listed were necessarily incurred'" and therefore recoverable under Code of Civil Procedure section 1032, subdivision (b). (*Seever*, *supra*, at p. 1557.) "[I]t is not enough for the losing party to attack submitted costs by arguing that he thinks the costs were not necessary or reasonable. Rather, the losing party has the burden to present evidence and prove that the claimed costs are not recoverable." (*Ibid*.)

Most of plaintiff's attack on the cost award is simply argument that he thinks the costs were not necessary for the defense of his case or reasonable. This is not enough. (*Seever v. Copley Press, Inc.*, *supra*, 141 Cal.App.4th at p. 1557.)

Plaintiff also identifies certain costs as not recoverable, but he cites no authority and makes no argument in support of his position. This forfeits his claim of error. (*In re Marriage of Falcone & Fyke*, *supra*, 164 Cal.App.4th at p. 830; *Mansell v. Board of Administration*, *supra*, 30 Cal.App.4th at pp. 545-546; *People v. Dougherty*, *supra*, 138 Cal.App.3d at p. 283.)

DISPOSITION

The judgment and order are affirmed. Defendants are to recover their costs on appeal.

JACKSON, J.

We concur:

PERLUSS, P. J.

WOODS, J.