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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

JUDITH FOGEL,

Plaintiff and Appellant,

v.

STATE FARM GENERAL INSURANCE COMPANY,

Defendant and Respondent.

2d Civil No. B268218
(Super. Ct. No. 56-2012-00421592-CU-BC-VTA)
(Ventura County)

Judith Fogel brought this breach of contract action against State Farm General Insurance Company (State Farm) for a personal property loss she claims occurred as a result of transactions with a consignment dealer. Fogel voluntarily provided the dealer with a diamond and other items to sell on consignment. When a dispute arose concerning monies owed by Fogel to the dealer, the dealer refused to return the diamond and other personal property pending resolution of their dispute.

Instead of suing the dealer, Fogel made an insurance claim, which State Farm denied. It determined the purported loss of the diamond and other personal property was not an "accidental direct physical loss"

covered under the relevant policies. The trial court agreed the loss was not "accidental" and granted summary judgment for State Farm. We affirm.

FACTS AND PROCEDURAL BACKGROUND

State Farm issued a Personal Articles Policy (PA Policy) to Fogel that provided coverage for a ladies' 5.7 carat diamond ring (hereafter "the diamond") valued at approximately $15,900. The PA Policy's coverage provision stated: "We insure for *accidental direct physical loss or damage* to the property covered . . . ." (Italics added.) State Farm also issued a Homeowners Policy (HO Policy) that covered the contents of Fogel's home. The HO Policy "insure[d] for *accidental direct physical loss* to property" caused by "[t]heft, including attempted theft and loss of property from a known location when it is probable that the property has been stolen." (Italics added.)

In August 2010, Fogel decided to sell the diamond. She brought the diamond to Brian Dubois, a consignment diamond and gold dealer with whom she had multiple prior dealings. She had, for example, previously sold a ring to Dubois for $12,000. All the prior transactions between them were oral and conducted in cash.

Fogel wanted at least $17,000 for the diamond. Dubois told Fogel he might have a buyer for it, with or without the setting. Fogel gave Dubois the diamond to sell on consignment. In return, Dubois provided Fogel with a $17,000 check as a "marker," but instructed her not to cash the check.

Dubois was not able to sell the diamond immediately. A week or two later, Dubois returned the diamond's setting to Fogel, but continued to try to sell the diamond. When the diamond failed to sell in a few months, Dubois offered to return it to Fogel, but she told him to continue with his

efforts. At one point, Fogel tried to cash the check that was given to her as a "marker," but she was unable to negotiate it.

In the meantime, Fogel engaged in other business transactions with Dubois. First, Dubois loaned her approximately $3,000 in cash. No arrangements were made for repayment of the loan, but Fogel assumed that "[f]uture business dealings would take care of" the debt.

Second, Dubois agreed to provide Fogel with cash to redeem jewelry she had pawned with King's Jewelry and Loan (King's). The agreement presumed that Fogel would compensate Dubois by allowing him to keep some of the redeemed jewelry. Using Dubois' money, Fogel redeemed 48 pieces of jewelry from King's. Fogel permitted Dubois to keep a gold watch, a gold bracelet, a charm bracelet, three rings and a topaz bracelet. Neither Fogel nor Dubois maintained records of the value of the redeemed jewelry or of the jewelry Dubois retained.

According to King's receipts, the 48 pieces of jewelry were redeemed for $8,686, and the weight of the gold for those pieces totaled 342.8 grams. Based on an agreed-upon price of $20 per gram, the value of the redeemed gold was $6,856. Without taking into account the jewelry Fogel kept, the redemption receipts show that Dubois paid more to redeem the jewelry than its actual value. This led Dubois to claim he was owed additional funds. Despite their disagreement over this fact, Fogel believed she and Dubois would work it out.

Next, Fogel provided Dubois with a statue to sell on consignment. Dubois sold the statue. Fogel claimed Dubois did not pay her for the statue, while Dubois claimed that he did.

Finally, Fogel and Dubois met to discuss Fogel's purported indebtedness to Dubois. Dubois said he would return the diamond if Fogel

executed a note acknowledging that she owed him money. Dubois claimed that Fogel owed him between $5,000 and $7,000. Fogel refused to sign a note. She did not believe she owed Dubois any money, but she understood that Dubois was holding the diamond as security for the alleged debt. She also believed an accounting was necessary to determine if she owed him money.

Fogel subsequently reported the diamond's loss to the police. Based on the facts she supplied, the police told her it was a "civil matter." Rather than suing Dubois, Fogel submitted a claim to State Farm for the alleged "theft" of the diamond and the other personal property she had voluntarily given to Dubois as part of their ongoing business dealings.

Specifically, Fogel made two insurance claims. One claim was submitted under the PA Policy for the purported theft of the diamond. The second claim was submitted under the HO Policy for the claimed theft of a statue, a gold watch, a gold bracelet, a charm bracelet, three rings and a topaz bracelet. State Farm denied both claims, concluding there was no accidental direct physical loss of the diamond as required by the PA Policy. State Farm based this conclusion on Fogel's admitted voluntary parting with the diamond consistent with her business history with Dubois. Similarly, State Farm concluded under the HO Policy that there was no accidental direct physical loss of covered property. Because Fogel gave the personal property to Dubois as part of her transactions with him, State Farm determined his retention of the items did not constitute theft.

Fogel sued State Farm for breach of contract. State Farm moved for summary judgment, arguing Dubois' retention of Fogel's personal property did not qualify as either an "accidental direct physical loss" of property under either policy or a "theft" under the HO Policy. It maintained

that without a covered loss, no benefits were owed and Fogel's claims were properly denied.

The trial court granted the motion. It concluded that State Farm made a prima facie showing that Fogel could not prove her claimed losses came within the policies' coverage. It further determined that Fogel did not offer evidence sufficient to raise a triable issue of material fact. Fogel appeals.

DISCUSSION

Standard of Review

A motion for summary judgment is properly granted only when "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) We review a grant of summary judgment de novo and decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348.) We view the evidence in the light most favorable to the opposing party, liberally construing the opposing party's evidence and strictly scrutinizing the moving party's. (*O'Riordan v. Federal Kemper Life Assurance Co.* (2005) 36 Cal.4th 281, 284.)

The interpretation of an insurance policy, like other contracts, is a legal question to which the court applies its own independent judgment. (*Haynes v. Farmers Ins. Exchange* (2004) 32 Cal.4th 1198, 1204; *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18.) "It is well settled that it is the burden of the insured to show that a loss falls within the basic scope of coverage of a policy. [Citation.] When an occurrence is clearly not included within the coverage afforded by the insuring clause, it need not also be specifically excluded. [Citation.] The analysis of an insurance policy . . . is

guided by the mutual intent of the parties, which is found, if possible, solely in the written provisions of the contract. [Citation.] The clear and explicit meaning of those provisions, as interpreted in their ordinary and popular sense, controls the interpretation unless the terms are either used by the parties in a technical sense or are given special meaning by the usage of the terms. [Citation.]" (*Rios v. Scottsdale Ins. Co.* (2004) 119 Cal.App.4th 1020, 1025.)

Fogel's Alleged Property Loss was Not "Accidental"

The insuring clauses of both the PA and HO Policies require an "accidental direct physical loss." This is a "fundamental precondition to coverage" under both policies. (*MRI Healthcare Center of Glendale, Inc. v. State Farm General Ins. Co.* (2010) 187 Cal.App.4th 766, 777 (*MRI Healthcare*).) Consequently, "[t]he accidental direct physical loss requirement . . . falls within [Fogel's] burden of proof." (*Id.* at p. 778; *Rios v. Scottsdale Ins. Co., supra,* 119 Cal.App.4th at p. 1025.) Fogel asserts that she has met this burden or was excused from meeting it. We disagree.

The term "'[a]ccidental' in an insurance policy ordinarily means unintended and unexpected by the insured." (*American Alternative Ins. Corp. v. Superior Court* (2006) 135 Cal.App.4th 1239, 1249.) "Our courts have repeatedly held that 'the term "accident" does not apply to an act's consequences, but instead applies to the act itself.' [Citations.] [¶] These cases make clear that '[a]n accident does not occur when the insured performs a deliberate act unless some additional, unexpected, independent, and unforeseen happening occurs that produces the damage.'" (*State Farm General Ins. Co. v. Frake* (2011) 197 Cal.App.4th 568, 579.) As explained in *Fire Insurance Exchange v. Superior Court* (2010) 181 Cal.App.4th 388, 392-393, "Where the insured intended all of the acts that resulted in the victim's

injury, the event may not be deemed an 'accident' merely because the insured did not intend to cause injury. [Citations.] The insured's subjective intent is irrelevant. [Citations.] Indeed, it is well established in California that the term 'accident' refers to the nature of the act giving rise to liability; not to the insured's intent to cause harm." (See also *Merced Mutual Ins. Co. v. Mendez* (1989) 213 Cal.App.3d 41, 48 ["[A]ppellants contend an accident occurs even if the acts causing the alleged damage were intentional as long as the resulting damage was not intended. The argument urged by appellants has been repeatedly rejected by the appellate courts"].)

In *MRI Healthcare*, the insured's MRI machine had to be "ramped down" to allow for roof repairs. Prior to taking that action, the insured was warned that a high probability existed that once ramped down, the MRI machine would not ramp up again. When the machine failed to ramp up, the insured submitted a claim under its business property policy, which covered "accidental direct physical loss." (*MRI Healthcare*, *supra*, 187 Cal.App.4th at pp. 774-775.) The trial court concluded that the loss was not accidental because the ramp down of the machine resulted from the insured's intentional act and because the claimed damage was not unexpected, unintended or unforeseen. (*Id.* at pp. 781-782.)

Here, the undisputed evidence established that the loss of the diamond and other items of personal property was not "accidental" within the meaning of the policies, but rather the result of a deliberate and intentional act by Fogel. (See *MRI Healthcare*, *supra*, 187 Cal.App.4th at p. 781.) Fogel voluntarily gave the items, which included the diamond, statue, and other assorted jewelry, to Dubois as part of their ongoing business dealings. She gave him the diamond and statue to sell and provided the other jewelry to compensate him, at least in part, for paying approximately $8,686 to redeem

the 48 pieces of jewelry from King's pawn shop. Fogel also borrowed $3,000 from Dubois with the expectation that the diamond would sell and that she would be able to pay him back. She knew, or at least should have known, that a business dispute could occur regarding compensation for the diamond and other items, and that Dubois would retain them as collateral until the dispute was resolved. Such a dispute was not an unexpected or unforeseen consequence of the various business transactions they were engaged in, particularly since they chose to conduct them in cash without any documentation.

The out-of-state cases cited by Fogel do not aid her position. Three of the cases discuss policy exclusions, not whether the loss was an "accidental direct physical loss." (See *Collins v. Royal Globe Ins. Co.* (Fla.Ct.App. 1979) 368 So.2d 941, 942 (*Collins*); *Schutt v. Farmers Ins. Group of Companies* (1994) 129 Ore.App. 401, 403 [879 P.2d 1303, 1304] (*Schutt*); *Tripp v. United States Fire Ins. Co.* (1935) 141 Kan. 897 [44 P.2d 236, 237] (*Tripp*).) This distinction is material as it is Fogel's burden to show that the claims fall within the insuring policies. (*MRI Healthcare, supra,* 187 Cal.App.4th at p. 778.) Since Fogel did not meet that burden, the burden did not shift to State Farm, as the insurer, to prove that the loss was caused by an excluded peril. (*Garvey v. State Farm Fire & Casualty Co.* (1989) 48 Cal.3d 395, 406.)

In any event, the cases are distinguishable on their facts. In *Schutt*, a man took a car from a dealer for a test drive and did not return it. The trial court determined that was not a "voluntary parting" of the vehicle and that the plaintiff was entitled to recover under the insurance policy for loss of the car. (*Schutt*, *supra*, 879 P.2d at p. 1307.) Similarly, in *Tripp*, a prospective purchaser test drove the plaintiff's car and then absconded with

it. (*Tripp*, *supra*, 44 P.2d at p. 237.) Although the insurance policy excluded theft when the insured voluntarily parts with title and/or possession, the court held the exclusion did not apply because the thief had custody of the vehicle, but not possession or title. (*Id.* at p. 238.)

In *Collins*, a person fraudulently induced the owner of a mobile home to deliver possession of the mobile home under the guise of renting it. (*Collins*, *supra*, 368 So.2d at p. 942.) The person and the motor home subsequently disappeared. The court determined a theft occurred because the person was not in "lawful possession" of the vehicle. (*Ibid.* ["[S]ince the thief intended to steal the vehicle at the time he acquired possession and all his representations to the plaintiff about rental of the vehicle were false and fraudulently designed to induce the plaintiff to deliver possession, the thief never acquired lawful possession of the vehicle"].) The court reached the same conclusion in *United Services Automobile Association v Park* (Fla.Ct.App. 1965) 173 So.2d 162, 163, in which the plaintiff sold his car to the defendant, who paid for it with an invalid check. When the plaintiff looked for the defendant, he had disappeared. The court of appeal affirmed the trial court's ruling that the vehicle had been stolen based on the false pretenses under which it had been sold. (*Id.* at p. 164.)

Fogel argues the instant case is no different than a party selling his or her vehicle, only to find, after transfer of the vehicle, that the check was a forgery or lacked sufficient funds. Under that scenario, she maintains, the transferee of the vehicle never obtained lawful possession, and therefore a theft occurred. But that is not what happened here. Dubois lawfully obtained possession of the diamond and other items because Fogel voluntarily gave them to him in connection with their various, ongoing business dealings. Dubois did not give Fogel a bogus check and then abscond

with the diamond. If he had, there might be some similarity to the cited cases. Instead, he gave her the $17,000 check as a "marker" to hold while he attempted to sell the diamond. When it failed to sell immediately, he returned its setting to Fogel and offered to return the diamond as well. Rather than accept his offer, Fogel asked him to continue his efforts to sell the diamond. She also borrowed $3,000 from him and obtained another $8,686 to redeem 48 pieces of jewelry held by King's. Fogel gave Dubois some of that jewelry to compensate him for the redemption cost, but he did not believe the jewelry fully compensated him for the loans. As a result, he withheld the diamond as collateral for the debt. Dubois said he would return the diamond if Fogel signed a note acknowledging that debt, but she refused to do so.

As State Farm points out, what occurred between Fogel and Dubois is not unusual. Disputes frequently arise between parties when goods are bought and sold or money is loaned. This was a foreseeable risk to Fogel when she undertook these business transactions. Fogel has not demonstrated that the PA and HO Policies insure against such risks. (See *MRI Healthcare*, *supra*, 187 Cal.App.4th at p. 778.)

Moreover, there is no evidence that Dubois tricked Fogel into giving him the diamond or other items. To the contrary, Fogel insisted that Dubois continue his efforts to sell the diamond while she borrowed money from him to, among other things, redeem the jewelry from King's. Fogel acknowledged that she would have to repay that money to Dubois, and presents no evidence that it was totally repaid. At best, she made a partial payment when she gave him some of the jewelry she redeemed from King's. As Fogel concedes, an accounting is necessary to determine whether or not she still owes money for the amounts loaned by Dubois.

State Farm's denial of Fogel's insurance claim does not leave her without a remedy. Dubois, who apparently is still holding the diamond, has expressed a willingness to resolve the dispute regarding the amounts owed. If the dispute cannot be resolved to Fogel's satisfaction, she can seek a judicial remedy against him. What she cannot do is claim an "accidental direct physical loss" or "theft" of the property for insurance purposes. The trial court properly entered summary judgment for State Farm.

DISPOSITION

The judgment is affirmed. Respondent shall recover its costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Vincent J. O'Neill, Judge

Superior Court County of Ventura

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