BROWN v. FARMERS GROUP, INC.

MICHAEL BROWN et al., Plaintiffs and Appellants,

v.

FARMERS GROUP, INC., et al., Defendants and Respondents.

No. A127670.

Court of Appeals of California, First District, Division Four.

Filed August 31, 2011.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

REARDON, Acting P.J.

The trial court granted summary judgment to respondents Farmers Group, Inc. and Mid-Century Insurance Company, finding that a claimed loss was excluded under the policy. Appellants Michael, Sheila and Brendon Brown appeal, contending that the dust infiltration they suffered at their home was covered by their policy. We affirm the judgment.

I. FACTS

In January 2007, appellants Michael and Sheila Brown purchased a newly constructed home on Ridge Crest Court in Oakley. When they purchased their home, the Browns signed disclosure statements acknowledging that the area around their home experienced gusty winds and would be in development for some years to come, which might result in dust and airborne mold. The husband and wife also obtained an "all-risk" homeowner's insurance policy for their home. The policy was issued by respondent Mid-Century Insurance Company, which is managed by respondent Farmers Group, Inc.[1] The all-risk policy was in effect from January 31, 2007 through January 31, 2008. It contained provisions insuring for losses to the dwelling and personal property.

The Browns—accompanied by their son Brendon—moved into the house in February 2007. Within days, the Browns noticed an unusual amount of dust accumulating in their house. It was a constant, ongoing condition. When they ran their heating and air conditioning system, the dust was even more noticeable. The Browns reported the high dust level to the builder. In April and May 2007, severe windstorms occurred in the area.

Sheila Brown contracted chronic valley fever, a respiratory condition resulting from exposure to fungus contained in certain dust.[2] Since March 2007, she has been hospitalized several times as a result of her condition, which may prove fatal.

In the summer of 2007, the Browns filed a claim under their Farmers' policy. In August 2007, Farmers' representatives came to the house and investigated the cause of the dust intrusion. According to Sheila Brown's sister, Farmers adjustor Mike Idarola stated that the loss was covered. By the end of August 2007, the

Browns received verbal notice that their claim was denied. In December 2007, Farmers sent a written letter denying coverage.

In January 2008, the Browns moved out of the house. An expert contractor inspected the house for them, discovering that an HVAC line in the attic was disconnected, causing dust to be brought into and dispersed throughout the house. The Browns advised Farmers of this information.

In May 2008, the Browns brought action against Farmers and Mid-Century[3] for breach of contract, breach of implied covenant of good faith and fair dealing, and intentional infliction of emotional distress.[4] They alleged that their losses were covered under the policy, that Farmers failed to properly investigate their loss, and that the insurance company mishandled their claim.[5] In their complaint, the Browns identified windstorms, the HVAC system or valley fever as potential causes of their loss. During discovery, they identified defects in the HVAC system, their windows and valley fever as potential causes.

In July 2009, Farmers moved for summary judgment. The Browns opposed the motion. Farmers objected to some of the evidence that the Browns offered in opposition to their motion, which were sustained. A hearing was conducted on the motion in October 2009.

In November 2009, the trial court granted summary judgment to Farmers on the breach of contract cause of action, based on its conclusion that the loss was not covered as a matter of law. The other causes of action for breach of the implied covenant of good faith and fair dealing and intentional infliction of emotional distress were also rejected because the Browns suffered no loss covered by the policy.

II. COVERAGE

A. *Standard of Review*

The Browns contend that the dust infiltration injury they suffered was covered by their policy and that the trial court erred by granting summary judgment premised on a contrary conclusion. Any party may move the trial court for summary judgment, contending that there are no triable issues of material fact. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843; see Code Civ. Proc., § 437c, subd. (c).) On appeal, we determine anew whether Farmers—as the party seeking summary judgment—has conclusively established that there is no coverage such that it is entitled to summary judgment as a matter of law. (See *Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 860; *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334; *Nissel v. Certain Underwriters at Lloyd's of London* (1998) 62 Cal.App.4th 1103, 1109-1110 (*Nissel*).) When an order granting summary judgment is based on an interpretation or application of the terms of an insurance policy, we review the trial court's decision de novo. (*Powerine Oil Co., Inc. v. Superior Court* (2005) 37 Cal.4th 377, 390 (*Powerine*).)

When ruling on a motion for summary judgment, the trial court considers all evidence set forth in the moving and opposing papers, except that to which objections have been made and sustained. (Code Civ. Proc., § 437c, subd. (c).) On appeal, we review the same evidence anew, viewing it in the light most favorable to the Browns, as the losing parties. However, we do not consider evidence that the trial court excluded on objections from Farmers.[6] (See *Wiener*

v. Southcoast Childcare Centers, Inc. (2004) 32 Cal.4th 1138, 1142; *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1035.)

B. *Proximate Cause of Loss*

1. *General Principles*

In an all-risk insurance policy, a peril is covered if it is not specifically excluded. (*State Farm Fire & Casualty Co. v. Von Der Lieth* (1991) 54 Cal.3d 1123, 1131; see *Garvey v. State Farm Fire & Casualty Co.* (1989) 48 Cal.3d 395, 406-407.) Once an insured establishes that an event falls within the basic coverage of the policy, the insurer bears the burden of proving that the claim is specifically excluded. (*Garvey v. State Farm Fire & Casualty Co., supra,* 48 Cal. 3d at p. 406.)

If there is more than one cause for a loss in a first party insurance case, the efficient proximate cause is the cause to which that loss will be attributed. (*Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 754; *Garvey v. State Farm Fire & Casualty Co., supra,* 48 Cal.3d at p. 403.) In these cases, coverage turns on whether the efficient proximate cause of the loss—the cause that sets the others in motion—is a covered peril. (*Julian v. Hartford Underwriters Ins. Co., supra,* 35 Cal.4th at p. 750; *Sabella v. Wisler*(1963) 59 Cal.2d 21, 31-32 [all-risk policy].) In these circumstances, the loss is covered if the covered risk was the efficient proximate cause of the loss. The loss is not covered if the covered risk was only a remote cause of the loss or the excluded risk was the efficient proximate cause or predominate cause. (*Julian v. Hartford Underwriters Ins. Co., supra,* 35 Cal.4th at pp. 750, 754; *State Farm Fire & Casualty Co. v. Von Der Lieth, supra,* 54 Cal.3d at pp. 1131-1132; see Ins. Code, § 530.)

The issue of what caused a loss is generally a question of fact. (*State Farm Fire & Casualty Co. v. Von Der Lieth, supra,* 54 Cal.3d at p. 1131.) However, even if the parties disagree about the efficient proximate cause of a loss, summary judgment is proper if all possible causes of the loss are excluded under the terms of the policy. (*Brodkin v. State Farm Fire & Casualty Co.* (1989) 217 Cal.App.3d 210, 217.) In this case, the Browns asserted five possible causes of their loss. The trial court analyzed each and found that none formed a basis for coverage. We consider each potential cause in turn.

2. *Potential Causes*

a. *Construction Activities*

In a declaration, Michael Brown stated that construction tractors were moving dirt behind the house, causing dust to become airborne. Farmers objected to this aspect of Brown's declaration as contradicting his discovery responses, and the trial court sustained that objection. The trial court found that the Browns could not assert construction activities as a proximate cause of the loss because they failed to identify this as a potential cause during discovery.[7]

Our review of the causes identified by the Browns during discovery satisfies us that the trial court's reasoning was sound. A party may not create an issue of fact sufficient to defeat a motion for summary judgment by making a declaration contradicting earlier discovery responses. When determining whether a triable issue of material fact exists, a trial court may give great weight to admissions made by a party in deposition testimony and may disregard his or her

contradictory affidavits. (*Benavidez v. San Jose Police Dept.* (1999) 71 Cal.App. 4th 853, 860-861; *Barton v. Elexsys Internat., Inc.* (1998) 62 Cal.App.4th 1182, 1191-1192.) As the Browns did not cite construction activity as a potential cause of their loss when asked about all potential causes of it, they are bound by this admission.

b. *Windstorms*

The Browns alleged in their complaint that windstorms caused dust to enter their home. In their declarations in opposition to summary judgment, Sheila and Michael Brown stated that severe windstorms in April and May of 2007 caused dust to enter the house. Farmers objected to these statements as contradicting the Browns' discovery responses, and the trial court sustained that objection. The trial court also rejected windstorms as a potential proximate cause for the loss for two reasons—because the Browns failed to identify these causes during discovery and because those causes were not accidental within the meaning of the policy. Again, we find the trial court's analysis to be sound. As the Browns failed to identify this potential cause of their loss during discovery, they essentially admitted that it was not a cause. They are bound by that admission. (See *Benavidez v. San Jose Police Dept., supra,* 71 Cal.App.4th at pp. 860-861; *Barton v. Elexsys Internat., Inc., supra,* 62 Cal.App.4th at pp. 1191-1192.)[8]

c. *Faulty HVAC Duct Installation*

The Browns offered a declaration from a contractor identifying the disconnected HVAC line as a possible cause of the loss. The trial court found that if the improperly installed HVAC duct was the proximate cause of the loss, it was specifically excluded under the terms of the policy. In so doing, it rejected the Browns' contention that the applicable policy language was ambiguous. The policy stated that Farmers did not insure against "loss or damage which is a construction defect in the **dwelling**" other than collapse. It also excluded "faulty . . . repairs . . . [or] construction" as causes of loss.

Policy language must be construed in the context of the policy as a whole, the circumstances of the case and common sense. It cannot be found ambiguous in the abstract. (*Powerine, supra,* 37 Cal.4th at pp. 390-391; *Nissel, supra,* 62 Cal.App.4th at pp. 1111-1112; see Civ. Code, § 1641.) This language of the policy is not reasonably susceptible to an interpretation that is more favorable to the Browns. As the policy language is clear, it governs. (*Powerine, supra,* 37 Cal.4th at p. 390; *Nissel, supra,* 62 Cal.App.4th at p. 1111; *Smith Kandal Real Estate v. Continental Casualty Co.* (1998) 67 Cal.App.4th 406, 415; see Civ. Code, § 1639.)

d. *Faulty Windows*

Another potential proximate cause of the loss was faulty windows. The trial court also rejected coverage based on the theory that faulty windows were the proximate cause of the loss. That loss, it reasoned, was excluded under the terms of the policy, which the trial court found to be unambiguous. The Farmers' policy excluded faulty repair or construction as a cause of loss. As that policy provision is clear and unambiguous, it applies to exclude this potential cause of

loss. (See *Powerine, supra,* 37 Cal.4th at p. 390; *Nissel, supra,* 62 Cal.App.4th at p. 1111.)

e. *Valley Fever Fungus*

The final potential proximate cause of the loss was Valley Fever, which is caused by a fungus. The trial court found that if the loss was proximately caused by a fungus, it was not covered, because that cause was plainly excluded under the policy. The policy provided that Farmers did not insure against loss from contamination, fungi or pathogens. It also excluded losses resulting from contamination, fungi or noxious substances. Considering this issue anew on appeal as we must, we conclude that the policy language clearly stated that there would be no coverage for losses caused by fungus. (See, e.g., *Nissel, supra,* 62 Cal.App.4th at p. 1110.)

C. *Farmers Admission of Coverage*

Finally, the Browns contend that the trial court erred by finding irrelevant their assertion that Farmers' agent Idarola admitted coverage. In her declaration in opposition to summary judgment, Sheila Brown stated that in August 2007, her sister reported to her in the presence of Farmers adjustor Mike Idarola that he found the claim to be covered. She also stated that Idarola did not deny what her sister said. Farmers objected to this evidence on the ground that any opinion on coverage offered by its agent was irrelevant to the issue of whether the policy actually covered the Browns' loss. The trial court sustained the objection.

Interpretation of an insurance policy is a legal question, not a factual one. (*Jordan v. Allstate Ins. Co.* (2004) 116 Cal.App.4th 1206, 1218 fn. 8; *Quan v. Truck Ins. Exchange*(1998) 67 Cal.App.4th 583, 602.) If a policy provision has a plain meaning, it is immaterial that an insured's agent misinterpreted that provision because opinion evidence is inadmissible to interpret the terms of an insurance contract. (*Prudential Ins. Co. of America, Inc. v. Superior Court* (2002) 98 Cal.App.4th 585, 603; *Chatton v. National Union Fire Ins. Co.* (1992) 10 Cal.App.4th 846, 865; see *Quan v. Truck Ins. Exchange, supra,* 67 Cal.App.4th at pp. 601-602.) Thus, if Idarola made an admission of coverage, it was not material. (See *Prudential Ins. Co. of America, Inc. v. Superior Court, supra,* 98 Cal.App.4th at pp. 603-604; *Quan v. Truck Ins. Exchange, supra,* 67 Cal.App.4th at p. 602.) The trial court properly sustained Farmers' objection to this evidence. (See fn. 5, *ante.*)

D. *Bad Faith*

As there was no coverage under the policy for any potential proximate cause, the trial court properly granted summary judgment to Farmers on the Browns' breach of contract cause of action. Their cause of action for breach of the covenant of good faith and fair dealing requires that the Browns establish that Farmers' denial of benefits was unreasonable. (See *Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 723.) As there is no covered loss, they cannot establish bad faith even if the insurer failed to properly investigate the claim. (See *Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1078;*Benavides v. State Farm General Ins. Co.* (2006) 136 Cal.App.4th 1241, 1250.)

E. *Intentional Infliction of Emotional Distress*

Their cause of action for intentional infliction of emotional distress also fails. The Browns argue that Farmers tried to convince them not to file a claim, became hostile to them when they did so, falsely promised that an adjustor would contact them promptly, failed to provide this contact in a prompt manner, admitted and then denied coverage under their policy, and conducted a biased investigation in order to deny coverage. They also assert that Farmers' representatives were hostile, rude and disrespectful to them when verbally denying their claim, and then waited an inordinate amount of time before sending them written notice of denial.

A cause of action for intentional infliction of emotional distress requires proof of extreme and outrageous conduct—behavior that it goes beyond all bounds of decency and that is intolerable in civilized society. (*Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 499 fn. 5; *Coleman v. Republic Indemnity Ins. Co.* (2005) 132 Cal.App.4th 403, 416.) Liability does not extend to mere insults, indignities and annoyances. (*Alcorn v. Anbro Engineering, Inc., supra,* 2 Cal.3d at p. 499 fn. 5.) Likewise, delay or denial of insurance claims is not outrageous conduct supporting a cause of action for intentional infliction of emotional distress. (*Coleman v. Republic Indemnity Ins. Co., supra,* 132 Cal.App.4th at p. 417.) Viewing the evidence in the light most favorable to the Browns, Farmers' representatives did not act in a manner that was extreme or outrageous enough to constitute intentional infliction of emotional distress. Thus, the trial court properly granted Farmers summary judgment on all causes of action.

The judgment is affirmed.

Sepulveda, J. and Rivera, J., concurs.

Footnotes

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1. For convenience, we refer to both respondents as Farmers.

2. There was also evidence that Brendon Brown became ill.

3. The action also named Farmers Insurance Group of Companies as a defendant, but a motion to quash service of process on it was granted.

4. The original complaint also alleged causes of action for failure to comply with statutory requirements to produce claims related documents in a timely manner, and engaging in unfair business practices. In August 2008, the trial court sustained a demurrer to these two causes of action without leave to amend.

5. They also filed a separate construction defect action against the builder for construction defects.

6. The Browns had the burden of showing that the trial court's adverse evidentiary rulings constituted an abuse of its discretion. (See, e.g., *DiCola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 679-680.) In most cases, they have not attempted to do so, arguing instead as if the trial court had not sustained Farmers' objections to their evidence. Even if the Browns could overcome this procedural defect in their argument, we would conclude that the trial court did not abuse its discretion by sustaining the objections that Farmers raised to their evidence, for the reasons it stated in its order granting summary judgment.

7. The trial court also found that even if this potential cause of loss were considered on its merits, the fact that the Browns signed disclosures about ongoing construction activities near their home would render such a loss not accidental within the meaning of the policy. (See *American Alternative Ins. Corp. v. Superior Court*(2006) 135 Cal.App.4th 1239, 1249; *St. Paul Fire & Marine Ins. Co. v. Superior Court* (1984) 161 Cal.App.3d 1199, 1202.) We need not reach this issue.

8. The trial court concluded that even if the Browns had identified this potential cause during discovery, it was not accidental within the meaning of the policy because they had acknowledged the potential for dust during their home purchase process. (See *American Alternative Ins. Corp. v. Superior Court, supra,* 135 Cal.App.4th at p. 1249; *St. Paul Fire & Marine Ins. Co. v. Superior Court, supra,* 161 Cal.App.3d at p. 1202.) In light of our conclusion, we need not address the merits of this alternative basis of the trial court's ruling.