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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

ANNE W. THAYER,

Plaintiff and Appellant,

v.

FIREMAN'S FUND INSURANCE
COMPANY,

Defendant and Respondent.

A130593

(San Francisco County
Super. Ct. No. CGC-05-444325)

Plaintiff Anne W. Thayer appeals from the order of the trial court granting defendant Fireman's Fund Insurance Company's motion for summary judgment. She claims the order is flawed because the motion was based on inadmissible evidence. She also asserts she presented substantial evidence that defendant breached the covenant of good faith and fair dealing by entering into a subrogation agreement and subsequently failing to renew her automobile insurance policy with respect to her husband. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On July 7, 2004, the trolley of a bus owned and operated by the City and County of San Francisco (City) struck a lamp post, causing the lamp and its cover to fall upon and damage a parked car owned by plaintiff.¹ At the time of the incident, plaintiff had an insurance policy in effect with defendant. Pursuant to the terms of the policy, defendant

¹ The July 7, 2004 date is taken from the complaint. Other documents in the record indicate the incident occurred on July 11, 2004.

paid for the repair of the car, minus a \$200 deductible. The policy conferred defendant with a right to recover payment from the responsible party. Specifically, the policy states “If [defendant] make[s] a payment under this policy and the person to or for whom payment was made has a right to recover damages from another we shall be subrogated to that right.”

Defendant authorized Craig/is Insurance Services to act as its subrogation representative in recovering the repair costs, and plaintiff was notified of such on October 1, 2004. On December 28, 2004, a release agreement was executed between the City and Craig/is. Defendant recovered \$7,629.91, the amount it had paid to repair the damages to plaintiff’s vehicle caused by the incident.

On August 23, 2005, plaintiff’s husband sued the City for property damage to the car.²

On August 25, 2008, plaintiff, having substituted in as the plaintiff in place of her husband, filed a second amended complaint (SAC) against defendants, Craig/is and the City.

On September 24, 2008, defendant filed a demurrer to the SAC.

On September 25, 2008, the City filed a demurrer to the SAC.

On October 22, 2008, the trial court sustained the demurrer of the City without leave to amend.

On December 10, 2008, the trial court filed its order sustaining, in part, defendant’s demurrer to the SAC. The demurrer was sustained without leave to amend as to two causes of action, and overruled as to causes of action for breach of the implied covenant of good faith and fair dealing, violation of Business and Professions Code section 17500, and violation of Business and Professions Code section 17200.

On April 15, 2010, defendant filed a motion for summary judgment or, in the alternative, for summary adjudication of the issues.

² Plaintiff’s husband is an attorney and is representing her in this matter.

One September 24, 2010, the trial court filed its order granting defendant’s motion for summary judgment. This appeal followed.

DISCUSSION

I. Standard of Review for Summary Judgment

The standard of review for summary judgment is well established. The motion “shall be granted if 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).)³ We independently review an order granting summary judgment, viewing the evidence in the light most favorable to the nonmoving party. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768; *Lackner v. North* (2006) 135 Cal.App.4th 1188, 1196.) In performing our independent review of the evidence, “we apply the same three-step analysis as the trial court. First, we identify the issues framed by the pleadings. Next, we determine whether the moving party has established facts justifying judgment in its favor. Finally, if the moving party has carried its initial burden, we decide whether the opposing party has demonstrated the existence of a triable, material fact issue.” (*Chavez v. Carpenter* (2001) 91 Cal.App.4th 1433, 1438.) Where “the facts are undisputed, the issue is one of law and the ‘appellate court is free to draw its own conclusions of law from the undisputed facts.’ [Citations.]” (*Suburban Motors, Inc. v. State Farm Mut. Auto. Ins. Co.* (1990) 218 Cal.App.3d 1354, 1359.)

II. Whether the Order is Appealable

As defendant correctly notes, an order granting summary judgment is not itself appealable. (*Levy v. Skywalker Sound* (2003) 108 Cal.App.4th 753, 761, fn. 7.) Instead, the appeal must be taken from a judgment entered on the basis of the summary judgment order. (See § 904.1, subd. (a)(1).) In the present case, no judgment appears in the record. However, in the interests of justice and to avoid delay, we construe the order granting summary judgment as incorporating an appealable judgment, and the notice of appeal as appealing from such judgment. (*Zavala v. Arce* (1997) 58 Cal.App.4th 915, 924, fn. 7)

³ All further statutory references are to the Code of Civil Procedure except where otherwise specified.

III. Defendant's Evidence Was Admissible

Plaintiff first argues that the evidence upon which defendant based its motion for summary judgment was inadmissible. Under our summary judgment statute, supporting and opposing declarations “shall be made . . . on personal knowledge, . . . and shall show affirmatively that the [declarant] is competent to testify to the matters stated in the affidavits or declarations.” (§ 437c, subd. (d).) A party challenging evidentiary rulings made in the course of a summary judgment motion has two burdens on appeal: the party must affirmatively to show error in the rulings and the party must establish prejudice. (*Truong v. Glasser* (2009) 181 Cal.App.4th 102, 119.) “A ruling that resulted in no discernible prejudice cannot, of course, be characterized as a miscarriage of justice.” (*Cristler v. Express Messenger Systems, Inc.* (2009) 171 Cal.App.4th 72, 81.)

Plaintiff claims five of the 11 exhibits attached to a declaration filed by defendant’s attorney were inadmissible because the documents were not authenticated and constituted hearsay. The contested documents are: (1) A copy of portions of plaintiff’s insurance policy with defendant that was in effect at the time of the incident, (2) a copy of correspondence dated October 1, 2004, from Craig/is to plaintiff providing her with notice of its subrogation rights, (3) a copy of the December 28, 2004 release agreement executed between the City and Craig/is, (4) a copy of correspondence dated February 28, 2007, from plaintiff’s counsel to the claims representative for defendant, and (5) a copy of correspondence dated September 11, 2007, from defendant to plaintiff advising her of the non-renewal of the insurance policy. As is routine in law and motion practice, these exhibits were authenticated through a declaration submitted by defendant’s attorney, who had personal knowledge of how defendant obtained the exhibits. (See *The Luckman Partnership, Inc. v. Superior Court* (2010) 184 Cal.App.4th 30, 34–35.)⁴

⁴ “Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law.” (Evid. Code, § 1400.)

We first note that at least two of the documents plaintiff asserts are inadmissible were attached and referenced in her very own pleadings. The December 28, 2004 release is attached as Exhibit A to the SAC. Her counsel's letter dated February 28, 2007, is also attached to the SAC as Exhibit B. That plaintiff would question the authenticity of these two documents defies credulity in light of the fact that plaintiff herself includes the *same documents* in a complaint that *she herself* filed in the trial court. (Cf. Evid. Code, § 1414 "A writing may be authenticated by evidence that: [¶] (a) The party against whom it is offered has at any time admitted its authenticity; or [¶] (b) The writing has been acted upon as authentic by the party against whom it is offered".) These two documents are admissible.

We are left with the copy of portions of plaintiff's insurance policy with defendant, the letter dated October 1, 2004, from Craig/is to plaintiff, and the letter dated September 11, 2007, from defendant to plaintiff. We note the insurance policy is accompanied by a January 21, 2010 authentication that appears to have been executed by an employee of defendant certifying that the document constituted "a true copy of the declarations, terms, exclusions and conditions of the above identified policy as of the date of this certification." Plaintiff does not offer any facts suggesting that this authentication is fraudulent. Additionally, the policy is referenced in the SAC as "Exhibit E," though this exhibit is not included with the complaint in the record on appeal.

As to the October 1, 2004 letter, in response to a request for admissions, plaintiff affirmatively admitted she received notice that Craig/is would handle defendant's subrogation claim in relation to the incident. She also acknowledged receipt of defendant's September 11, 2007 notice of nonrenewal of insurance in her evidence submitted in opposition to defendant's motion. She reiterates that acknowledgment in her opening brief on appeal. Finally, we also note defendant's attorney attested, under penalty of perjury, that the copies of the documents lodged in connection with the motion for summary judgment constituted true and correct copies of what they purport to be.

There is nothing in the record on appeal to suggest otherwise. In sum, plaintiff's evidentiary objections lack merit.⁵

IV. Refusal to Renew Plaintiff's Insurance Policy

In its statement of undisputed material facts, defendant stated: “[Plaintiff’s] policy with [defendant] provided [defendant] with the option not to renew the policy provided that sufficient notice of non-renewal was provided to [plaintiff]. The policy also specifically excluded from coverage depreciation of the insured’s auto.” Plaintiff responded that this fact was disputed because “Title 10, §§ 2632.13^[6] and 2632.19^[7] of the California Code of Regulations (CCR) prohibited [defendant] from refusing to renew.” On appeal, she claims the failure to renew the policy supports her claim for breach of the covenant of good faith and fair dealing.

Defendant’s notice of nonrenewal of insurance indicates there were three accidents in which plaintiff’s husband was at fault. The accidents occurred on February 27, 2005, January 7, 2006, and May 4, 2007. In her opposition to defendant’s motion for summary judgment, she claimed her husband had told defendant he was not at fault as to two of the three accidents, and suggested the nonrenewal was evidence of bad faith. Defendant argued that a claim of bad faith cannot be grounded on a nonrenewal, citing to *Greene v. Safeco Ins. Co.* (1983) 140 Cal.App.3d 535, 538 (*Greene*). Defendant also asserted plaintiff had failed to provide evidence of damage because she had not shown her husband could not have obtained insurance through another company.

In the absence of statutory provisions to the contrary, an insurer may refuse to renew a term policy “ ‘for any reason, or for no reason at all.’ ” (*Greene, supra*, 140 Cal.App.3d 535, 538, italics omitted.) “ ‘To require liability coverage against the judgment of the contracting parties would constitute an unprecedented judicial

⁵ Even if the objections had merit, plaintiff does explain how the trial court’s failure to sustain her objections resulted in prejudice to her.

⁶ California Code of Regulations, title 10, section 2632.13, subdivision (e), which appears within a set of regulations pertaining to good driver discounts, sets forth the procedures an insurer must follow in determining whether a driver was principally at fault for an accident.

⁷ California Code of Regulations, title 10, section 2632.19 sets forth the circumstances that permit an automobile insurer to refuse to renew an insured’s policy.

interference into private contractual and economic arrangements.’ [Citation.]” (*Schimmel v. NORCAL Mutual Ins. Co.* (1995) 39 Cal.App.4th 1282, 1285.) An exception to this rule is automobile insurance, as to which the people of California, by passage of Proposition 103, imposed a duty to renew. “Proposition 103, in [Insurance Code] section 1861.03, subdivision (c), provides . . . : ‘Notwithstanding any other provision of law, a notice of cancellation or non-renewal of a policy for automobile insurance shall be effective only if it is based on one or more of the following reasons: (1) nonpayment of premiums; (2) fraud or material misrepresentation affected the policy or insured; (3) *a substantial increase in the hazard insured against.*’ Before the enactment of Proposition 103 insurers had an unfettered right to refuse to renew policies [citation].” (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 826, italics added.)

As noted, plaintiff claimed below that she raised a triable issue of fact because her husband “previously had explained to [defendant] why, in two of those accidents, he had not been at fault.” According to a declaration filed by her husband, he “supplied the [defendant] with the name, address and telephone number of an independent witness who had told me that he would so testify regarding the accident of 2/27/05.” The declaration also includes a copy of a check for \$5,000 from the City which he claims was paid “in recognition of its responsibility for the accident of 5/04/07.” Significantly, plaintiff did not include an affidavit from the independent witness. And while the copy of a check from the City to plaintiff contains a notation that the check was for property damage, there is nothing in the record documenting the events leading up to the issuance of this check. Plaintiff thus failed to present evidence sufficient to raise a triable issue of fact with respect to the propriety of defendant’s decision to not renew the insurance policy as to her husband.

V. Defendant’s Release of The City from All Claims

Plaintiff also claims defendant breached the covenant of good faith and fair dealing because it released the City from liability for any and all damages, allowing the City to use the release as an affirmative defense to plaintiff’s claims against it for depreciation to her car and for the deductible for which defendant had not reimbursed

her. In her opening brief on appeal, plaintiff fails to cite to any legal authority in support of her claim.

California Rules of Court, rule 8.204(a)(1)(B) and (C) requires parties to an appeal to “support each point by argument and, if possible, by citation of authority” and to “[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears.” Plaintiff has not presented a cogent and reasoned argument with appropriate citations to the legal authority supporting her assertions. For example, she claims that defendant overreached by executing a gratuitous release but provides no citations supporting her assertion that defendant’s “overreaching constituted a breach of its covenant of good faith and fair dealing.” It is not the Court of Appeal’s job to make her case. Therefore, plaintiff has waived this issue on appeal. (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 685 [“appellant must affirmatively demonstrate error through reasoned argument, citation to the appellate record, and discussion of legal authority”]; *People ex rel. Dept. of Alcoholic Beverage Control v. Miller Brewing Co.* (2002) 104 Cal.App.4th 1189, 1200 [“appellant must present a factual analysis and legal authority on each point made or the argument may be deemed waived”].)

In any event, the release provides that Craig/is and defendant release the City “of and from claims or causes of action for property damages, heretofore sustained, suspected or unsuspected.” Candidly, there is no provision in the release providing for reimbursement to plaintiff for the \$200 deductible expense incurred nor for any diminution in value of the car as a result of the incident. However, there also is nothing that explicitly prohibits plaintiff from attempting to recover said amount.

Additionally, plaintiff has acknowledged that defendant’s policy does not cover depreciation in value. The policy explicitly stated that defendant’s “limit of liability for loss will be the lesser of the [¶] (1) Actual cash value of the stolen or damaged property; or [¶] (2) Amount necessary to repair or replace the property with other property of like kind and quality. In her responses to defendant’s request for admissions, she admitted defendant had compensated her for the cost to repair her car and that she was not entitled

to damages for the diminution in the value of her car under the policy that was in effect at the time of the July 2004 incident. She also affirmed she had knowledge of the subrogation agreement between defendant and Craig/is before the execution of the release.⁸

DISPOSITION

The order is affirmed.

Dondero, J.

We concur:

Marchiano, P. J.

Margulies, J.

⁸ While defendant has elected to discuss several issues that plaintiff has not raised in her brief on appeal, we decline to address them here as plaintiff has not properly presented any of these issues to this court.