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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

MELINDA BARANY et al.,

Plaintiffs and Appellants,

v.

MERCURY INSURANCE COMPANY,

Defendant and Respondent.

A140179

(City & County of San Francisco
Super. Ct. No. CGC-10-498876)

Melinda Barany and Albert M. Kun (collectively plaintiffs) appeal from a judgment for defendant Mercury Insurance Company after a court trial concerning coverage under an automobile insurance policy for damages incurred as a result of an accident. Plaintiffs contend that the court erred when it denied their motion to strike Mercury's answer, determined that their claims were not covered under the policy, and awarded certain costs. We reduce the cost award by \$187.95, but otherwise affirm the judgment.

I. BACKGROUND

Kun was injured while driving a car owned by Barany, who he lived with for 24 years, when he collided with a car driven by Hilary Andron. Plaintiffs sued Andron for personal injury and property damage. A jury determined that Kun was responsible for the accident, judgment was entered for Andron, and the judgment was affirmed by Division Five of this Appellate District. (*Barany, et al. v. Andron* (Apr. 6, 2012, A130891) [nonpub. opn.])

Plaintiffs also sued Mercury, alleging that Mercury breached Kun's insurance policy by failing to pay for his medical expenses, replacement of Barany's automobile, and the cost of towing the vehicle. The court found that these claims were not covered by the policy. The court further found that Mercury had no duty to defend a cross-complaint filed by Andron in the other case.

II. DISCUSSION

A. Motion to Strike the Answer

Mercury filed its answer to the complaint on August 20, 2012. Nine months later, on May 17, 2013, plaintiffs moved to strike the answer on the ground that it was not signed by Mercury's counsel. Code of Civil Procedure section 128.7, subdivision (a) provides: "Every pleading, petition, written notice of motion, or other similar paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. . . . An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party." The answer in the clerk's transcript contains only what is stated to be "Page 1 of 2" of the document. The court denied the motion to strike as untimely.

Mercury has attached to its brief a proof of service of a copy of the answer on August 17, 2012, three days before the answer was filed, which included the second page bearing the signature of counsel. Plaintiffs do not deny receiving this document and, in any event, they have not established that they were prejudiced by denial of the motion to strike. Page two of the answer set forth affirmative defenses, and plaintiffs claim the trial court "prejudicially erred in allowing testimony on defenses not affirmatively pleaded. Non-coverage is such an affirmative defense." But "non-coverage" is not an affirmative defense. Mercury was not legally required to plead it as such. "While the burden is on the insurer to prove a claim covered falls within an exclusion [citation], the burden is *on the insured* initially to prove that an event is a claim within the scope of the basic coverage. [Citations.]" (*Royal Globe Ins. Co. v. Whitaker* (1986) 181 Cal.App.3d 532,

537 [italics added].) Plaintiffs assert that the absence of a signed order in the court’s file “goes to the jurisdiction of the court,” but they have no authority for that proposition.

B. Coverage Issues

The policy covers plaintiffs’ losses only if Barany’s 1999 Volkswagen Cabriolet that Kun was driving at the time of the accident was an “owned” or “non-owned” automobile as defined in the policy, and it was neither.

(1) *Medical Expenses*

Part II of the policy covers medical expenses incurred by the insured for “bodily injury caused by an accident resulting in a collision while occupying *an owned automobile or a non-owned automobile . . .*”¹ The definitions in Part I of the policy apply in Part II.

Part I defines an “Owned Automobile” to include “(a) a motor vehicle *listed in the declarations,*” and “(c) any private passenger or utility automobile, operable or inoperable, the ownership or lease-hold of which is acquired by the named insured either solely or with a listed resident relative, during the policy period, provided the automobile meets these four conditions: [¶] . . . [¶] (2) the automobile has *never been owned by or registered to: . . . a person residing with the named insured . . .*” The only vehicle listed in the policy’s declarations page is a 2003 Volkswagen Golf. Barany acknowledged in a statement to Mercury after the accident that she was the registered owner of the 1999 Volkswagen Cabriolet, and that she and Kun had been living together for 24 years. Thus, the Cabriolet was not an “Owned Automobile” under the policy as defined in Part I.

Part I defines a “Non-Owned Automobile” to mean “a vehicle that [¶] . . . [¶] (b) *is not owned by . . . any other persons listed as drivers in the policy declarations [or] . . . a person residing with an insured . . .*” Since Barany owned the Cabriolet, is listed as a driver on the policy declarations, and lived with Kun, the Cabriolet was not a “non-owned automobile” under the policy as defined in Part I.

¹ All italics in language quoted from the policy have been added, and bold typeface in the policy has been removed.

Therefore, the Cabriolet was neither an “owned” or “non-owned” automobile under the policy as defined in Parts I and II, and thus the policy provided no medical expense coverage for Kun’s injuries.

(2) *Collision and Towing*

The provision for collision coverage in Part III of the policy states: “The company, at its option, will repair, replace or pay for the *owned automobile*, or part thereof, for loss caused by collision but only for the amount of each loss in excess of the deductible stated in the declarations. The company will provide this same coverage for a *non-owned automobile* provided it is operated with the permission of the owner, by the named insured or a relative listed, as a driver, in the declarations.”

The Part III provision for towing coverage reads: “The company will pay costs for labor done at the initial place of disablement and for towing, made necessary by the disablement of the *owned automobile or non-owned automobile*, up to the amount listed in the declaration per disablement.”

Thus, collision and towing coverage is again afforded only for “owned” and “non-owned” automobiles.

Part III incorporates Part I’s definition of “non-owned automobile.” As we have said, the Cabriolet is not a “non-owned automobile” within that definition. Part III defines “Owned Automobile” to include “[a] motor vehicle listed in the declarations,” and “a newly acquired automobile” as defined in Part I. Again, the Cabriolet is not listed in the declarations. Nor is the Cabriolet “a newly acquired automobile” as defined in Part I, which simply incorporates language from the definition of “owned automobile” quoted above: “(c) any private passenger or utility automobile, operable or inoperable, the ownership or lease-hold of which is acquired by the named insured either solely or with a listed resident relative, during the policy period, provided the automobile meets these four conditions: [¶] . . . [¶] (2) the automobile has *never been owned by or registered to: . . . a person residing with the named insured . . .*”

Accordingly, the policy did not afford collision or towing coverage for Kun’s accident.

There is an endorsement to the policy that excludes a “1987 Volkswagen Cabriolet” from coverage. The model year of the vehicle was a misprint. Kun was asked, “Did you know that the [1999 Cabriolet] is excluded on the policy?” Kun answered, “No.” Another question asked him, “Is the 1999 Volkswagen Cabriolet the same as the 1987 Volkswagen Cabriolet that is excluded?” Kun answered, “Yes, she has only owned one Volkswagen Cabriolet.”

Despite this admission, plaintiffs observe that Kun was not driving a 1987 Cabriolet at the time of the accident, and they assert that “[a]n ordinary person would reasonably conclude that if he was driving a vehicle that was not excluded by (*sic*) coverage, coverage would be provided for that vehicle.” But no reasonable person would believe that specific exclusion of a particular vehicle from coverage would mean that any other vehicle would be covered. The exclusion is irrelevant in any event because, even without it, there was no coverage for the 1999 Cabriolet.

C. Defense of Andron’s Cross-Complaint

In the case plaintiffs filed against Andron, she cross-complained for indemnity and declaratory relief. Plaintiffs tendered defense of the cross-complaint to Mercury, and Mercury refused. The policy states that Mercury “shall defend the insured against any suit, alleging bodily injury or property damage for which this policy provides indemnity.” The trial court found “that under the Mercury policy there was no duty to defend the cross-complaint filed against Mr. Kun by Hilary Andron, because in that cross-complaint there was no claim for property damage or bodily injury damages It is true that the cross-complaint could have been amended practically at any time under the law. However, the testimony in this case was clear that if that happened and an amended cross-complaint had been filed that Mercury would reevaluate whether it would need to defend Mr. Kun in regards to that cross-complaint.”

Plaintiffs argue that the court erred in finding that Mercury had no duty to defend because the cross-complaint “sought damages,” and Mercury was aware of the “extensive damages” to Andron’s automobile, and the “substantial damages” to Andron, “who was hospitalized after the accident.” However, the damages Andron sought were not within

the scope of Mercury's defense obligation because they were not for bodily injury or property damage she suffered in the accident. The damages were for indemnification of any liability she incurred in the lawsuit. Just because Andron could have expanded her claims to include bodily injury or property damage did not mean that Mercury had an obligation to defend plaintiffs before she did so. "[I]t is irrelevant that the third party might have suffered harm that could give rise to a claim for damages covered under the insured's policy. What matters is whether the third party has *sought to recover* damages from the insured. It is only when the third party does that, that it has made a claim which triggers even potential coverage under a liability policy." (*San Miguel Community Association v. State Farm General Ins. Co.* (2013) 220 Cal.App.4th 798, 801.)

The court correctly concluded that there was no duty to defend in this instance.

D. Costs

Plaintiffs contend that the court erroneously awarded deposition costs of \$2,557 and a jury fee of \$187.95. In support of that assertion, plaintiffs cite Mercury's memorandum of costs dated August 20, 2013. However, Mercury later filed an amended cost memorandum that did not include the deposition costs, and they were not included in the costs awarded.

We agree with plaintiffs that the jury fee was improperly awarded. We see no justification for that award when Mercury waived a jury trial.

III. DISPOSITION

The judgment is modified to reduce the amount of costs awarded by \$187.95, from \$6,112.75 to \$5,924.80. As so modified, the judgment is affirmed. Mercury shall recover its costs on appeal.

Siggins, J.

We concur:

McGuinness, P.J.

Jenkins, J.