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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

REBBIE DAVIS-SYLVESTER,

Plaintiff and Appellant,

v.

GLOBE LIFE AND ACCIDENT  
INSURANCE COMPANY,

Defendant and Respondent.

B241931

(Los Angeles County  
Super. Ct. No. BC477386)

APPEAL from a judgment of the Superior Court for the County of Los Angeles.  
Joanne O'Donnell, Judge. Reversed.

Law Offices of James T. Hudson and James T. Hudson for Plaintiff and Appellant.

Booth, Mitchel & Strange and Christopher C. Lewi for Defendant and  
Respondent.

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Plaintiff Rebbie Davis-Sylvester appeals from the judgment after the court sustained without leave to amend the defendant's demurrer to her complaint for breach of contract and bad faith in refusing to pay benefits under her deceased husband's life insurance policy.<sup>1</sup> We reverse.

### **FACTS AND PROCEEDINGS BELOW**

Plaintiff's complaint alleges the following facts.

In March 2011, plaintiff applied to defendant Globe Life and Accident Insurance Company (Globe) for a \$50,000 policy on the life of her husband. On March 7, 2011 plaintiff received the policy in the mail. Plaintiff was the named beneficiary. A copy of the policy is attached to the complaint.

The policy provides that the monthly premium is \$35.48 commencing April 7, 2011, payable in advance at Globe's home office.

With respect to late premium payments, the policy allows a 31-day grace period for payment of the premium. The policy explains: "This means that if any premium after the first is not paid on or before the date it is due, it may be paid during the following 31 days." The policy states that it will remain in force during the grace period but if the premium due has not been paid by the end of the grace period the policy "will lapse." Under the policy, the insured's coverage "shall terminate at the end of the [g]race [p]eriod following any premium due date for which the [i]nsured's required premium has not been paid. Any premium paid for any period after the date coverage terminates will not continue the [i]nsured's coverage in force and will be returned."

Under the heading "Reinstatement" the policy provides that if the policy lapses, Globe will reinstate it if a request for reinstatement is made within one year of the due date of the first unpaid premium, "the [i]nsured is still insurable according to our normal rules" and all overdue payments plus interest are paid.

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<sup>1</sup> We ignore plaintiff's "cause of action" for breach of the covenant of good faith and fair dealing because it is part of the cause of action for breach of contract.

Plaintiff paid the initial \$1.00 premium for the period March to April 2011.

In April 2011, plaintiff received a notice from Globe stating that a premium of \$35.48 was due on April 7. Plaintiff did not pay that premium within the 31-day grace period. In May 2011, plaintiff received a notice from Globe that a premium of \$35.48 was due on May 7. Plaintiff sent Globe \$35.48 on May 27. In June 2011, plaintiff received a notice from Globe stating that a premium of \$35.48 was due on June 7.

Plaintiff's husband died on July 2, 2011.

On July 7, 2011, plaintiff notified Globe of her husband's death. Globe advised plaintiff that it had applied the payment she made in May to the premium due in April and terminated the policy in May.<sup>2</sup>

On or about July 25, 2011, plaintiff sent Globe a money order for \$104.46 accompanied by a letter in which she stated the \$104.46 represented the premiums for a three-month period—May, June and July 2011. Plaintiff stated that she “never was informed that the policy was lapsed.” She asked Globe to accept her payments.

Of the \$104.46 that plaintiff sent Globe in July 2011, Globe retained \$57.35 and on August 1, 2011, sent plaintiff a check for \$47.11. The record does not reflect whether plaintiff cashed Globe's check. (The amount Globe retained was more than one month's premium but less than two month's.) The record contains no explanation for the amount of money that Globe retained.

Plaintiff sued Globe for breach of contract including breach of the duty of good faith and fair dealing based on its failure to pay death benefits under the policy. Plaintiff alleged that Globe waived any right it had to declare the policy lapsed for nonpayment of the premiums, waived any right it had to refuse reinstatement of the policy and is estopped from declaring the policy lapsed.

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<sup>2</sup> The May termination date was incorrect. Because Globe accepted plaintiff's April payment, the earliest the policy could have lapsed was at the end of the May grace period, June 7, 2011. The policy provides that if the premium is not paid when due “[a]t the end of the grace period, the certificate will lapse.” The policy does not lapse retroactively to the date the payment was due.

Globe demurred to the complaint on the ground that plaintiff concedes the policy lapsed for failure to pay the premiums and thereafter the insured died. Under those circumstances, Globe argued, plaintiff had no right to reinstatement of the policy even if she made up the past due premiums because by then the insured was no longer “insurable.” Globe did not address plaintiff’s waiver and estoppel arguments.

The trial court sustained Globe’s demurrer without leave to amend. Plaintiff filed a timely appeal. We reverse.

## **DISCUSSION**

### **I. STANDARD OF REVIEW.**

In reviewing an order sustaining a demurrer without leave to amend, we accept as true the properly pleaded factual allegations of the complaint. (*McCall v. PacificCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.) Where, as here, the complaint incorporates the terms of a contract, we consider those terms as part of the pleading. Furthermore, the allegations of the complaint must be liberally construed with a view to attaining substantial justice among the parties. (Code Civ. Proc., § 452; *King v. Central Bank* (1977) 18 Cal.3d 840, 843.) Finally, we review the complaint de novo to determine whether the trial court erred in sustaining the demurrer. (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 879.)

### **II. THE COMPLAINT PLEADS FACTS SUFFICIENT TO SHOW THAT GLOBE WAIVED ITS RIGHT TO TERMINATE THE POLICY PRIOR TO THE DEATH OF THE INSURED.**

Globe maintains plaintiff cannot state a cause of action for breach of the life insurance contract because her complaint shows on its face that the policy terminated on June 8, 2011, the end of the May 2011 grace period and nearly a month before the insured died. Globe further argues that neither its acceptance of plaintiff’s May 27, 2011 premium payment, which it applied to the past due April payment, nor its subsequent bills for premium payments constituted a waiver or estoppel of its right to terminate the policy at the end of the May grace period. We conclude, however, that

plaintiff has alleged sufficient facts to establish Globe waived the timely payment of premiums.

We begin our analysis with two well-established legal principles: (1)“forfeitures generally are not favored . . . particularly [in the case] of insurance contracts” (*Bittinger v. New York Life Ins. Co.* (1941) 17 Cal.2d 834, 840-841); and (2) *non fieri potest placentam et habere et quoque eam edere* (“you can’t have your cake and eat it too”) (*Nelson v. County of Los Angeles* (2003) 113 Cal.App.4th 783, 790).

Here, plaintiff alleges that Globe not only accepted premium payments from plaintiff after the May and June grace periods expired, it accepted a payment that plaintiff sent on July 25, 2011, knowing that her husband, the insured, had passed away on July 2, 2011, prior to the due date for the July premium. Having accepted those policy payments, plaintiff argues, fundamental fairness requires Globe to pay the policy benefits.

The “great weight of authority” holds that if an insurer unconditionally accepts premiums knowing that a loss has occurred, it may have waived the right to claim that the policy terminated prior to the loss. (*Hargett v. Gulf Ins. Co.* (1936) 12 Cal.App.2d 449, 454 and see cases collected in 16 Williston on Contracts (4th ed. 2000) § 49:79, p. 596, 5 Couch on Insurance (3d ed. 2012) § 78:48, pp. 78-97 to 78-100, and 15 Appleman, Insurance Law and Practice (1985) § 8503, p. 326.) This principle applies to life insurance cases where the insurer has retained the policyholder’s late premiums knowing of the death of the insured. (*Enfinger v. Order of United Commercial Travelers of America* (Fla.Dist.Ct.App. 1963) 156 So.2d 38, 41-42.) There is also authority holding that if the premium was earned before the loss then the insurer’s taking and retaining the premium with knowledge of the loss does not constitute evidence tending to show a waiver. (*Hargett v. Gulf Ins. Co.*, *supra*, 12 Cal.App.2d at p. 456.) The resolution of these seemingly contradictory results rests on the factual question of

the insurer's intent in accepting the premium—a question that cannot be answered on demurrer.<sup>3</sup>

Waiver is generally a question of fact. (*McCary v. John Hancock etc. Life Ins. Co.* (1965) 236 Cal.App.2d 501, 509.) In our view the facts pled in the complaint, taken as true, are sufficient to state a claim that Globe waived the right to declare a lapse or forfeiture of the policy based on the lateness of the premium payments.

#### **DISPOSITION**

The judgment is reversed. Appellant is awarded her costs on appeal.

ROTHSCHILD, Acting P. J.

We concur:

CHANEY, J.

JOHNSON, J.

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<sup>3</sup> None of the anti-waiver cases cited by Globe, *Ryman v. American Nat. Ins. Co.* (1971) 5 Cal.3d 620, *Advanced Network, Inc. v. Peerless Ins. Co.* (2010) 190 Cal.App.4th 1054 and *Silva v. National American Life Ins. Co.* (1976) 58 Cal.App.3d 609 have any bearing on the situation here in which the insurer allegedly accepted an overdue payment with knowledge that a loss had already occurred.