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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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| RICHARD ASHOFF,<br>Plaintiff and Appellant,<br>v.<br>ESSENTIA INSURANCE COMPANY,<br>Defendant and Respondent. | G046880<br>(Super. Ct. No. 30-2011-00472787)<br>O P I N I O N |

Appeal from a judgment of the Superior Court of Orange County, Gregory H. Lewis, Judge. Affirmed.

Law Offices of Robert K. Scott, Robert K. Scott, James W. Haines; Sina Law Group and Reza Sina for Plaintiff and Appellant.

Murchison & Cummings, Carolyn A. Mathews and Maria Starn for Defendant and Respondent.

Plaintiff Richard Ashoff appeals the granting of defendant Essentia Insurance Company's (Essentia) motion for summary judgment. We affirm.

I

FACTS

Hagerty Classic Marine Insurance Agency, Inc. (Hagerty) issued a classic boat insurance policy on Ashoff's 1958 classic Chris Craft Continental 18-foot wood boat, effective July 17, 2010, to July 17, 2011. Ashoff bought the boat in 2007. The insurance policy was underwritten by Essentia and insured Ashoff against "accidental, direct physical loss or damage [to the boat] except as specifically excluded in this policy." The policy excluded from coverage loss or damage caused by or resulting from neglect, wear and tear, defect, deterioration, weathering, inherent vice and other causes not relevant to our discussion.

On November 17, 2010, Ashoff told Hagerty he had been informed his boat sank where it was berthed and California Recreation Marina was attempting to raise the boat and transfer it to a boat yard. That same day, Hagerty referred Ashoff's claim to Brian Sarland and Sarland took Ashoff's recorded statement. Ashoff said he had last used the boat on November 14, 2010. He said there were no recent repairs to or issues with the boat, and that he did not hit any submerged object that day.

Hagerty hired Charles Reininga, a marine surveyor, to inspect and survey Ashoff's boat. Reininga was familiar with Ashoff's boat, the *Amoré*, having inspected the boat in 2009. The day after Ashoff was notified his boat sunk, on November 18, 2010, he informed Reininga the *Amoré* had been salvaged by Sea Tow and was out of the water at Basin Marine in Newport Beach.

Reininga surveyed the *Amoré* five days after the boat had sunk. He found the hull to be in good condition with the exception of "a visible gap between the hull planks and the transom on the port side of the keel." On December 2, 2010, Reininga performed a float test on the *Amoré*. He found "a visible water leak into the vessel at the

lower portion of the interior transom just above the cross keel wood framing connected to the transom, and . . . observed that the water was pooling at the stern of the vessel at a fast rate." Reininga concluded "the damages to Ashoff's vessel are consistent with sinking due to wear, tear, and fatigue of the hull planking and seal joints at the transom area." A week later, on December 9, 2010, Hagerty wrote to Ashoff informing him the loss was not covered by the insurance policy because Hagerty found the *Amoré* "sank due to wear, tear, and fatigue of the hull planking and seal joints at the transom area."

On May 5, 2011, Ashoff filed suit against Essentia for breach of contract and breach of the covenant of good faith and fair dealing. Ashoff waived any damages in excess of $75,000 to prevent removal of the action to the United States District Court. (See 28 U.S.C. § 1332.)

Essentia took Ashoff's deposition on January 17, 2012. Ashoff testified he took the *Amoré* out on Sunday, two days before it sank. According to Ashoff he and his girlfriend, "Just putt[ed] around the harbor and relaxed, and we went around the harbor and came back to the dock, stayed at the dock for another three hours, took a nap, relaxed, [and] read a book." He said he had to have the battery jumped that day because the battery "was dead." Ashoff was asked, "When you took the *Amoré* out on Sunday, did you have any impact with anything?" (Italics added.) He said he did not. He was then asked, "Did anything impact you?" He again answered, "No."

Essentia filed its motion for summary judgment on November 4, 2011. The motion alleged, and the evidence offered in support of the motion demonstrated, the sinking was not covered by the insurance policy because the boat sank as a result of neglect, wear and tear, and deterioration. The motion further alleged Ashoff offered no viable reason why the *Amoré* sank while berthed in the marina.

Ashoff filed his opposition on February 14, 2012. His declaration in opposition to the motion gave a different description of what happened the last time he used his boat. For the first time, he stated that when he took the boat out on Sunday,

November 14, 2010, he and his girlfriend went out of the harbor and cruised beyond the Newport breakwater. Out in the open water, a large ship went by the *Amoré* causing a large wake to form, which the *Amoré* hit straight on and hard. The *Amoré*'s bow went up into the air and the boat "slapped hard against the ocean water near the front third of the flat bottom hull." Ashoff claimed the *Amoré* slammed so hard against the ocean water that the windshield fasteners broke and the windshield came loose. He thereafter went back into the harbor, but the engine died a few minutes later. He was unable to start the restart engine, requiring a jump from the harbor sheriff.

Ashoff submitted the declaration of Steven Ward in support of his opposition. Ward, an accredited member of the Society of Marine Surveyors, was retained as an expert by Ashoff. Relying on Ashoff's representation about hitting the large wake of a large ship in the ocean, Ward opined the sudden impact "caused water in the fuel tank to enter the fuel line and foul the engine."

Ward stated that wood planks on the bottom of a boat will shrink, creating gaps between the planks and causing leaks when the boat has been out of the water for any appreciable time. He said that in order to properly perform a float test, a wood boat must be soaked for two to three days before the test to allow the wood planks to swell. He conducted a float test in the same manner as Reininga—i.e., without first letting the boat soak. Ward performed the test on February 2, 2012, after he had the boat moved from Ashoff's warehouse, more than 14 months after the boat sank and had been removed from the water. During the test, Ward noticed the *Amoré* leaked in numerous places. He opined the *Amoré* did not sink "due to wear, tear, and fatigue of the hull planking and seal joints at the transom area" contrary to Reininga's conclusion.

Essentia's reply brief in support of its motion for summary judgment raised an additional ground for granting relief: the doctrine of uberrimae fidei—that both parties to an insurance contract have a duty of utmost good faith, an entrenched doctrine of admiralty law. Essentia also relied on Insurance Code section 1900, which requires

each party to a marine insurance matter to disclose all the information each has regarding the risk.

The superior court granted Essentia's motion for summary judgment. The court found Ashoff's evidence lacked credibility. The court concluded there was "no triable issue as to any material fact and that Essentia is entitled to judgment as a matter of law." The court also concluded the doctrine of uberrimae fidei and California Insurance Code section 1900 required Ashoff to communicate all material information in his possession regarding the risk and the whole truth in relation to all matters relating to the claim. The court further found Ashoff's claim that the *Amoré* hit a large wake days before it sank was not revealed to Essentia in a timely manner and Ashoff did not produce evidence tending to show the *Amoré* sank as the result of a fortuity, as opposed to a noncovered event. Lastly, the court held the implied covenant of good faith and fair dealing was not breached by Essentia.

## II

## DISCUSSION

*General Rules Applicable to Summary Judgment Motions*

"The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute. [Citation.]" (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 843 (*Aguilar*).) The trial court is required to grant a motion for summary judgment 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 of Civ. Proc., § 437c, subd. (c).) When the defense brings a motion for summary judgment, it must demonstrate the action has no merit in order to be entitled to judgment as a matter of law. (*Id.*, § 473c, subd. (a).) The defense makes this showing by proving either "[o]ne or more of the elements of the cause of action cannot be separately established," or that an affirmative defense exists as to the

cause of action. (*Id.*, § 473c, subds. (*o*)(1), (2).) Once the defense has made this requisite showing, the burden shifts to the plaintiff to demonstrate by way of declarations, affidavits, or other evidence a triable issue of fact exists as to that cause of action. (*Aguilar, supra*, 25 Cal.4th at p. 843.)

Reviewing an order granting summary judgment, "'we examine the facts presented to the trial court and determine their effect as a matter of law. . . .'" (*Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1154.) Thus, our review of the facts is de novo. (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 534.)

*There Were no Triable Issues of Material Fact*

Ashoff alleged two causes of action: breach of contract, and breach of the implied covenant of good faith and fair dealing. As to the breach of contract cause of action, the elements are "(1) the existence of a contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff. [Citation.]" (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.) In order to prevail on its summary judgment motion, Essentia needed only to show Ashoff could not establish one of the elements of his breach of contract action. (*Aguilar, supra*, 25 Cal.4th at p. 853.) Here, the element Ashoff could not establish was a breach by Essentia.

There was a contract between the parties. Essentia's obligation was to insure the *Amoré* for damage "accidental, direct physical loss or damage to [the *Amoré*] except as specifically excluded [by the] policy." The policy contained an exclusion provision, excluding from coverage any loss or damage caused by neglect, wear and tear, latent defect, gradual deterioration, weathering, and inherent vice. In denying coverage, it was Essentia's conclusion the *Amoré* sank due to "wear, tear, and fatigue of the hull planking and seal joints at the transom area." The evidence offered by Essentia in support of its motion supported a denial of coverage.

Reininga surveyed the boat just days after it sank and was refloated. He was familiar with the *Amoré*, having examined the boat in 2009 when Ashoff claimed finish on the boat had peeled. This time, he observed the hull of the boat appeared to be in good condition, with the exception of "a visible gap between the hull planks and the transom on the port side of the keel." Reininga further observed there were no impact damages to the hull. During the float test Reininga performed less than two weeks later, he observed "a visible water leak into the vessel at the lower portion of the interior transom just above the cross keel wood framing connected to the transom, and . . . that the water was pooling at the stern of the vessel at a fast rate." Based on those observations, he concluded the boat sank due to "wear, tear, and fatigue of the hull planking and seal joints at the transom area."

Essentia had no evidence before it tending to indicate any other reason for the sinking. Indeed, discovery did not raise any other cause. One of Essentia's interrogatories asked Ashoff to state all the facts he believes to have been the cause of the *Amoré* sinking. Ashoff's response in August 2011, approximately nine months after the incident, was that he did not know the cause of the sinking. When Ashoff was deposed in January 2012, about 14 months after his boat sank, Ashoff was asked when he had last taken the *Amoré* out and what he did that day. Ashoff said he took the boat out on a Sunday, two days before the boat sank. When asked what he had done when he took the boat out, he said that he and his girlfriend "just putt[ed] around the harbor and relaxed, and we went around the harbor and came back to the dock, stayed at the dock for another three hours, took a nap, relaxed, [and] read a book." Ashoff said he had to have the battery jumped that day. When he asked why the battery that had been replaced in 2008 had to be jumped, Ashoff said it was because the battery was dead. He was also asked if he impacted anything when he took the *Amoré* out the Sunday before it sank. He said he did not and nothing impacted the boat.

Essentia filed its motion for summary judgment on November 4, 2011, and on February 14, 2012, Ashoff filed his opposition to the motion. It was at this point, almost 15 months after the *Amoré* sank and less than a month after his deposition testimony, that Ashoff opposed the motion for summary judgment arguing the boat sank because on its last excursion he did not just "putt around the harbor." For the first time, he claimed he took the *Amoré* out onto the ocean that day, encountered a large swell caused by a large passing ship and hit the swell so hard the bow of the *Amoré* went into the air and its hull slapped hard against the ocean water, causing "the windshield fasteners to break and the windshield to come loose." Ashoff contended his boat's engine quit because ocean water entered the fuel tanks and fouled the engine. After the *Amoré* was adrift for some time, a harbor sheriff gave the boat a jump start, at which point Ashoff took the *Amoré* back to its dock.

While hitting a small wake is something most may not think important enough to mention in attempting to determine what caused a boat to sink, hitting a large wake in the ocean so hard that the windshield broke the last time the boat was used is something one would tend to remember, especially if asked whether anything impacted the boat. Even more troubling is that Ashoff did not tell Essentia's attorneys he took the boat out into the ocean on that last excursion.

Thus, Ashoff's whole story changed when he opposed Essentia's summary judgment motion. As this new evidence directly contradicted his earlier sworn deposition testimony, the trial court was free to disregard it. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21-22; *Barton v. Elexsys Internat., Inc.* (1998) 62 Cal.App.4th 1182, 1191-1192.) "Admissions or concessions made during the course of discovery govern and control over contrary declarations lodged at a hearing on a motion for summary judgment. [Citations.]" (*Visueta v. General Motors Corp.* (1991) 234 Cal.App.3d 1609, 1613.)

"There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar*, *supra*, 25 Cal.4th at p. 850, fn. omitted.) The declaration of Ward did not create any such issues. Ward's conclusion that the sinking was "consistent with a single and sudden impact caused by another boat's wake" was based on Ashoff's statement to him about the boat hitting a large wake. To the extent Ashoff attempts to cast doubt on Reininga's use of the float test without soaking the boat first to allow the planks to swell, the test performed by Ward in the same fashion—but done more than 14 months after the boat had been removed from the water—did not create a triable issue of material fact. Although there seems to be agreement that a wood boat's hull should be soaked before a float test when it has been out of the water for an appreciable time, it appears there was only one leak when Reininga tested the boat a short time after it had been refloated and removed from the water. That leak was in the same location where Reininga had observed "a visible gap between the hull planks and the transom on the port side of the keel" when he surveyed the boat just days after it had sunk. On the other hand, after the boat had been out of the water for over 14 months and Ward conducted a float test without soaking the hull before hand, the boat leaked from so many locations in the hull the source of the leaks could not be determined. The result of Ward's test was, therefore, of no value to the court in raising a contested issue of material fact.

As Ashoff failed to demonstrate a triable issue of material fact on his breach of contract cause of action—i.e., that his loss was covered by his policy with Essentia—he also failed to show a triable issue of material fact in his second cause of action for breach of the implied covenant of good faith and fair dealing. "[A] claim for breach of the implied covenant of good faith and fair dealing cannot be maintained unless benefits are due under the plaintiff's insurance policy. [Citations.]" (*Dollinger DeAnza Associates v. Chicago Title Ins. Co.* (2011) 199 Cal.App.4th 1132, 1156.) Furthermore,

up until February 2012, when Ashoff changed his story, Ashoff himself said he had no reason to believe his boat sank for a reason covered by his insurance policy. It is difficult to conceive how Essentia could have acted in breach of its implied covenant of good faith and fair dealing when it based its denial of coverage on Ashoff's version of what happened.

*Essentia's Raising the Doctrine of Uberrimae Fidei in its Reply Brief Below*

Ashoff argues the superior court's reliance on the maritime concept of uberrimae fidei requires reversal for two reasons. He first argues Essentia did not raise the issue until its reply brief in the summary judgment motion, so he did not have an opportunity to brief the issue. Next, he argues the concept applies to the formation of maritime insurance contracts, not to claims made thereunder.

Uberrimae fidei is a well-established federal maritime concept that places on an insured a "duty to make a full and complete disclosure on a marine insurance application." (*Certain Underwriters at Lloyds, London v. Giroire* (S.D.Fla. 1998) 27 F.Supp.2d 1306, 1311.) The applicant for maritime insurance is under a duty "to reveal every fact within his knowledge that is material to the risk. [Citation.]" (*Cigna Property. & Cas. Ins. v. Polaris Pictures* (9th Cir. 1998) 159 F.3d 412, 420, fn. omitted.)

We need not decide whether the uberrimae fidei applies to claims under, as well as applications for, maritime insurance. Besides finding in favor of the insurance company on the uberrimae fidei concept, the trial court also concluded there was no dispute regarding a material fact. Ashoff concedes the court must be upheld if valid on either ground.

III

DISPOSITION

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

MOORE, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.