

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

TU PHAM,

Plaintiff and Appellant,

v.

HUNG CHU,

Defendant and Respondent.

G047087

(Super. Ct. No. 30-2010-00419766)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Sheila Fell, Judge. Affirmed.

Angelo & Di Monda, Christopher E. Angelo and Joseph Di Monda for Plaintiff and Appellant.

Law Offices of Cleidin Z. Atanous, Cleidin Z. Atanous and Michelle L. Villarreal for Defendant and Respondent.

*

*

*

Following a jury trial in the underlying action, plaintiff Tu Pham obtained a judgment against defendant Hung Chu in the amount of \$333,300. This appeal is from a postjudgment order in that action.

Pham alleged Chu's insurance company, Mercury Insurance (Mercury), improperly failed to defend Chu and settle the case for Chu's policy limits (\$15,000). Pham sought an order pursuant to Code of Civil Procedure¹ section 708.510, requiring Chu to assign to Pham his right to sue and collect from Mercury for its alleged bad faith failure to settle within the policy limits. The superior court denied the motion, finding "[b]ad faith rights" cannot be assigned by court order and assignment of such rights in this case would result in an improper splitting of a cause of action, as notwithstanding any assignment Chu would retain his right to sue Mercury seeking damages for emotional distress and/or punitive damages. Pham appealed.

Prior to the court's ruling, Mercury brought a separate action for declaratory relief, naming Chu and Pham as defendants. Chu filed a cross-complaint, and with the superior court's permission, Pham filed a complaint in intervention.² We hold the trial court did not abuse its discretion in denying Pham's motion.

I

FACTS

The record on appeal is limited. It does not contain the complaint or a record of the evidence at trial. It appears the underlying action concerned an automobile

¹ Undesignated statutory references are to the Code of Civil Procedure.

² "(a) The court in which the action or special proceeding is pending may permit a judgment creditor who has obtained a lien under this article to intervene in the action or proceeding pursuant to Section 387.

"(b) For the purposes of Sections 708.450 and 708.470, a judgment creditor shall be deemed to be a party to the action or special proceeding even though the judgment creditor has not become a party to the action or proceeding under subdivision (a)." (§ 708.430.)

accident involving vehicles driven by Krystal Hoang and Chu. Pham was a passenger in Chu's vehicle. Pham offered to settle the matter for \$15,000, the amount of Chu's policy limits. Mercury declined the offer and the matter proceeded to trial.

In special verdicts, the jury found Hoang was not negligent, Chu was negligent, and Chu's negligence was a substantial factor in causing Pham harm. The jury found Chu was responsible for Pham's damages of \$333,300.

Pham brought a motion under section 708.510, seeking a court order requiring Chu to assign his cause of action against Mercury for its alleged bad faith failure to tender the applicable policy limits within a reasonable time. According to Chu's opposition, he acknowledges the bad faith claim is assignable and he was willing to assign the right to Pham in exchange for an agreement not to execute the judgment against him. Pham was not willing to enter into such an agreement.

The court denied Pham's motion for an assignment order on July 13, 2012. The court held bad faith rights do not fall within the six categories of payments listed in section 708.510, a defendant cannot assign bad faith claims seeking emotional distress damages or punitive damages, and to assign only part of a bad faith claim would result in an impermissible splitting of a cause of action. Pham appeals from this order.

Prior to the court denying Pham's motion, Mercury filed a complaint for declaratory relief, seeking a judicial determination of its rights, responsibilities, duties, and obligations under the policy it issued to Chu. Shortly after the trial court denied Pham's motion for an assignment, Chu filed a cross-complaint against Mercury for breach of the implied covenant of good faith and fair dealing, breach of contract, and general negligence. Chu prayed for punitive damages on the first cause of action. After

receiving permission from the court, Pham filed a complaint in intervention, alleging an interest in the cause of action and that he is Chu's judgment creditor.³

II

DISCUSSION

Section 708.510 is located in that portion of the Code of Civil Procedure providing remedies to judgment creditors. Subdivision (a) of section 708.510 provides as follows: "Except as otherwise provided by law, upon application of the judgment creditor on noticed motion, the court may order the judgment debtor to assign to the judgment creditor . . . all or part of a right to payment due or to become due, whether or not the right is conditioned on future developments, including but not limited to the following types of payments: [¶] (1) Wages due from the federal government that are not subject to withholding under an earnings withholding order. [¶] (2) Rents. [¶] (3) Commissions. [¶] (4) Royalties. [¶] (5) Payments due from a patent or copyright. [¶] (6) Insurance policy loan value."

The fact that this section states the court "may" order an assignment upon the application of the judgment debtor means the court is to exercise its discretion in determining whether to order an assignment. (See *Housing Authority of Oakland v. Superior Court* (1941) 18 Cal.2d 336, 339 [Legislature's use of "may" expresses intent to vest discretion in the trial court].) We therefore review the trial court's denial for an abuse of discretion.

All contracts contain an implied covenant of good faith and fair dealing. (*Murphy v. Allstate Ins. Co.* (1976) 17 Cal.3d 937, 940.) In an insurance contract, this covenant "requires the insurer to settle an appropriate case although the express terms of

³ Chu filed a motion asking us to take judicial notice of the declaratory relief action filed by Mercury (Orange County Superior Court case No. 30-2012-00556310), Chu's cross-complaint against Mercury, and Pham's complaint in intervention filed in that case. We grant the request. (Cal. Rules of Court, rule 8.252.)

the policy do not impose such a duty' [citation]." (*Id.* at pp. 940-941.) "[I]n deciding whether or not to settle a claim, the insurer must take into account the interests of the insured, and when there is a great risk of recovery beyond the policy limits, a good faith consideration of the insured's interests may require the insurer to settle the claim within the policy limits. An unreasonable refusal to settle may subject the insurer to liability for the entire amount of the judgment rendered against the insured, including any portion in excess of the policy limits. [Citation.]' [Citation.]" (*Hamilton v. Maryland Casualty Co.* (2002) 27 Cal.4th 718, 724-725.)

Pham sought an order from the trial court directing Chu to assign his cause of action against Mercury for breach of the implied covenant of good faith and fair dealing to Pham. Pham has cited us to no authority holding such a cause of action is assignable under section 708.051.

An insured's action against his insurance company for a breach of the implied covenant of good faith and fair dealing sounds not only in contract, but also in tort. (*Hamilton v. Maryland Casualty Co.*, *supra*, 27 Cal.4th at p. 725.) "Although the insured may assign his cause of action against the insurer for its breach of the duty to settle [citation], he cannot assign the personal tort aspect of that bad faith cause of action because that aspect is not assignable in California. [Citation.]" (*Schlauch v. Hartford Accident & Indemnity Co.* (1983) 146 Cal.App.3d 926, 931.) When an insured has assigned his cause of action for violation of the implied covenant of good faith and fair dealing, "but retains his personal claims, such as for emotional distress and punitive damages, [he] must join the assignee in a single cause of action against the insurer; separate suit by the insured improperly splits the cause of action." (*Heredia v. Farmers Ins. Exchange* (1991) 228 Cal.App.3d 1345, 1361, fn. 1, citing *Purcell v. Colonial Ins. Co.* (1971) 20 Cal.App.3d 807.)

The trial court denied Pham's motion for an assignment, in part, because such an assignment could result in improperly splitting Chu's cause of action against

Mercury. We agree. As between the two parties, Chu would appear to have more at stake in a lawsuit against Mercury. Chu has filed a cause of action for breach of the implied covenant of good faith and fair dealing, seeking both emotional distress damages and punitive damages. (See *Schlauch v. Hartford Accident & Indemnity Co.*, *supra*, 146 Cal.App.3d at p. 931.)

It appears Pham's primary concern is that Chu will settle his lawsuit for less than he owes Pham, leaving Pham unable to collect his full judgment. However, Pham is a party to the declaratory relief action not only as a named defendant but also as an intervenor on the cross-complaint Chu filed against Mercury. As such he is in a position to voice his concerns to the trial judge in the pending action. Pham's interests are thus protected.

Under the circumstances we find in this record, we cannot find the trial court abused its discretion when it denied the requested assignment. Accordingly, we affirm the court's order.

III

DISPOSITION

The order is affirmed. Chu shall recover his costs on appeal.

MOORE, J.

WE CONCUR:

O'LEARY, P. J.

IKOLA, J.