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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CARVALE CONSTRUCTION, INC. et
al.,

Plaintiffs and Appellants,

v.

PROBUILDERS SPECIALTY
INSURANCE COMPANY, RRG,

Defendant and Respondent.

G048635

(Super. Ct. No. 30-2010-00417408)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Andrew
P. Banks, Judge. Affirmed.

Charles G. Kinney for Plaintiffs and Appellants.

Branson, Brinkop, Griffith & Strong, John R. Campo and David P.
McDonough for Defendant and Respondent.

* * *

After a bench trial the court awarded judgment in favor of defendant Probuilders Specialty Insurance Company, RRG against plaintiffs Carvale Construction, Inc. and Michael Carvale in their action for breach of contract and of the covenant of good faith and fair dealing based on defendant's denial of a claim under an insurance policy it issued to plaintiffs. Plaintiffs argue the court erred by finding defendant did not act in bad faith and that plaintiffs' unclean hands was a complete defense to the action. We agree plaintiffs' claims were barred by their unclean hands and affirm.

FACTS AND PROCEDURAL HISTORY

In 2005 plaintiffs entered into a construction contract with Brian and Cherie Wink to remodel their residence in Yorba Linda (Project).¹ The contract price was \$400,000. Construction began in January 2007 when the site received temporary power. In August of that year plaintiffs applied for and were issued an insurance policy from defendant. In March 2008 the Winks terminated the contract with plaintiffs before the Project was completed. The Project was completed in January 2012.

In July 2008 the Winks submitted a claim for defective construction directly to defendant. In August defendant sent a letter to plaintiffs informing them the Winks had made a claim. The letter stated defendant would "conduct a full investigation."

Defendant hired a professional adjuster who investigated the claim. She met with Michael Carvale to obtain his statement and had at least six telephone conversations with him. Despite requests, he never provided plaintiffs' job file to her. She also met with Mrs. Wink at the Project. Additionally she spoke with the manager of the city's building department.

¹ The parties disagree about whether this was a remodel or a new build after the existing residence was completely torn down. Based on the issues we are deciding this is not material.

In October defendant wrote to the Winks denying the claim. Defendant also wrote to plaintiffs advising it had “decline[d] coverage in its entirety, including any duty to defend or indemnify [plaintiffs]” because the “policy [did] not provide coverage for the claim at issue.” The three reasons listed were 1) there had been no “‘occurrence’” as defined in the policy because the claim was based on “simply poor workmanship”; 2) the New Construction Exclusion applied because the residence had been completely torn down and rebuilt; and 3) the Specified Operations Exclusion excluded “property damage after work is completed arising out of ‘all roofing operations.’” The letter asked plaintiffs to contact defendant if they disagreed with or wanted to discuss denial of the claim. Defendant also asked plaintiffs to provide any information they had that would change the basis for denial of the claim. Plaintiffs never contacted defendant. The policy contains an endorsement requiring plaintiffs to immediately report an occurrence if it could result in a claim.

A month later the Winks filed their action against plaintiffs and numerous other defendants. They subsequently filed the second amended complaint pleading a variety of causes of action, including negligence, breach of contract, strict liability, breach of warranty, fraud, and negligent misrepresentation. Plaintiffs did not tender the action to defendant.

In October 2010 plaintiffs filed a complaint against defendant for breach of contract. The third amended complaint (TAC) alleges causes of action for breach of contract, declaratory relief, and breach of the covenant of good faith and fair dealing.

After a bench trial the court issued its Statement of Decision. It found defendant breached its duty to defend plaintiffs against the Winks’ suit. The breach occurred when defendant sent the October 15 letter, stating it “must decline coverage in its entirety, including any duty to defend or indemnify” plaintiffs. Defendant sent this letter before seeing the Winks’ lawsuit and never reviewed it. The court rejected defendant’s defense based on plaintiffs’ failure to tender the Winks’ action, finding

defendant's "unqualified denial of any duty of defense" in responding to the Winks excused plaintiffs from tendering defense of the action.

Despite the finding of breach of contract, the court ruled defendant had not breached the duty of good faith and fair dealing. Defendant's denial of a duty to defend was the result of an "honest mistake, bad judgment and/or negligence" and was not unreasonable or without good cause.

Defendant also prevailed on its unclean hands defense. The Statement of Decision contained a lengthy discussion of the evidence presented and the court's findings. It found plaintiffs had made material misrepresentations in their application for insurance. These misrepresentations included the failure to include the Project as one of its three largest projects or gross receipts for the Project, despite the fact the Project was ongoing at the time plaintiffs completed the application. Defendant relied on plaintiffs' understatement of their total gross receipts for their three largest projects during the policy period in determining its premium as well as plaintiffs' misrepresentations about their relationships with subcontractors and a claim they had a contract including a hold harmless agreement plus affirmation they were additional insureds on those subcontractors' policies.

The answers to the questions on the application were material, given that defendant sought them in writing. Further, an endorsement to plaintiffs' policy conditioned coverage on the truthfulness of those representations. These facts showed plaintiffs had unclean hands, a complete defense to the action. Based on the foregoing, the court entered judgment in favor of defendant.

DISCUSSION

1. Introduction and Standard of Review

Plaintiffs argue the standard of review to be applied is de novo, because the only issue revolves around interpretation of the insurance application and the letters to the Winks and plaintiffs denying the claim. They assert no facts were in dispute because

they “filled out the ambiguous insurance application as best” as they could and the trial court “cannot second[ly] guess” what plaintiffs’ answers would have been if the application “had been less ambiguous.”

No so. While the printed application itself may be subject to a de novo standard, how plaintiffs filled out the application is a question of fact the trial court necessarily decided. This is a sufficiency of the evidence issue.

In deciding whether sufficient evidence supports the judgment we begin with the presumption the judgment is correct. (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.) On review of a judgment ““based upon a statement of decision following a bench trial, ‘any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision. [Citations.]’ [Citation.]”” (*Axis Surplus Ins. Co v. Reinoso* (2012) 208 Cal.App.4th 181, 189.) We may not reweigh or resolve conflicts in the evidence or redetermine the credibility of witnesses. (*Citizens Business Bank v. Gevorgian* (2013) 218 Cal.App.4th 602, 613.) We liberally construe the court’s findings of facts, whether express or implied. (*Ibid.*) Plaintiffs’ contrary evidence that would support the opposite result is not relevant. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 874.) When the evidence supports two or more reasonable inferences, we may not substitute our conclusion for that of the trial court. (*Ibid.*)

2. *Unclean Hands Is a Complete Defense*

In deciding unclean hands was a complete defense to the entire action, the court made numerous factual findings based on plaintiffs’ completion of the insurance application. Plaintiffs argue the court’s findings were incorrect and set out their interpretation of their answers.

The application asked plaintiffs to list the three largest projects “that are in progress or will be completed during the proposed policy period” (capitalization & boldface omitted), including a description of the work and the gross receipts for each.

Plaintiffs responded, “[v]arious small residential remodeling work” and showed gross receipts of \$175,000. The Project was not specifically mentioned nor can it be described as a “small residential” project. The court found these answers were misrepresentations.

Plaintiffs argue they gave truthful answers. Because the Winks were “running out of money,” it was not clear whether the Project would be completed or what if any work would be done during the policy period. But Michael Carvale testified at trial the Project was ongoing when he completed the application in August 2007.

Moreover, plaintiffs gave the exact same answer to another question on the application that asked for “the 3 largest projects completed during the past 3 years.” (Capitalization & boldface omitted.) The two questions are mutually exclusive. The three largest projects completed during the past three years could not be the same as the three largest projects in progress or to be completed. This is additional evidence the answers were not truthful.

Plaintiffs also claim there is no evidence they believed the Project was one of their three largest. But the contract for the project was \$400,000. Even if the entire amount was not to be paid out during the one-year policy period, as plaintiffs argue, it was reasonable for the court to find the Project was still larger than the “[v]arious small residential remodeling” jobs totaling \$175,000 plaintiffs listed.

Attacking from another angle plaintiffs claim the term “gross receipts” in the application was ambiguous; it was not clear as to whether it referred to gross receipts for a project in total or per year. But a review of the application form shows the term, in context, is clear. One question asked about the three largest projects completed in the past three years. Thus, gross receipts would refer to that three-year period. And, as plaintiffs acknowledge, they should have included gross receipts for those three years, which, they concede, was a “slightly larger” amount than the \$175,000 they disclosed. Plaintiffs admit this would have included sums the Winks paid from 2005 through 2007.

The other question, the one asking about the three largest projects in process or that will be completed during the policy period, plainly seeks gross receipts for the projects that should have been listed.

These were not plaintiffs' only omissions on the application. They admittedly misrepresented certain information about their use of subcontractors. They stated their subcontractors would not be allowed to work unless they supplied a certificate of insurance. But plaintiffs did not obtain those certificates. Additionally, plaintiffs represented they would be named as an additional insured on their subcontractors' insurance policies and they would have written contracts with the subcontractors that contained a hold harmless agreement. But again, plaintiffs did not have written contracts and were not named as additional insureds. Further, plaintiffs left completely blank a section seeking information about their relations with roofing contractors.

Given all these misrepresentations and omissions, it is reasonable to infer plaintiffs' failure to mention the Project was intentional and not due to some misunderstanding of the application.

Plaintiffs argue that the \$400,000 price for the Project was irrelevant because premiums were based on the estimated gross receipts or "estimated exposures" (capitalization & boldface omitted) for the policy period, shown as \$175,000. Plaintiffs claim the \$400,000 was immaterial and "it did NOT matter what [they] wrote as to prior gross receipts or as to subcontractors" because that information had no bearing on the premium or whether to issue the policy. We disagree.

First, plaintiffs have set up a false premise. It was not just the amount of \$400,000 that was an important fact. Plaintiffs did not disclose the Project at all as one of their ongoing projects or the amount of any of the gross receipts to be generated. As a result, the \$175,000 plaintiffs claim was used to determine the premium was understated

because none of the Project receipts were disclosed. Thus, even using plaintiffs' argument, the premium would have been higher.

Second, it was not just the failure to disclose the Project. Omission of the information about the subcontractors was also material. Endorsement No. 7 to the policy provides a condition precedent to the policy "applying to any claim in whole or in part based upon work performed by any . . . subcontractors" (capitalization omitted) is plaintiffs' receipt of "a valid written indemnity and hold harmless agreement" (capitalization omitted) and being named as an additional insured by the subcontractors. Plaintiffs advised the claims adjuster there were three subcontractors and part of the Winks' claim is based on alleged defective work by subcontractors. It is reasonable to infer defendant would not have issued the policy had it known plaintiffs had not obtained an indemnity agreement or been named as an additional insured.

"The materiality of a misrepresentation is determined by its probable and reasonable effect upon the insurer. [Citation.] The misrepresentation need not relate to the loss ultimately claimed by the insured. [Citation.] The test for materiality is whether the information would have caused the underwriter to reject the application, charge a higher premium, or amend the policy terms, had the underwriter known the true facts. [Citation.]" "The fact that the insurer has demanded answers to specific questions in an application for insurance is in itself usually sufficient to establish materiality as a matter of law." [Citations.]" (*Mitchell v. United National Ins. Co.* (2005) 127 Cal.App.4th 457, 474, 475.)

Plaintiffs' claim defendant did not meet its burden to show plaintiffs misrepresented the facts on the application is not correct. The information on the application and Michael Carvale's own testimony proved the misrepresentations. (*Citizens Business Bank v. Gevorgian, supra*, 218 Cal.App.4th at p. 613 [testimony of single witness can be sufficient].) And plaintiffs did not put on any evidence to support

the claims they now make that the application was ambiguous, they completed it as they understood it, and their answers were honest.

It is reasonable to infer plaintiffs' failure to mention the Project was intentional and not due to some misunderstanding of the application. It is also a reasonable inference defendant might have had misgivings about issuing the policy at all or may have increased the premium, especially in light of the other omissions regarding the subcontractors. Thus, the court's factual findings that plaintiffs made material misrepresentations on the application and that this constituted unclean hands is supported by substantial evidence.

We reject plaintiffs' argument the unclean hands defense is unavailable because defendant never rescinded the policy. An insurance company has the option to rely on material untruthful information on an insurance application as a complete defense to an action; rescission is not required. (*Superior Dispatch, Inc. v. Insurance Corp. of New York* (2010) 181 Cal.App.4th 175, 192.) Nor are we persuaded by plaintiffs' assertion defendant cannot rely on this defense because it was not mentioned in the letters or the answer to the TAC. Defendant did allege unclean hands in its answer.

Moreover, plaintiffs' claim they were prejudiced by defendant's failure to raise its right to rescind because they "would have" defended against the Winks' action differently by settling early rather than litigating it is speculative and without support in the record.

Likewise we are not convinced by plaintiffs' contention defendant waived its right to rescind due to its failure to investigate the information plaintiffs supplied in their application. First and again, defendant did not seek to, nor was it required to, rescind. Second, as a general rule an insurer is not required to verify the truthfulness of answers in an insurance application but may rely on them as provided. (*Mitchell v. United Nationa. Ins. Co., supra*, 127 Cal.App.4th at p. 477.) As the trial court noted, "An insured who withholds information and then blames the insurer for not discovering it is at

best exhibiting gamesmanship; he cannot have it both ways.” (*Lunardi v. Great-West Life Assurance Co.* (1995) 37 Cal.App.4th 807, 822, fn. 9.)

3. Anticipatory Breach

Plaintiffs claim defendant’s denial of the Winks’ claim was an anticipatory breach by defendant, excusing all conditions in the policy. They include as conditions “the possibility that misstatements in the application could be used against” them and the “lack of insurance or hold[harmless documents from subcontractors.” But those are not conditions. These were misrepresentations on the application, whether or not they would be “used against” plaintiffs.

4. Costs and Other Arguments

Because we are affirming the judgment based on unclean hands, there is no need to discuss breach of the implied covenant of good faith and fair dealing nor is there a basis to reverse the award of costs.

DISPOSITION

The judgment is affirmed. Defendant is entitled to costs on appeal.

THOMPSON, J.

WE CONCUR:

O’LEARY, P. J.

IKOLA, J.