INSURANCE

Bad Faith

Declaratory Relief

SUMMARY JUDGMENT: Granted in favor of the plaintiff.

CASE/NUMBER: T.H.E. Insurance Co. v. Southern Pacific Transportation Co., Union Pacific Railroad Co.. et al. / CV977294RAP.

COURT/DATE: USDC Central / Feb. 28, 2000.

JUDGE: Hon. Richard A. Paez.

ATTORNEYS: Plaintiff - Roger W. Clark, Robert D. Goldberg (Bienstock & Clark, Santa Monica).

Defendant . Allan Shenoi (Graham & James. LLP, Los Angeles); Steven L. Paine (Cotkin, Collins & Ginsburg, Los Angsles].

TECHNICAL EXPERTS: Plaintiff - Boyd Veenstra. claims handling, Burbank; Elliott C. Rothman, broker standard of care. Los Angeles; Barbara C. Luna, economic losses. Sherman Oaks: Eoyd S. Lemon, attorney standard of care, Los Angeles: Bob Greitz, trucking industry practices, San Leandro.

Defendant . David F. Peterson. claims handling practices, Agoura Hills; Richard J. Masters, broker standard of care. Oxnard: Jules H. Kamin, economist, Los Angeles; Jeffrey Amos, cargo transportation and insurance practices in the trucking industry, iong Beach.

FACTS: T.H.E. Insurance Company (T.H.E.) is an approved but non-admitted carrier. in California. Since T.H.E. is not admitted, it is required to do business in California through a surplus line broker. T.H.E. contracted with James Hilbrant Insurance Services to serve as its surplus line broker: Hilbrant contracted wdh several California retail insurance brokers, including Robert Varner.

In May 1995,. T.H.E. issued a truckers. commercial insurance policy with limits of $1 million 'to Mendez Trucking (Mendez). T.H.E. had distributed to Hilbrant a standard application to be used by retail brnkers in applications for insurance.

Varner took the application to Mendez to complete. Only two trucks were placed on the approved from. Four days after the insurance policy was issued, a Mender employee had a collision with another truck operated by an employee of Southern Pacific. Transportation (SPT); the Mendez truck was not scheduled under T.H.E.'s policy.

Mencez claimed to have reported the accident to T.H.E. through Varner, who acknowledged receiving he accident report, but admits he did riot pass the report on to T.H.E. In July 1995, T.H.E. canceled and the reason given was an unacceptable number of vehicles to be insured. This was based on T.H.E.'s learning that Mendez had a total of 59 different vehicles

In September 1995, the SPT employee sued Mendez. Mendez tendered their defense to T.H.E. The jury in the trial of the lawsuit found tor the employee against Mendez and SPT damages of 51.120 million. During the trial, a claims representative from SPT found an Insurance certificate issued by Vamer naming SPT as an additional Insured under T.H.E.'s policy. During the trial, SPT made its first written tender for defense and indemnificaticn, but T.H.E. declined:::

SPT claimed that Mendez had a contractual obligation to have SPT named as an additional Insured on T.H.E.'s policy. After the trial, SPT denied Mendez any further access to its SPT yards. Mendez claimed this decision caused them to go into bankruptcy.

Mendez alleged that if T.H.E had accepted the tender and had defended and in demnified Mendez and SPT, then SPT would not have terminated its contracts with Mendez. Mendez also alleged that Varner was the actual or ostensible agent of T.H.E. Varner allegedly represented himself to be an agent of T.H.E.. he produced a propnetary insurance application with T.H.E.'s name and-in his alleged capacity as agent lor T.H.E. he issued numerous certificates of insurance in favor of Mendez The application purportedly directed the applicant to report claims to the agent-broker, with Mendez contending this referred to Vamer.

T.H.E. brought this declaratory relief action in the U.S. District Court for a determination that it had no duty to'defend or indemnify either Mendez or SPT. Both Mendez and SPT filed a counterclaim seeking damages'under several theories including breach of the covenant of good faith and fair dealing. Mendez sought to reform the insurance policy to properly list all of Mendez' vehicles.

SPT claimed it was entitled to coverage since it relied on the certificate allegedly issued-by Vamer naming SPT as an additional insured. Mendez alleged Varner had committed a grievous error when he' listed just two trucks on the insurance application 'to T.H.E. Vamer had supposedly been instructed by Mendez to secure coverage for all trucks owned or operated by Mendez.

PLAINTIFF CONTENTIONS: T.H.E. contended it could nor have acted in bad faith because there was a genuine tssue of liability wnether coverage existed under the policy. Also. that Vamer could not oe the ostensible agent of T.H.E. because no act or omission of T.H.E. caused or contributed to having Menoez believe that Varner was their agent. Mendez could not reform the insurance policy because Mender delayed filing its reformation action, and should be barred by laches. and that unclean hands also barred Mendez from reforming the insurance policy. Mendez had allegedly provided false answer in its application for insurance regarding its history of insurance cancellations and non-renewals.

DEFENDANT CONTENTIONS: Mendez can tended that T.H.E.. through its agents Hillbrant and Varner, participated in a misrepresentation of the true facts m the relationship between T.H.E., Hillbrant and Varner. T.H.E. acted below the standard of care in not determining the correct and complete name that should oe used as the named insured.

T.H.E. had full knowledge of the total numoer of vehicles that Mendez believed were insured at tie time the policy was canceled in July 1995. T.H.E. acted unreasonably and without just cause in its communication, investigation and refusal to provide coverage to Msndez.

T.H.E was guilty of unreasonable conduct because it failed to settle and it forced Mendez to litigate ro obtain benefits under the policy.

DAMAGES: Mendez alleged that as a result of T.H.E.'s bad faith failure to defend and indemnify, Mendez suffered a judgment in the underlying SPT employe? lawsuit in the sum of $1,120 million, and Mendez was compelled to file for bankruptcy. The bankruptcy trustee liquidated the business. Mendez claimed the value of the business to be $4,623.375. Mendez sought punitive damages.

SETTLEMENT DISCUSSIONS: In Novemoer, Mendez made a demand to T.H.E. in rhe sum of $5.9 million. T.H.E. made no offer.

OTHER INFORMATION: Trial was scheduled for December 1999. The court neard arguments an opposing motions fcr summary judgment at the final status conference in November 1999. The court announced its proposed ruling from the bench at the final status conference. The court issued its judgment in late December 1999. Mendez has filed an appeal.

THE RESULT: Judge Richard Paez granted summary judgment in favor of T.H.E. The court ruled there was a genuine issue of liability and T.H.E. could not be liable in bad faith to Mendez. Judge Paez also held that no reasonable tner of fact could find that Mendez reasonabiy believed Vamer was acting as the agent for T.H.E. In addition, Judge Paez found :hat the Mendez reformation claim was baned by laches.

NOT FOR PUBLICATION

UNITED STATES OF AMERICA

FOR THE NINTH CIRCUIT

T.H.E. INSURANCE COMPANY, Plaintiff-Appellee, v. GILBERT VASQUEZ, Trustee, Bankruptcy Estate of Mendez Trucking Inc.; MENDEZ TRUCKING INC.; MANUEL MENDEZ, Defendants-Appellants.	No. 00-55241 D.C. No. CV-97-07294-TJH MEMORANDUM*

Appeal from the United States District Court
Central District of California
Terry J. Hatter, Jr., Chief District Judge, Presiding

Argued and Submitted October 19, 2001
Pasadena, California

BEFORE: BROWNING, FERNANDEZ and FISHER, Circuit Judges.

We affirm the district court's grant of summary judgment on all of Manuel Mendez and Mendez Trucking Inc.'s counterclaims and on T.H.E. Insurance Company's claim for declaratory relief.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this Circuit except as may be provided by Ninth Circuit Rule 36-3.

We agree that Mendez fails to raise a genuine issue of material fact as to Varner's ostensible agency. "[T]here are three requirements necessary before recovery may be had against a principal for the act of an ostensible agent. The person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one; such belief must be generated by some act or neglect of the principal sought to be charged; and the third person in relying on the agent's apparent authority must not be guilty of negligence." *Associated Creditors' Agency v. Davis*, 13 Cal. 3d 374, 399, 118 Cal. Rptr. 772, 788 (1975); Cal. Civ. Code § 2300; Cal. Civ. Code § 2334. Mendez raises a triable issue of fact as to *his* reasonable belief that Varner was an agent of T.H.E., and Mendez's failure to read and complete the application form before signing it does not constitute negligence in ascertaining Varner's status as an agent. However, Mendez cannot point to a sufficient act or omission *by T.H.E.* before the Flagg accident that led Mendez to believe that Varner was in fact T.H.E.'s agent. It is insufficient that T.H.E. made its proprietary insurance application forms available to Varner. Because Mendez fails to raise a triable issue of fact as to T.H.E.'s conduct generating a reasonable belief in Varner's purported agency, Mendez cannot sustain his claim that Varner was the ostensible agent of T.H.E. and the counterclaims for breach of contract, reformation and breach of insurance policy,

as reformed, negligent concealment and misrepresentation, fraud and breach of fiduciary duty must fail as a matter of law.

We also affirm the district court's grant of summary judgment on the claim for breach of the implied covenant of good faith and fair dealing. Because the policy covered only two trucks, neither one of which was involved in the Flagg accident, the face of the policy unambiguously barred a claim based on that accident. Accordingly, the implied covenant of good faith and fair dealing did not require T.H.E. to conduct any further investigation. *See, e.g., Waller v. Truck Ins. Exch., Inc.*, 11 Cal. 4th 1, 36, 44 Cal. Rptr. 2d 370, 390 (1995); *Brinderson-Newberg Joint Venture v. Pacific Erectors, Inc.* , 971 F.2d 272, 282 (9th Cir. 1992). As a matter of law, T.H.E. did not violate its duty to act in good faith. *See, e.g., Lunsford v. American Guar. & Liab. Ins. Co.*, 18 F.3d 653, 656 (9th Cir. 1994).

AFFIRMED.