Appellate Reports and Cases in Brief

Recent cases of interest to members of the plaintiffs' bar

By Jeffrey Isaac Ehrlich

Henderson v. Farmers Group, Inc.

(2012) __ Cal.App.4th __ (2d Dist., Div. 4.)

Who needs to know about this case: Lawyers bringing cases against property insurers

Why it's important: Confirms that delay in submitting proof-of-loss is subject to notice-prejudice rule; confirms that UCL claims can be based on common-law violations of an insurer's obligations to the policyholder

Synopsis: In consolidated cases, various Farmers insureds sued Fire Insurance Exchange (their insurer) and its parent, Farmers Group, Inc., for bad faith and violations of the UCL (Bus. & Prof. Code, § 17000), arising out of the manner in which the insurer handled their claims for smoke damage after the 2009 Station Fire. The trial court granted summary adjudication of all the plaintiffs' operative claims. The Court of Appeal reversed summary adjudication of the bad-faith and UCL claims.

The gist of the plaintiffs' claims was that Farmers would send hygienists to their home to determine if there was smoke damage sufficient to trigger a claim under the policy, and if the hygienist's report came back positive (e.g., showing damage), Farmers would enforce the proof-of-loss deadline in the policy, without informing the insured of the contents of the hygienists' reports. The plaintiffs sued Farmers for bad faith, disputing its coverage denials and arguing that its conduct violated the UCL.

The trial court found that the submission of a timely proof of loss was a condition precedent to coverage under the policies, and that plaintiffs failed to file timely proofs of loss. It also found that Farmers was prejudiced by this failure. The Court of Appeal reversed. The court noted that, while the proof-of-loss requirement is stated as condition precedent in the standard-form fire policy, "the condition is not absolute." The court held that the condition as subject to the so-called "notice-prejudice rule," which holds that an insurer cannot assert defenses based on the insured's breaches of certain policy conditions (typically notice or cooperation), without demonstrating that the breach caused substantial prejudice to the insurer's ability to evaluate the claim. The court rejected the insurer's claim that the notice-prejudice rule was limited to breaches of the cooperation or notice provisions in a policy. The court applied the strong public policy in California against technical forfeitures of insurance benefits. In addition, because of the nature of the loss (the presence of particulate matter) it was unlikely that any proof of loss submitted by the insureds would have provided the insurer with much useful information. In addition, the Farmers PMK testified that Farmers relied upon the hygienists' conclusions, not the proof of loss, in preparing its estimates.

While the trial court held that Farmers had, in fact, demonstrated prejudice, it failed to provide any legal argument or cite any evidence of prejudice in its appellate brief. It was therefore not entitled to summary judgment on the issue of prejudice.

The court further held that Farmers was not entitled to summary adjudication of the plaintiffs' bad-faith claims, because the record would allow the jury to find that Farmers required a proof of loss only when its investigation concluded that the insured had a valid claim. This would allow a jury to find that Farmers used the proof of loss requirement as a shield to deny meritorious claims.

The court also reversed the trial court's summary adjudication finding on the UCL claims. It held that *Moradi-Shalal* does not bar UCL claims based on a common-law bad-faith claim against the insurer, expressly declining to follow *Textron Financial Corp. v. National Union Fire Ins. Co.* (2004) 118 Cal.App.4th 1061, which held to the contrary. The Supreme Court has granted review to clarify the issue. (*Zhang v. Superior Court* (2009) 178 Cal.App.4th 1081, review granted Feb. 10, 2010, S178542.)

Finally, the court affirmed summary judgment for FIE's parent, Farmers Group, Inc., finding that the plaintiffs had failed to make any showing that FIE was not adequately capitalized, or to support their other theories for vicarious liability (joint venture and ostensible agency).

Short(er) take

The "completed and accepted doctrine"; construction defects

Neiman v. Leo A. Daly Co. (2012) __ Cal.App.4th __ (2d Dist., Div. 1.)

Neiman was injured when she fell on stairs at a theater on the campus of Santa Monica Community College. She sued, inter alia, the architect who designed the theater and observed its construction, Leo A. Daly Co. ("LAD"). She argued that the theater stairs were defective because

they lacked a contrasting marking stripe, which had been called for in the plans prepared by LAD. The trial court granted summary judgment under the "completed and accepted" doctrine. Affirmed. The completed and accepted doctrine holds that once a contractor has completed its work and the owner has accepted it, the contractor is not liable to third parties injured as a result of a patent defect in the contractor's work. The theory underlying the doctrine is that the owner has a duty to inspect and remedy any patent defects, and therefore the owner's failure to do this operates as an intervening cause for which the contractor is not liable. Neiman contended that there was a triable issue of fact about whether the defect was latent or patent. The Court of Appeal held that because the contrasting stripe was clearly shown on the theater's plans, an inspection by the owners should have revealed its absence.

Attorney's fees; Civil Code section 1717; attorneys who are "of counsel" *Sands & Associates v. Juknavorian* (2012) __ Cal.App.4th __ (2d Dist., Div. 1.)

Trial court awarded fees to a law firm under Civil Code section 1717 as the prevailing party in a lawsuit against a client. Law firm was represented in that lawsuit by an attorney who was "of counsel" to the law firm. Reversed. In *Trope v. Katz* (1995) 11 Cal.4th 274, 277, the Supreme Court held that a lawyer could not recover attorney's fees as the prevailing party when he litigated the case on his own behalf. Here, because the relationship between a law firm and an attorney "of counsel" to that firm is close, personal, regular, and continuous, a law firm and its "of counsel" attorney constitute a single, de facto firm, and thus a law firm cannot recover attorney fees under a prevailing party clause when, as a successful litigant, it is represented by an "of counsel" attorney.

Arbitration; trial court jurisdiction after remand from appellate court; limited new trial *Ayyad v. Sprint Spectrum, LP.*

In litigation that began in 2003, plaintiffs won a class-action judgment against Sprint concerning early-termination fees. The Court of Appeal affirmed the judgment in favor of the class, but remanded the case to the trial court for a new trial on the limited issue of Sprint's actual damages and the calculation of the set-off that Sprint might receive. On remand, Sprint moved to compel arbitration of all the claims, arguing that until the Supreme Court's opinion in *Concepcion,* any attempt to compel arbitration would have been futile. The trial court refused to compel arbitration, finding that it lacked jurisdiction to hear the motion. Affirmed.

A reviewing court has authority to affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had. (Code Civ. Proc., § 43.) The order of the reviewing court is contained in its remittitur, which defines the scope of the jurisdiction of the court to which the matter is returned. On remand, the trial court must adhere to the reviewing court's directions even if the lower court is convinced the appellate court's decision is wrong or has been impaired by subsequent decisions. "In short, when an appellate court remands a matter with directions governing the proceedings on remand, those directions are binding on the trial court and *must* be followed. Any material variance from the directions is unauthorized and void." In refusing to entertain Sprint's motion to compel arbitration, the trial court did no more than comply scrupulously with the appellate court's remand directions, and therefore it did not err.

Wrongful injuries to trees; calculation of damages; attorney's fees *Rony v. Costa* (2012) __ Cal.App.4th __ (1st Dir., Div. 1)

Rony's neighbor, Costa, hired an unlicensed laborer to trim tree limbs overhanging Costa's yard so Costa could install an outdoor pizza oven. The laborer trimmed overhanging limbs, but also climbed into an 80-foot tall Monterey Cypress in Rony's yard and cut about 30 percent of the canopy. It was undisputed that the cuts rendered the tree "aesthetically compromised." From some angles, the tree looks like half a tree. Rony sued Costa, but not the laborer he hired, and obtained a judgment under Civil Code section 3346 and Code of Civil Procedure section 733, which provide for double damages for wrongful injuries to trees and timber. Rony's expert calculated the loss at $59,428; while Costa's expert pegged it at $7,530. The trial court adopted the latter figure, but held that it did not sufficiently compensate Rony, so he increased it by $15,000, and then doubled the resulting figure, awarding Rony total damages of $45,060. Rony then moved for attorney's fees under Code of Civil Procedure section 1029.8, which allows for a treble-damage award against an unlicensed person who causes injury or damage to another person as a result of performing services for which a license is required, and also allows an award of attorney's fees. The trial court awarded Rony $50,148 in fees. Costa appealed.

The court affirmed the damage award, finding that the fact finder had great discretion in determining the amount of damages to award. Awards for damage to trees can include lost aesthetics and functionality. The court's decision to increase the award by $15,000 over what Costa's expert calculated the loss to be was not an amount that shocked the reviewing court's conscience. The court reversed the attorney's fee award, however, because the statute, by its terms, applied only to an unlicensed person who performs services for which a license is required, not to a party who hires such an unlicensed person. Rony could have recovered the award from the laborer who cut the tree, but not from Costa.

Anti-SLAPP Statute; legal malpractice; appellate procedure; need for reporter's transcript *Chodos v. Cole* (2012) _ Cal.App.4th __ (2d Dist. Div. 5.)

Chodos was sued for legal malpractice by a former client, whose claim included the allegation that he failed to properly advise her concerning a settlement agreement. Chodos cross-complained against two other attorneys for indemnity, arguing that the client had those lawyers also review the settlement agreement; that she had relied on their advice about the settlement, not his; that if he was liable to her for malpractice arising from the settlement, the attorneys should indemnify him. The attorneys filed an anti-SLAPP motion against Chodos, which the trial court granted. It dismissed his cross-complaint, and awarded fees against Chodos. Reversed.

Chodos's failure to supply a reporter's transcript did not require affirmance because he had failed to provide an adequate record for appellate review. California Rules of Court, rule 8.120(b) requires a reporter's transcript on appeal only if "an appellant intends to raise any issue that requires consideration of the oral proceedings in the superior court." California Rules of Court, rule 8.130(a)(4) provides that an appellant may "elect to proceed without a reporter's transcript." Since the legal issues presented in the review of the anti-SLAPP ruling were purely legal issues, and no party relied on oral argument before the trial court, the court would proceed with the appeal. (Note that if the court had reached the issue of the calculation of attorney's fees, it appears that it would have held that a reporter's transcript was necessary.)

The court reversed the anti-SLAPP ruling because a legal-malpractice claim, and by extension an indemnity claim arising from a legal-malpractice claim, does not arise from constitutionally protected activity. "The authorities have established that the anti-SLAPP statute does not apply to claims of attorney malpractice. As stated in one authoritative work, 'California courts have held that when a claim [by a client against a lawyer] is based on a breach of the fiduciary duty of loyalty or negligence, it does not concern a right of petition or free speech, though those activities arose from the filing, prosecution of and statements made in the course of the client's lawsuit. The reason is that the lawsuit concerns a breach of duty that does not depend on the exercise of a constitutional right.'"

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