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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ERIKA VELEZ et al., Plaintiffs and Appellants, v. STATE FARM GENERAL INSURANCE COMPANY et al., Defendants and Respondents.	B199091 (Los Angeles County Super. Ct. No. GC037429)

APPEAL from a judgment of the Superior Court of Los Angeles County. Jan A. Pluim, Judge. Affirmed.

Ford & Serviss, William H. Ford, III, and Claudia J. Serviss for Plaintiffs and Appellants.

Robie & Matthai, James R. Robie, Kyle Kveton and Diana K. Rodgers for Defendant and Respondent State Farm General Insurance Company.

This is an appeal from the judgment entered in favor of respondent State Farm General Insurance on appellants Erika Velez, John Velez, Rosemarie Henley and Amanda Henley's[1] complaint, after State Farm's special motion to strike under Code of Civil Procedure section 425.16 was granted. We affirm.

Facts

Appellants' complaint brought causes of action for intentional and negligent misrepresentation, based on State Farm's[2] conduct in earlier litigation which appellants filed against their former landlords, Jeanne and Edward Dunne and Dunne Properties. (Hereinafter, "the Dunnes" and "the Dunne litigation").

Appellants' complaint in the Dunne litigation was filed in July of 2004. It alleged that on September 1, 2000, appellants had leased a house from the Dunnes. In March 2003, they discovered leaks, then mold, in the house. They informed the Dunnes, whom they later learned had had earlier notice of water intrusion problems and who knew that unremediated water intrusion problems would lead to mold and health hazards. (The complaint alleged that in September 2000, the Dunnes conspired to conceal water intrusion damage by painting a wall.) Beginning in March 2003 and continuing until October 2003, appellants experienced a multitude of ailments caused by exposure to mold.

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[1] Appellants are an extended family: Rosemarie Henley and John Velez are Erika Velez's adult children. Amanda Henley is Rosemarie's child.

[2] As we will see, State Farm was not a party to the litigation, but was the insurer for a party. However, as the parties impliedly recognize, any misrepresentation would have been State Farm's, and not that of the underlying defendants. (See *Doctors' Co. Ins. Services v. Superior Court* (1990) 225 Cal.App.3d 1284, 1295 [where the insurer provides a defense for a party, the realities of the insurer's role in litigation dictate that the insurer be treated as an authorized party for purposes of the litigation privilege].)

The Dunnes were insured by State Farm throughout appellants' tenancy, with a Rental Dwelling policy. They tendered defense of the Dunne litigation to State Farm, which hired Robert Walker[3] to represent them.

The Rental Dwelling policy defines "occurrence" as "an accident, including exposure to conditions, which results in (a) bodily injury; (b) property damage or (c) personal injury; during the policy period. Repeated or continuous exposure to the same general conditions is considered to be one occurrence." Based on this definition, State Farm decided that only one policy period and one policy limit was applicable to appellants' lawsuit. State Farm thus informed Walker that the Dunnes' limits of liability were $500,000.

Walker used that information when he drafted the Dunnes' answers to Form Interrogatory 4.1, which asks "At the time of the incident, was there in effect any policy of insurance through which you were or might be insured in any manner . . . for the damages, claims, or actions that have arisen out of the incident? If so, for each policy state: (a) the kind of coverage; (b) the name and address, and telephone number of each insurance company; (c) the name, address, and telephone number of each named insured; (d) the policy number; (e) the limits of coverage for each type of coverage contained in the policy; (f) whether any reservation of rights or controversy or coverage dispute exists between you and the insurance company . . . ."

Each defendant in the Dunne litigation answered that there was liability insurance, and listed State Farm policy number 92-PY-716-3, with $500,000 as the coverage limits. Each defendant answered "yes" to subpart (f) concerning coverage disputes.

Appellants also served a Request for Production of Documents, requesting a copy of policy number 92-PY-716-3. State Farm sent Walker, and Walker on behalf of the Dunnes produced, a declarations page with that policy number and a policy period of

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[3] Walker was also a defendant in this action. Judgment was entered in his favor after his Code of Civil Procedure section 425.16 motion was granted. Appellants do not challenge the judgment in his favor.

December 3, 2002 to December 3, 2003. The document lists a number of coverages and limits, including a "Business liability" per occurrence limit of $500,000 and annual aggregate of $1,000,000. It also indicates that it is a Renewal Certificate.

Based on the Dunnes' representation that only $500,000 in insurance was available, appellants settled their case against the Dunnes for that amount. A letter from Walker to appellants' counsel (an exhibit to Walker's Special Motion to Strike) states that the settlement judge "indicated that the settlement was based upon the payment of State Farm policy limit . . . ."

Appellants later learned that the Dunnes were insured by State Farm throughout their tenancy. They filed this lawsuit, contending that State Farm had misrepresented material facts regarding the liability coverage available.

State Farm filed a Special Motion to Strike, contending that the claims against it arose from its exercise of its constitutional right to petition and that appellants could not establish the probability of prevailing on the merits for a number of reasons: its conduct was privileged under Civil Code section 47; there was no misrepresentation because, under Rental Dwelling policy's definition of occurrence, only one policy limit covered this claim; the statements were made in a settlement conference and were thus inadmissible under Evidence Code section 1119; and finally, that it could not defend itself without revealing information protected from disclosure under Insurance Code section 791.13.[4] A State Farm Rental Dwelling policy was attached to its Special Motion to Strike.

The trial court granted appellants' request for limited discovery relevant to the motion. In addition to the evidence already referenced, that process yielded State Farm policies issued to the Dunnes for the policy periods December 3, 1999 to December 3,

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[4] That statute provides that "An insurance institution, agent, or insurance-support organization shall not disclose any personal or privileged information about an individual collected or received in connection with an insurance transaction unless . . . ." The "unless" clauses include authorization by the individual. (See *Irvington-Moore, Inc. v. Superior Court* (1993) 14 Cal.App.4th 733, 742.)

2000; December 3, 2000 to December 3, 2001; and December 3, 2001 to December 3, 2002; the declaration page of the Dunnes' policy for the 2002-2003 period, and an additional California disclosure for that policy which was not part of the exemplar policy attached to State Farm's motion.

Appellants defended the Special Motion to Strike by contending that the litigation privilege did not apply because State Farm had concealed the existence of a policy, an exception to the litigation privilege (Civ. Code, § 47, subd. (b)(3)); that under the continuous injury trigger of coverage adopted in *Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, all four State Farm policies applied to their claims; that the statements were not made in a settlement conference; and that Insurance Code section 791.13 did not apply because there was no personal information at stake.

State Farm then raised an additional argument under the litigation privilege. It contended that the Dunnes had only one policy, albeit with four policy periods, and that it had at worst concealed the *terms* of a policy. State Farm cited *Home Ins. Co. v. Zurich Ins. Co*. (2002) 96 Cal.App.4th 17 which held that a statement misrepresenting a policy's limits was not a statement concealing the existence of an insurance policy and did not fall under the Civil Code section 47, subdivision (b)(3) exception to the litigation privilege.

The trial court found that State Farm had met its burden of demonstrating that the complaint implicated protected activity, and that appellants did not establish a probability that they would succeed on the merits. Judgment was entered for State Farm.

Discussion

On a motion under Code of Civil Procedure section 425.16, subdivision (b)(1), a court must first decide whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. If so, the court's next task is to determine whether the plaintiff had demonstrated a probability of prevailing on the claim. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) Our review is de novo. (*Shekhter v. Financial Indemnity Co.* (2001) 89 Cal.App.4th 141, 151.) Whether Code of Civil Procedure section 425.16 applies and whether the plaintiff

has shown a probability of prevailing are legal questions which we review independently on appeal. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 999.)

Appellants impliedly concede that State Farm made a showing that the claims here arise from protected activity, the right to petition, but challenge the finding that they did not show a probability of success on the merits. We find that State Farm's Special Motion to Strike was properly granted.

As the parties brief this case, the decisive issues are whether there were four policies or one policy with four renewals, whether more than one policy limit covered the underlying claims, and the impact of Insurance Code section 791.13. We need not reach any of these intriguing questions, because we agree with State Farm's final argument. In order to establish a probability of prevailing on the claim, a plaintiff responding to a Special Motion to Strike must state and substantiate a legally sufficient claim. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123.) As State Farm argues, appellants did not meet their burden of demonstrating that their complaint was "'supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.' [Citation.]" (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.)[5]

"In assessing the probability of prevailing, a court looks to the evidence that would be presented at trial . . . a plaintiff cannot simply rely on its pleadings, even if verified, but must adduce competent, admissible evidence." (*Roberts v. Los Angeles County Bar Assn.* (2003) 105 Cal.App.4th 604, 613-614.) "The court considers the pleadings and evidence submitted by both sides, but does not weigh credibility or compare the weight of the evidence. Rather, the court's responsibility is to accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to

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[5] Appellants contend that State Farm waived the argument because it failed to raise it in the trial court. Issues of sufficiency of the evidence are never waived. (*People v. Neal* (1993) 19 Cal.App.4th 1114, 1122.)

determine if it has defeated that submitted by the plaintiff as a matter of law. [Citations.]" (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212.)

In order to prevail at trial in this case, appellants would have to prove, inter alia, that if they had had the correct information about coverage, they would have achieved a more favorable result in the Dunne litigation. Such proof would necessarily have included proof that their claim was worth more than $500,000, or that State Farm or a jury could have been persuaded to think so. Yet, other than the allegations of their unverified complaint, appellants submitted no proof on that point. That is, they submitted no information on the merits of their underlying claims, and only scant information about the settlement and the settlement process.

What is more, appellants' causes of action depend on proof that State Farm misrepresented or failed to disclose a material fact. Appellants' unverified complaint makes this allegation, but the facts presented to the trial court are to the contrary. State Farm produced a declarations page marked "renewal certificate," thus informing appellants that there were earlier policies, or policy periods, and the potential, at least, for additional coverage.

Further, State Farm seems to have recognized that although it had privately decided its coverage position, there was another point of view. The "yes" answer to the question about coverage disputes between the Dunnes and their insurance company informed appellants that there might well be disputes which implicated their own rights. (See *Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone* (2003) 107 Cal.App.4th 54 [insurer's obligation to deal truthfully with underlying plaintiff standing in insured's shoes].)

These facts establish that State Farm did not conceal or misrepresent the facts about coverage, and that appellants could not prevail at trial.

Disposition

The judgment is affirmed. Respondent to recover costs on appeal.

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ARMSTRONG, J.

We concur:

TURNER, P. J.

MOSK, J.