

Judge Benson – Law & Motion – Wednesday October 25, 2023, @ 9:00 AM
TENTATIVE RULINGS

1. 21CV01054 Farrara, Brianna N et al. v. Volkswagen Group of America, Inc.

EVENT: Plaintiffs' Motion to Compel the Deposition of Defendant's Person Most Knowledgeable

The Court orders the PMK depositions take place within the next 60 days.

Matters For Examination

The motion is granted in its entirety (nos. 1-34) As to nos. 5,6,7,10,12,13, and 14 the Court notes Defendant has properly preserved its privilege objections as the topics have the potential to include privileged matters. Regarding nos. 17,22,23,24 and 29, the topics are limited in time to 2019 – present.

Production of Documents

The motion is granted in its entirety. Regarding nos. 1,3,4,5,6 and 7, to the extent Defendant is claiming privilege it must provide a privilege log. Regarding request nos. 2,12,13,14,15,16, and 17, the requests are limited to 2019 – present.

Plaintiff shall prepare and submit a form of order consistent with this ruling within 2 weeks.

2. 21CV02431 Rivera, David L. v. Annichero, Maria

EVENT: Motion to Enforcement Settlement and Lift Stay of Proceedings (Continued from 8/30/23)

Motion to Enforce Settlement and Lift Stay of Proceedings is Continued to November 22, 2023 at 9:00am. The parties are ordered to update the Court on the status of this motion no later than November 9, 2023.

3. 22CV00191 Souza, Earl et al v. California Fair Plan et al.

EVENT: Defendants Waligorski Insurance Agency Inc. and Ashley Mandolfo's Motion for Summary Judgment

Defendants Waligorski Insurance Agency Inc. and Ashley Mandolfo's Motion for Summary Judgment is DENIED.

Concerning Defendants' evidentiary objections that are material to this motion, Defendants' objection to the declaration of Paul W. Burkett is sustained in part. While an expert witness may properly testify as to custom and practice ... he may not state interpretations of the law, whether it be of a statute, ordinance or safety regulation promulgated pursuant to a statute. (*Elder v. Pacific Tel. & Tel. Co.*, (1977) 66 Cal. App. 3d 650, 664; disapproved on other grounds in *Osborn v. Mission Ready Mix* (1990) 224 Cal.App.3d 104) There can be no dispute that duty is a question of law for the court to decide. (See *Kesner v. Superior Court*, (2016) 1 Cal. 5th 1132, 1142)

Defendants' objection is sustained regarding Mr. Burkett's declaration in that it improperly opines on the issue of duty which is a legal question reserved for the Court.

Additionally, Defendants' objections to Plaintiff's UMF 2 is sustained in part. There is no supporting evidence that Defendants filled out the application over the phone. However, as detailed herein, there is evidence supporting Plaintiffs' contention that Defendants endeavored to fill out the application on Jeff Souza's behalf with knowledge that he was unaware of the contents of the application. (UMF 3) The principle that moving party's affidavits are strictly construed and those of the opposing party are liberally construed on summary judgment is well settled. (See *DiLoreto v. Board of Education* (1999) 74 Cal.App.4th 267, 275)

Based on the undisputed facts that Defendants "asked me some questions and filled it out", that Jeff "never saw the application or signed it", and based on the rules of liberal construction, it could be inferred that Defendants endeavored to fill out the application on Jeff Souza's behalf with knowledge that he was unaware of the contents of the application. Under this scenario, the Court finds whether the application was or was not filled out over the phone is immaterial.

The evidence presented by Plaintiffs in their opposition presents a factual scenario distinguishable from the typical case in which the broker only owes a limited duty.

Travelers Property Casualty Co. of America v. Superior Court, (2013) 215 Cal. App. 4th 561, 578-579:

"Insurance brokers owe a limited duty to their clients, which is only 'to use reasonable care, diligence, and judgment in procuring the insurance requested by an insured.' [Citations.]" (*Pacific Rim Mechanical Contractors, Inc. v. Aon Risk Ins. Services West, Inc.* (2012) 203 Cal.App.4th 1278, 1283 [138 Cal. Rptr. 3d 294], second and third italics added.) "The rule changes, however, when—but only when—one of the following three things happens: (a) the agent misrepresents the

nature, extent or scope of the coverage being offered or provided ... , (b) there is a request or inquiry by the insured for a particular type or extent of coverage ... , or (c) the agent assumes an additional duty by either express agreement or by “holding himself out” as having expertise in a given field of insurance being sought by the insured ...

Notably, neither party has cited, nor is the Court aware of any published case dealing with circumstances similar to the present facts. In reviewing the published cases cited by Defendants wherein the broker was found to owe no duty, the Court finds those cases distinguishable. In none of those cases did the broker voluntarily assume any additional obligations.

Here, the evidence presented if credited suggests Defendants endeavored to fill out the application on Plaintiff Jeff Souza’s behalf. It could be reasonably inferred that based on the fact Jeff Souza never saw the application and never signed the application Defendants knew or should have known that Jeff Souza was relying on them to accurately communicate the questions included in the application.

If Plaintiffs prove the foregoing to the satisfaction of the trier of fact, the Court finds Defendants would owe a duty to accurately communicate the questions contained in the application, and specifically the question concerning additional ownership interests in the property.

For practical purposes the Court finds the application and the policy are inextricably intertwined. It is reasonable to infer that had the additional interests section of the application been accurately completed, the named insureds would have included Earl and Marilyn Souza thus eliminating the issue giving rise to this case.

While the circumstances of this case do not fit neatly into any of the three exceptions to the limited duty rule, the Court finds the circumstances alleged by Plaintiffs fall under the category of misrepresentation. By allegedly undertaking the task of filling out the application on Plaintiff Jeff Souza’s behalf and failing to communicate the application question re: additional ownership interests, this was a form of misrepresentation. Because, as discussed, the application and policy are inextricably intertwined, failure to accurately communicate the question on the application effectively would amount to a misrepresentation of policy coverage. As a result, the Court finds a triable issue of fact exists whether Defendant failed to accurately communicate the ownership interest question on the application and that this is a factual predicate to the determination of duty.

Contrary to Defendants’ contention, imposition of a duty under these circumstances does not require Defendants to perform independent research. Rather, if a duty is imposed at trial under the facts presented in this motion, such a duty simply requires Defendants to accurately convey the contents of the application. If a trier of fact determines that Defendants endeavored to fill out the application on Jeff Souza’s behalf with knowledge that he was unaware of the contents of the application, public policy would require Defendants to accurately communicate the contents including the additional ownership interest section.

Plaintiffs shall prepare and submit a form of order consistent with this ruling within 2 weeks.

4. **23CV00353 Stachura, David v. Tamietti, Betsey**

EVENT: Defendant Betsey Tamietti's Motion to Recover Attorney Fees and Costs Pursuant to the Anti-SLAPP Statute

Defendant Betsey Tamietti's Motion to Recover Attorney Fees and Costs Pursuant to the Anti-SLAPP Statute is GRANTED. Defendant is awarded \$62,500.00 in attorney fees and \$539.36 in costs. Defendant shall prepare and submit a form of order and judgment.

5. **23CV02207 CBC Settlement Funding, LLC v. MC**

EVENT: Amended Petition for Transfer of Structured Settlement Payment Rights Pursuant to California Insurance Code § 10134 (Continued from 9/27)

The Court will hear from the payee and petitioner.

6. **23CV02435 In re: Garland Scardone**

EVENT: Change of Name (Adult)

The Court is in receipt of the proof of publication and will sign the decree provided.

7. **23CV01966 In re: Lea, Jenny Ann**

EVENT: Change of Name (Adult)

The Petition is GRANTED. The Court will sign the decree provided.

