2010 WL 4773187 (C.D.Cal.) (Trial Motion, Memorandum and Affidavit)
United States District Court, C.D. California.
Southern Division

Henry BROCKSCHMIDT and Linda Brockschmidt, individuals, Plaintiffs,
v.
LIBERTY MUTUAL FIRE INSURANCE COMPANY, a
corporation; and Does 1 through 30, inclusive, Defendants.

No. SACV 10-0030 JVS (ANx).
September 15, 2010.

Liberty Mutual Fire Insurance Company's Reply to Plaintiffs Opposition to Motion to Dismiss the Third Cause of Action; Memorandum of Points & Authorities in Support

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Date: September 27, 2010

Time: 1:30 p.m.

Court: 10-C

MEMORANDUM OF POINTS AND AUTHORITIES

I. *INTRODUCTION*

Plaintiffs' Opposition is **late** under Local Rule 7-9, which requires Oppositions to be filed 21 days in advance of the hearing date. Plaintiffs' Opposition was filed on **Tuesday, September 14, 2010**, which is 13 days before the hearing date. Plaintiffs emailed Defendant, Liberty Mutual Fire Insurance Company, a courtesy copy of its Opposition on **Monday, September 13, 2010**, and consequently, Liberty Mutual has filed this Reply as expeditiously as possible.

On substantive matters, Plaintiffs do not plead the required elements of **financial elder abuse** in their third cause of action, as a matter of law. The statute requires a taking or obtaining "for a wrongful use or with intent to defraud" or "by undue influence." (*Welf & Inst. Code*, §15610.30(a).) Plaintiffs do not allege the elements of fraud in the First Amended Complaint ("FAC.") Nor do plaintiffs allege that Liberty Mutual exerted "undue influence."

Most significantly, plaintiffs do not allege that Liberty Mutual took plaintiffs' policy benefits for a "wrongful use." Withholding of policy benefits is not a "wrongful use", as a matter of law. At best, it amounts to a "genuine dispute" over insurance coverage and is governed by the "genuine dispute doctrine." This is a defense to alleged "bad faith" liability that may be applied where the insurer denies a claim based on the reasonable reliance on the opinion of an expert, which is the case here. (See *McCoy v. Progressive West Ins. Co.* (2009) 171 Cal.App.4th 785, 79.)

II. *PLAINTIFFS DO NOT PLEAD THE ELEMENTS OF FINANCIAL ELDER ABUSE AS A MATTER OF LAW*

A. ***2008 Amendment And Legislative Intent***

We begin by examining the **financial elder abuse** statute material to plaintiffs' contentions. Since 1982, the Legislature has enacted numerous measures to prevent the **abuse** of **elders**. (See *ARA Living Centers -- Pacific, Inc. v. Superior Court* (1993) 18 Cal.App.4th 1556, 1559-1560; *Zimmer v. Nawabi* (E.D. Cal. 2008) 566 F.Supp.2d 1025, 1033-1034.) Generally, "the Legislature has proceeded carefully and diligently in its effort to curb the worst practices against our **elders**." (Balisok, **Elder Abuse** Litigation (The Rutter Group 2009) ¶ 1:22, p. 1-3 (rev. # 1, 2009).) Pertinent here, is **§15610.30(a),** which defines **financial elder abuse** as occurring when a person or entity does any of the following:
(1) Takes, secretes, appropriates, obtains, or retains real or personal property of an **elder** or dependent adult **for a wrongful use** or **with intent to defraud**, or both.

(2) Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an **elder** or dependent adult for a wrongful use or with intent to defraud, or both.

(3) Takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an **elder** or dependent adult **by undue influence**, as defined in Section 1575 of the Civil Code.

Also pertinent here is **§15610.30(b)**, which further provides:

> A person or entity shall be deemed to have taken, secreted, appropriated, obtained, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates, obtains, or retains the property and the person or entity knew or should have known that this conduct is likely to be harmful to the **elder** or dependent adult.

Also pertinent is **§15610.30(c)**, which provides:

> For purposes of this section, a person or entity takes, secretes, appropriates, obtains, or retains real or personal property when an **elder** or dependent adult is deprived of any property right, including by means of an agreement, donative transfer, or testamentary bequest, regardless of whether the property is held directly or by a representative of an **elder** or dependent adult.

A "representative" is defined in **§15610.30(d),** which provides:
For purposes of this section, "representative" means a person or entity that is either of the following:

(1) A conservator, trustee, or other representative of the estate of an **elder** or dependent adult.

(2) An attorney-in-fact of an **elder** or dependent adult who acts within the authority of the power of attorney.

Prior to the 2008 amendment to this statute, **§15610.30(b)**, read as follows:

> A person or entity shall be deemed to have taken, secreted, appropriated, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates or retains possession of property **in bad faith**. (bold added.)

The new language "clarifies to a great degree **what kind of conduct** constitutes **financial abuse**, **what instrument of transfer** would be subject to scrutiny, and that it matters not if the **elder** or dependent adult **holds the property** right directly or indirectly

through others." (Sen. Com. On Judiciary, Analysis of Sen. Bill No. 1140 (2007-2008 Reg. Sess.) as amended March 10, 2008, p. 10.) Also, "this definition of taking for a wrongful use [shifts] the proof required from the defendant's knowledge or presumed knowledge of the **elder's** or dependent adult's right to the property taken, to the defendant's knowledge or presumed knowledge of the effect of the taking on the **elder** or dependent adult, to which a reasonable person standard may be applied." (*Id*. at p. 11.)

"Thus, a person [could be found] guilty of committing **financial elder abuse** so long as it would be obvious to a reasonable person that the taker [was] not entitled to the **elder's** assets." (Birkel et al., *Litigating **Financial Elder Abuse** Claims* (Oct. 2007) Los Angeles Lawyer p. 20, fn. omitted.) Keeping this in mind, we analyze whether plaintiffs allege the required elements of **financial elder abuse**.

B. ***The Elements Of Fraud Or Undue Influence Are Not Alleged***

Under the statute, a taking must be "for a wrongful use or with intent to defraud, or both", or "by undue influence." First, plaintiffs do not plead the elements of fraud or undue influence. *Fed. R. Civ. Proc.* 9(b) requires particularity when pleading fraud. With respect to fraud, plaintiffs must allege in the FAC that Liberty Mutual made an untrue statement to plaintiffs, knowing it was false and with the intent to deceive plaintiffs; plaintiffs relied to their detriment on this misrepresentation and sustained damages proximately caused by Liberty Mutual's fraudulent conduct. (Vol No. 23, California Forms of Pleading and Practice, § 269.91.) Plaintiffs simply conclude, without pleading the specific elements, that Liberty Mutual is guilty of fraud. (FAC, ¶36.) Plaintiffs make no mention of any allegation of undue influence.

Thus, neither fraud or undue influence is alleged in the FAC, and therefore, plaintiffs must allege a taking or obtaining "for a wrongful use" in order to meet the statute's requirements. As discussed below, plaintiffs cannot do so because refusal to pay policy benefits does not constitute a "wrongful use" as a matter of law.

B. ***Refusal To Pay Policy Benefits Is Not A "Wrongful Use" As A Matter Of Law***

With respect to the statute's "wrongful use" requirement, plaintiffs argue that they have alleged a "wrongful use" contending that it is sufficient, under the statute, simply to allege that Liberty Mutual should have known that its conduct of allegedly depriving plaintiffs of policy benefits was likely to be harmful to them. "Wrongful use" is not otherwise defined in the statute, and plaintiffs supply no legal authority suggesting refusal to pay policy benefits constitutes a "wrongful use" or **financial elder abuse**.

The wrongfulness element can be satisfied by fraud, constructive fraud, undue influence, embezzlement, or conversion. (See Balisok, **Elder Abuse** Litigation (The Rutter Group 2009) **Financial Abuse**, §8.21 ["The range of possible schemes that might be addressed by remedies for **financial abuse** is too broad for comprehensive treatment. Each scheme, however, will be presumptively fraudulent or the product of actual fraud, undue influence and/or mistake."] Plaintiffs, however, do not allege that Liberty Mutual committed fraud, constructive fraud, embezzlement, or conversion. Nor do plaintiffs allege Liberty Mutual exerted any undue influence on plaintiffs.

Further, no case law has ever held that alleged wrongful withholding of insurance policy benefits is a "wrongful use." Further, **former** § 15610.30(b) provided that bad faith was sufficient to satisfy the condition of wrongful use or intent to defraud. The "bad faith" language has since been deleted. Thus, plaintiffs' allegations of bad faith refusal to pay insurance policy benefits do not amount to "wrongful use."

At best, plaintiffs allege a "genuine dispute" over coverage where Liberty Mutual denied plaintiffs claim based on its reasonable reliance on the opinion of its registered professional engineer, John Doyle. Doyle concluded that plaintiffs claim for damage to the foundation of their home was pre-existing damage and was not caused by the water softener leak in December 2008. On February 6, 2009, Doyle investigated the issue of whether the water leakage caused or contributed to the sloped floor condition and cracking in the walls and ceilings in the kitchen and dining area. The Report stated, in pertinent part, as follows:

1. Expansive clay soils naturally occur at the site. Expansive clay soils are subject to significant swelling and shrinkage following wetting and drying.

5. The observed unlevel floor condition at the kitchen/dining room area, the uneven gap between the wall base plate and the floor, the cracking in the walls and ceilings above the dining room door, and the out-of-square condition of the door frame at the kitchen/dining room were caused by long-term soils-related differential movement of the foundation and floor support footings that occurred several years ago. All of these conditions preexisted the two episodes of water leakage.

7. The possible (though minor) additional differential movement of the floor support piers below the kitchen that may have resulted from the water leakage has not materially increased the scope or the cost of the releveling effort that was already necessary to address the differential movement and cracking that existed at the Brockschmidt kitchen/dining room area prior to December 2008. The possible additional differential movement and widening of the wall and ceiling cracking does not, by itself, warrant the re-leveling and associated repairs that are proposed by Mr. Bonham. It is principally the pre-existing differential movement and cracking that warrants the proposed repairs.

Based on Doyle's professional opinion, Liberty Mutual denied coverage for that portion of plaintiffs claim. (See also FAC at ¶¶13,21&22.)

“Where there is a ‘genuine issue’ as to the insurer's liability under the policy for the claim asserted by the insured, there can be no bad faith liability imposed on the insurer for advancing its side of that dispute.” (*Jordan v. Allstate Ins. Co*. (2007) 148 Cal.App.4th 1062, 1072.) (italics in original.) “The ‘genuine dispute’ doctrine may be applied where the insurer denies a claim based on the opinions of experts.” (McCoy, *supra*, 171 Cal.App.4th at p. 793.) “A court can conclude as a matter of law that an insurer's denial of a claim is not unreasonable, so long as there existed a genuine issue as to the insurer's liability.” (*Fraley v. Allstate Insurance* (2000) 81 Cal.App.4th at p. 1282.)

In Fraley, a fire caused damage to the insured homeowners' (the Fraleys) home, which was covered by their deluxe homeowners' policy issued by Allstate. The policy covered the actual cash value, or alternatively, the full replacement cost of the home if it was repaired or replaced within 180 days of the actual cash value payment. The issue was whether a homeowners policy required the Fraleys to repair or replace their damaged property within 180 days of a certain date as a prerequisite to obtaining replacement cost. The court of appeal concluded it did and affirmed summary judgment in favor of Allstate on the Fraleys' action for breach of contract and bad faith. The court of appeal held that the policy clearly required the Fraleys to comply with the 180-day period for full replacement costs benefits. Further, because there was a **genuine dispute** regarding Allstate's contractual obligations, the claim for bad faith failed as a matter of law. (Id. at p. 1293.)

As a matter of law, plaintiffs do not allege a “wrongful use” under the **financial** **elder** **abuse** statute, and therefore, the third cause of action must be dismissed.

III. *LIBERTY MUTUAL RELIES ON CASES INTERPRETING THE 2008 VERSION OF THE FINANCIAL ELDER ABUSE STATUTE*

In their Introduction, plaintiffs misconstrue Liberty Mutual's argument stating that Liberty Mutual erroneously links “bad faith” to **financial** **abuse** and “has forwarded this old theory to the court and relied on old law.” (Opposition at p. 2.) Although Liberty Mutual cited certain cases in its moving papers that pre-date the 2008 amendment to the **financial** **elder** **abuse** statute, the holdings of those cases still remain good law. These cases also demonstrate that a claim for **financial** **elder** **abuse** alleges wrongful conduct by a person or entity in a fiduciary relationship. (See e.g., *Zimmer v. Nawabi*, 566 F. Supp.2d 1025 (E.D. CA 2008) [Court granted an **elderly** borrower's motion for summary judgment on her breach of fiduciary duty claim and **Elderly** **Abuse** Act claim against a mortgage broker that received fees **wrongfully** obtained as a result of the employees' false statements. The court stated that under California law a mortgage loan broker acts in a fiduciary capacity. A mortgage broker breaches this

duty if he or she provides materially misleading an incomplete information regarding the terms of a loan, even if the correct terms are in the loan documents and the borrower does not read the written documents]; *Negrete v. Fidelity & Guar. Life Ins. Co.*, 444 F. Supp.2d 998, 1003 (C.D. 2006.) [Court denied Fidelity & Guarantee Life Insurance Company's ("F&G") motion to dismiss the **financial elder abuse** claim concluding that the relationship alleged in plaintiff's complaint was not simply that of an insurer-insured, but rather one that entailed a fiduciary duty. Plaintiff conservator's class action suit in connection with the sale of annuities to older persons also alleged "wrongful Use" in that the complaint alleged that F&G fraudulently acquired millions of dollars by engaging in a "churning" scheme, specifically, using deceptive practices to deplete the accumulated cash value from an existing life insurance policy or annuity.

IV. *CONCLUSION*

Liberty Mutual respectfully requests the court grant its motion to dismiss plaintiffs' third cause of action under the **Elder Abuse** Act because plaintiffs assert a theory of recovery that is improper as a matter of law. Plaintiffs can allege no set of facts in support of their claims which would entitle them to relief under the statute. Specifically, plaintiffs cannot allege that Liberty Mutual's refusal to pay policy benefits constitutes a "wrongful use." Additionally, Liberty Mutual requests that the court strike all of the damages as well as attorneys' fees and costs that plaintiffs seek to recover under the third cause of action.

Dated: September 15, 2010

Respectfully Submitted,

ROPERS, MAJESKI, KOHN & BENTLEY

By: */s/ STEPHEN J. ERIGERO*

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WENDY MIELE

Attorneys for Defendant

LIBERTY MUTUAL FIRE INSURANCE

COMPANY

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