2012 WL 7151681 (C.D.Cal.) (Trial Motion, Memorandum and Affidavit)
United States District Court, C.D. California.

Frederick MEISEL, Plaintiff,

v.

BANKERS LIFE & CASUALTY COMPANY; and Does 1 through 40, Inclusive, Defendants.

No. 2:12-cv-03719-MWF(MANx).
November 12, 2012.

Plaintiff's Opposition to Defendant's Motion for Partial Summary Judgment

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Hon. Michael W. Fitzgerald.

(Filed concurrently with Affidavit of Kristin Hobbs and Statement of Genuine Dispute)

Date: December 3, 2012

Time: 10:00 am

Place: Courtroom 1600

312 N. Spring Street

Los Angeles, CA 90012

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I. *INTRODUCTION*

This case arises out of the denial of long term care benefits to Frederick Meisel ("Mr. Meisel") by Bankers Life & Casualty Company ("Bankers" or "Defendant").

Mr. Meisel bought a long term care Policy ("the Policy") in 2002 from Bankers. Defendant's Motion, UF 1. Bankers specializes in policies and annuities for seniors. Hobbs Aff., ¶4 (Exhibit 1). Fred has various policies and annuities with Bankers that he has purchased over the years. Hobbs Aff., ¶ 5 (Exhibit 2). Bankers advertises their products aim to "improve the financial security of [their] customers and policyholders" and "[f]or over 125 years, [Bankers] has helped policyholders relieve their financial concerns with life, health and annuity products." Hobbs Aff., ¶4 (Exhibit 1).

After a being hospitalized and subsequently placed on hospice for COPD with increased weakness and shortness of breath, cor pulmonale, chronic kidney disease stage III, benign tremor, peripheral neuropathy, and decreasing functional status, Mr. Meisel began receiving 24/7 live-in care. Hobbs Aff., ¶¶ 6, 7 (Exhibits 3, 4). Mr. Meisel had live-in care from March 30, 2011 through September 15, 2011. Defendant's Motion, UF 4, UF 7.

Mr. Meisel submitted a claim for benefits under his Policy, which was denied by Bankers on the basis he was not a chronically ill individual per the Policy. Defendant's Motion, UF 6. A chronically ill individual under the Policy is an Insured who is, "unable to perform without Standby Assistance or Hand-On Assistance, from another individual, at least two Activities of Daily Living." Defendant's Motion, Rikker Aff, ¶4 (Exhibit 1). The Activities of Daily Living ("ADL's") listed in the Policy are: bathing; continence; dressing; eating; toileting; and transferring. *Id.*

Bankers was informed by Mr. Meisel's in-home care company and Mr. Meisel's grandson and power of attorney that Mr. Meisel required assistance with his ADL's. Hobbs Aff., ¶ 8 (Exhibit 5). Despite Mr. Meisel's condition, Bankers denied his claim. Defendant's Motion, UF 6. Mr. Meisel appealed the denial, but Bankers upheld its decision. Hobbs Aff., 9 ¶ (Exhibit 6). Mr.

Meisel paid $23,800 out-of-pocket for the in-home care he received that should have been covered by his Policy with Bankers. Hobbs Aff., 10 ¶ (Exhibit 7).

Bankers recognizes that financial security is being sold along with the long term care policy. The Bankers application Mr. Meisel filled out in 2002 states: "People buy long-term care insurance for many reasons. Some don't want to use their own assets to pay for long-term care....Others don't want their family to have to pay for care or don't want to go on Medicaid." Hobbs Aff, ¶11 (Exhibit 8).

The operative Complaint alleges breach of contract, breach of the duty of good faith and fair dealing, and financial **elder** **abuse**. Mr. Meisel is over the age of 65 and is thus an **elder** under *Welfare & Institutions Code* section 15610.27. Defendant's Motion for Partial Summary Judgment is limited to Plaintiff's claim for Financial **Elder** **Abuse**. Defendant does not argue that as a matter of law it did not breach the contract by retaining benefits or that its conduct in retaining benefits was not a breach of the duty of bad faith and fair dealing.

The issue before the court is whether Bankers deprived Mr. Meisel of a property right by retaining benefits due to Plaintiff, an **elder**, under an insurance contract, and whether Bankers knew or should have known their conduct was likely to be harmful to him. This is a matter of first impression as neither party has been able to find case law that is directly applicable. As explained below, Defendant is not entitled to summary judgment because disputed issues of material fact exist with regard to Defendant's liability for Financial **Elder** **Abuse**.

II. *REQUIREMENTS FOR MOTION FOR SUMMARY JUDGMENT*

Summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A material fact is one that could affect the outcome of the suit, and a genuine issue is one that could permit a reasonable jury to enter a verdict in the nonmoving party's favor. *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242, 248 (1986). The moving party bears the burden of demonstrating the absence of a genuine issue of material fact. Id. at 256.

On issues for which the ultimate burden of persuasion at trial lies with the nonmoving party, the moving party bears the initial burden of establishing the absence of a genuine issue of material fact. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000). Once the moving party carries its initial burden, the nonmoving party "may not rely merely on allegations or denials in its own pleading," but must go beyond the pleadings and, "by affidavits or as otherwise provided in [Rule 56,] set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e); *accord Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Valandingham v. Bororquez*, 866 F.2d 1135, 1137 (9th Cir. 1989).

On those issues for which it will bear the ultimate burden of persuasion at trial, the nonmoving party "must produce evidence to support its claim or defense." *Nissan Fire*, 210 F.3d at 1103.

In its inquiry, the court must view any inferences drawn from the underlying facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The court also may not engage in credibility determinations or weigh the evidence, for these are jury functions. *Anderson*, 477 U.S. at 255.

III. *FINANCIAL **ELDER** **ABUSE** OCCURRED BECAUSE BANKERS RETAINED THE PERSONAL PROPERTY OF MR. MEISEL. AN **ELDER**, FOR A WRONGFUL USE: WELF. & INST. CODE § 15610.30*

"The purpose of the [**Elder** **Abuse** Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of **abuse** and custodial neglect." *Delaney v. Baker*, 20 Cal. 4th 23, 33 (1999). Financial **Elder** **Abuse** is codified in California *Welfare & Institutions Code* section 15610.30, which reads:

(a) "Financial **abuse**" of an **elder** or dependent adult occurs 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.

(b) 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.

(c) 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.

Thus, a common sense reading of section 15610.30 shows that subsection (a) and its three prongs identify the three separate manners in which one may act to wrongfully deprive an **elder** or dependent adult of his property right. In Mr. Meisel's case, subsection (a)(1) is the operative section, as Bankers itself directly wrongfully took and or retained Mr. Meisel's policy benefits. Subsection (b) defines what constitutes "wrongful use" for purposes of satisfying the various prongs of subsection (a), discussed *infra*. Lastly, subsection (c) defines what is meant by "takes, secretes, appropriates, obtains, or retains real or personal property" to satisfy subsection (a).

Bankers claims in its Motion that Mr. Meisel is unable to prove the elements in subdivisions (b) and (c) because he "was not deprived of a property right by means of an agreement or otherwise nor did Bankers Life engage in conduct harmful to him." Defendant's Motion, p.8:13-15. This is simply not true. As discussed below, Bankers is not entitled to judgment as a matter of law in this respect and, as such, their Motion must be denied.

A. BANKERS RETAINED THE PERSONAL PROPERTY OF MR. MEISEL BECAUSE MR. MEISEL WAS DEPRIVED OF A PROPERTY RIGHT BY MEANS OF AN AGREEMENT OR OTHERWISE; *Welf. & Inst. Code* § 15610.30(c)

To be liable for financial **elder abuse**, an entity must "[t]ake[], secrete [], appropriate[], obtain[], or retain[] real or personal property of an **elder** or dependent adult for a wrongful use." *Welf. & Inst. Code* § 15610.30(a)(1). An "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." *Welf. & Inst. Code* § 15610.30(c) (emphasis added). Bankers retained the personal property of Mr. Meisel, an **elder**, when it deprived him of his property right in the benefits due him under the Policy.

1. As this Is a Case of First Impression, the Canons of Construction Apply and "Any Property Right" Includes Benefits due Under a Contract

As the issue presented in this Motion is a case of first impression, the Court should first look to a plain reading of the statute in order to interpret it. "The cardinal principle of statutory construction is to save and not to destroy." *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937).

The wording of this section makes it clear that the triggering action is depriving the dependent adult of *any property right*. The plain meaning of "any property right," is any property right. The benefits due under a contract have long been deemed to be property rights. *Union Pac. R. Co. v. U.S.*, 99 U.S. 700, 720 (1878); *Estate of Mitchell*, 76 Cal. App. 4th 1378, 1392 (2000) ("[A] contract right which has been earned or purchased for consideration is property.").

The phrase, "including by means of an agreement, donative transfer, or testamentary bequest" is open ended, and is illustrative of the various mechanisms by which an **elder** or dependent adult can be deprived of his property rights. There is nothing in phrasing of this section which suggests this is an exhaustive list of the actions which can be used to deprive an **elder** or dependant adult of property rights.

Thus Defendant's Motion must be denied because Plaintiff can present a triable issue of fact as to whether Bankers committed Financial **Elder** **Abuse** by retaining the benefits due to Mr. Meisel, a property right, under his Policy.

2. Financial Elder Abuse is Established when an Elder is Deprived of Any Property Right, "Including By Means of an Agreement," which Includes the Benefits Due to Mr. Meisel Under His Insurance Contract With Bankers

While Plaintiff maintains the benefits due him under the insurance contract falls into the category of "any property right," an insurance contract is also an "agreement" for purposes of establishing financial **elder** **abuse**. Defendant argues that "by means of an agreement" should only apply to ways in "which a person might unduly influence an **elder's** disposition of property." Defendants Motion p.9:1-2. This is not supported in a plain and simple reading of the statute.

Defendant argues that "agreement" does not mean "contracts in general," but rather only applies to how a person may unduly influence an **elder's** disposition of property. Defendant's Motion p.9:1-2. Courts have disagreed with Defendant's argument, finding a triable issue of fact for purposes of establishing financial **elder** **abuse** when the sale of annuities to seniors was at issue. *In re Conseco Ins. Co. Annuity Marketing & Sales Practices Litis.*, 2007 WL 486367 *5 (N.D. Cal.). Further, the unambiguous meaning of agreement proves contrary to Defendant's position. Black's Law Dictionary states: "The term 'agreement,' although frequently used as synonymous with the word 'contract,' is really an expression of *greater breadth of meaning and less technicality. Every contract is an agreement;* but not every agreement is a contract." (emphasis added).

Defendant's restrictive reading of "agreement" risks rendering the statute incoherent. Although not speaking on the statute at issue, the Ninth Circuit has already cautioned against this sort of convoluted reading in *Commodity Futures Trading Com'n v. White Pine Trust Corp.*, 574 F.3d 1219, 1224-1225 (2009), where counsel's argument "strain[ed] common sense" by selectively choosing creative definitions for words with plain meaning and arguing a complex construction of a simply worded statute. The Court further stated: "But nothing in the statute requires us to split hairs in such a bizarre and apparently pointless fashion. If the best that one can say for Baere's proposed interpretation is that it is possible in theory but absurd in practice, then we must decline the proposal." Id at m.5.

Thus, Mr. Meisel was deprived of a property right by Defendant when they withheld benefits that were due to him under a contract and Bankers is liable for Financial **Elder** **Abuse**. As such, Defendant's Motion must be denied.

3. Defendant's Interpretation of the Legislative History Behind "By Means of an Agreement" Is Incorrect

The 2008 amendment to *Welfare & Institutions Code* section 15610.30 added subsection (a)(3) to include undue influence as a means of establishing liability. The 2008 amendment also added "by means of an agreement, donative transfer, or testamentary

bequest" to subsection (c) to define a taking, secreting, obtaining, or retaining. Nothing in the law's construction suggests these two disjointed phrases in different subsections that do not refer to each other, are co-dependent.

Defendant spends significant time arguing that because these two phrases were enacted at the same time, that "by means of an agreement" should only apply when triggered by "undue influence." Defendant's argument ignores the plain language of a simple statute, and requires mental gymnastics to reach its conclusion. This position is simply not supported by the plain words of the law, the legislative history, or case law.

To support Defendant's theory that undue influence and agreements are co-dependent, Defendant recites lengthy legislative passages discussing undue influence; however, nowhere in these sections is the word "agreement" ever even mentioned! Defendant's Motion p.10:6-27, p.11:18-27. The same is true for the passage Defendant cites regarding "agreements;" nowhere in this passage is undue influence mentioned. Id. at p.11:1-14. It is unclear why Defendant believes agreements should only be used in the context of undue influence and even why Defendant feels this is supported by legislative history.

As a reasonable jury could find that Bankers retained a property right due to Mr. Meisel, Defendant's Motion must be denied.

B. BANKERS' KNEW OR SHOULD HAVE KNOWN THEIR DENIAL OF MR. MEISEL'S CLAIM WAS LIKELY TO BE HARMFUL TO MR. MEISEL; *Welf. & Inst. Code* § 15610.30(b)

In addition to showing that an **elder** was deprived of a property right, the plaintiff must also prove the property right was retained for wrongful use to establish financial **elder abuse**. *Welf. & Inst. Code* § 15610.30(b). A property right is retained for "wrongful use if, among other things, the person or entity...retains the property and the person or entity knew or should have known that this conduct is likely to be harmful to the **elder**." *Id*. Bankers argues Mr. Meisel had too much money to make the low amount of the claim harmful to him. Not only is this an incorrect analysis of what constitutes harmful conduct, it is callous reasoning that Bankers should somehow be entitled to claim its retention of benefits was not harmful because Mr. Meisel can "learn to live within his means." Defendant's Motion p.13:20-21; UF No. 16.

1. Bankers Had Actual Knowledge Their Conduct Was Harmful to Mr. Meisel Because it Is Noted in the Bankers Claim File Mr. Meisel Was In Financial Hardship

Bankers had actual knowledge their conduct in retaining the benefits was harmful to Mr. Meisel. On June 22, 2011, it is noted in Bankers claim file that policyholder "is in finan[cial] hardship at this time and a speedy proc[ess] [would be] appreciated. Hobbs Aff., ¶ 12 (Exhibit 9). Plaintiff is mystified how Bankers can claim ignorance when they noted Mr. Meisel's financial distress in their own file. Further, it is improper for Bankers to conduct post-hoc analysis of Mr. Meisel's financial condition, two years after denying his claim and with the help of an annuities expert, to argue Mr. Meisel was not financially harmed by their behavior because he found a way to make due.

Bankers recognizes financial security is being sold along with the long term care policy. The Bankers application for long term care insurance Mr. Meisel filled out in 2002 states: "People buy long-term care insurance for many reasons. Some don't want to use their own assets to pay for long-term care.... Others don't want their family to have to pay for care or don't want to go on Medicaid." Hobbs Aff., ¶ 11 (Exhibit 8).

Thus, a reasonable jury could find that Bankers had actual knowledge that the denial was harmful to Mr. Meisel and Defendant's Motion must be denied.

2. Bankers Should Have Known Denying the Claim Was Likely to Be Harmful to Mr. Meisel Because He Is on a Fixed Income and $23,000 Is a Substantial Amount

First, it seems irrefutable that wrongfully retaining property of another is harmful. Despite this, Defendant argues Mr. Meisel's claim of $23,800 is trivial. This is not correct as it is a substantial amount for Mr. Meisel, whose only asset aside from his annuities is a ten-year-old van. Defendant states Mr. Meisel's financial condition was undeterred by their denial of the claim but Bankers does not dispute that Mr. Meisel had to pay out of pocket to cover the claim. Defendant's Motion 12:20-22; UF No. 7. Mr. Meisel did not remove any money from his Annuity 069 between 2007 and 2010, and then withdrew large sums in 2011 to cover the claim. Defendant's Motion 13:1-3. Thus, there was clearly a change in his financial condition.

Prior to the claim, Mr. Meisel had approximately $88,000 in his annuities. The claim of $23,800 is nearly a third of his assets, a staggering loss to a retiree on a fixed income. Bankers callously states that their wrongful retention of his claim benefits cannot be harmful because Mr. Meisel has not yet had to do without. Banker's argues Mr. Meisel was not harmed because he has low living expenses by living with his 89 year-old companion, Dottie. Defendant's Motion, p.13:10-12. It does not matter that Mr. Meisel is, and has always been, a fiscally responsible person. Bankers should not benefit from Mr. Meisel's discipline in contracting his lifestyle to manage his funds and live “within [his] means.” Defendant's Motion, p.13:20-21, UF 16.

Bankers also states Mr. Meisel waited to file his claim and that should prove he was not in financial distress. This is blatantly false and contrary evidence is documented throughout Bankers own claim file. Bankers was notified the day that Mr. Meisel started receiving benefits that he would be filing a claim and phone conversations were extensively documented throughout the Claim File. Hobbs Aff, ¶ 13 (Exhibit 10).

Thus, a reasonable jury could find that Bankers knew or should have known the denial was likely to be harmful to Mr. Meisel and Defendant's Motion must be denied.

IV. CONCLUSION

Based on the foregoing, Defendant's Motion for Partial Summary Judgment must be denied because Plaintiff can prove Defendant committed Financial **Elder Abuse**. As Plaintiff has raised triable issues of fact concerning whether Bankers committed financial **elder abuse** in retaining benefits due to Mr. Meisel under the Policy, and the burden is on the moving party to show no triable issue can exist, Defendant's Motion must be denied.

DATED: November 12, 2012

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