Belz v Clarendon America Ins. Co.

Default Judgment Against Disappearing Insured Effective to Bind Insurer and Defeat MSJ after Suit versus Carrier to Collect (12/07)

Plaintiff Gary Belz hired a contractor, Alan Namay, to build a healthplex on his property. Namay did the work in 1999 and 2000 but the building leaked. Namay was covered for commercial general liability by Clarendon America Insurance Company, the defendant in this appeal.

Belz advised Clarendon of his claim in December 2001 and it retained Crawford Claims Management to investigate and adjust the matter. Belz gave Crawford expert reports, repair estimates, and contact information for subcontractors. Crawford was unable to locate Namay.

In July 2002, Crawford wrote Belz on behalf of Clarendon, indicating the insurer would be unwilling to make a decision until it spoke with its insured. In September, Belz told Crawford he intended to sue Namay, and in December 2002 the suit was filed and served upon Namay. Namay failed to notify Clarendon and no responsive pleading was filed. In January 2003, Belz filed a request to enter a default, but did not notify Clarendon.

Clarendon hired a new adjustor, West Coast Casualty. On February 13, 2004, West Coast learned from Belz of the suit against Namay and received a copy of documents relating to the suit. On February 17, 2004, Clarendon learned of the default entry and retained a law firm to have the default set aside.

The law firm sought voluntary set aside of the default from Belz. He refused. The firm then made a motion to vacate the default based on CCP section 473. Belz opposed and filed a request for entry of a default judgment against Namay. On April 28, 2004, the superior court denied the motion to vacate and entered a default judgment against Namay in the amount of $191,395.90. Namay s subsequent motion to reconsider and an appeal both failed.

Meanwhile, Clarendon communicated with Namay for the first time in May 2004 with a letter denying coverage. It stated Namay had failed to *notify*

Clarendon of the suit resulting in the default judgment. It also stated that Namay had failed to *cooperate* with Clarendon.

Belz sued Clarendon on June 30, 2005, to recover the amount of the judgment. The lawsuit was based on Insurance Code section 11580(b)(2) which requires that liability policies contain a provision that:

whenever judgment is secured against the insured based on ... property damage, then an action may be brought against the insurer on the policy... by such judgment creditor to recover on the judgment.

Clarendon filed a general denial, alleging defenses based on provisions of its policy. In February 2006, Clarendon filed a summary judgment based on policy language that the,

....Company shall have *no liability* for any *default judgment entered against any insured*, nor for any judgment..... rendered or entered *before notice to the Company* giving the Company a reasonable time in which to protect its and its insured s interests...

Belz opposed the motion contending Clarendon must show that Namay s conduct caused prejudice. In reply, Clarendon stated that a showing of prejudice was not necessary, and, alternatively, that Namay s conduct had resulted in prejudice by preventing it from thoroughly investigating Belz claim and presenting a defense in the underlying suit.

The trial court heard the motion and concluded Namay had breached the policy and that Clarendon did not have to show prejudice. The summary judgment was granted in Clarendon s favor. This appeal followed.

The Second District Court of Appeal concluded the main question should focus on whether the key policy provision, quoted above, is a (1) notice provision, (2) cooperation clause, or (3)a no-voluntary-payment provision.

A ***notice provision*** requires the insured to inform the insurer promptly of any claims, suits, or occurrences, and obligates the insured to forward immediately to the insurer a copy of any demands, notices, summons, or legal papers received in connection with a claim or suit.

A *cooperation clause* provides the insured will cooperate with the insurer in the investigation, settlement, or defense of a claim or suit.

A *no-voluntary-payment provision* states the insured will not, except at his or her own expense, voluntarily make a payment , assume any obligation, or incur any expense, without the insurer s consent.

In California, the insured s breach of the *notice provision* or a *cooperation clause* does not excuse the insurer s performance unless the insurer can show it suffered prejudice. The Court of Appeal found that Namay s default **was** the result of lack of notice or failure to cooperate, and was not attributable to the payment of a settlement or defense costs. As such, the law required Clarendon to show prejudice to assert either the notice provision or the cooperation clause as a policy defense.

In *Clemmer v Hartford Insurance Co.* (1978) 22 Cal. 3d 865, the Supreme Court explained in the context of a *notice defense*, to establish *actual prejudice*, the insurer must show:

...it lost something that would have changed the handling of the underlying claim. The insurer must show a substantial likelihood that, with timely notice .... it would have settled the claim for less or taken steps that would have reduced or eliminated the insured s liability.

The California Supreme Court, in *Billington v Interinsurance Exchange* (1969) 71 Cal. 2d 728, stated that in order to establish it was *prejudiced* by the failure of the insured to *cooperate* in his defense, the insurer must:

...establish at the very least that if the cooperation clause had not been breached there was a substantial likelihood the trier of fact would have found in the insured s favor.

Because Namay breached a *notice provision*, and Clarendon did not make a showing that it suffered *actual, substantial prejudice*, the trial court erred in granting summary judgment. According to the Court, Clarendon s assertion that Namay s default interfered with its ability to conduct a thorough investigation and to present a defense in the underlying suit, assumes ... to lenient a test for prejudice. The Court gives no guidance on what would be required to satisfy the prejudice requirement in this case. The judgment was

reversed.

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