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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

RAJWINDER KAUR,

Plaintiff and Appellant,

v.

FIRE INSURANCE EXCHANGE,

Defendant and Respondent.

F055359

(Super. Ct. No. 382612)

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus County. Roger M. Beauchesne, Judge.

Law Offices of William L. Cowin, William L. Cowin, for Plaintiff and Appellant.

McLaughlin Law Group, William T. McLaughlin, for Defendant and Respondent.

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Appellant Kaur's home was destroyed by fire on July 27, 2005. Her claim for benefits under her homeowners insurance policy was denied by respondent Fire Insurance Exchange (FIE) on June 21, 2006. The following month Kaur filed this action against FIE. A month-long trial resulted in a jury verdict and judgment in favor of the insurer. The jury's special verdict expressly found that appellant failed to comply with the so-called "cooperation" clause of the insurance policy requiring the insured to "as

often as we reasonably require ... provide us with records and documents we may request, including banking or other financial records, if obtainable, and permit us to make copies." The jury also made a special finding that appellant's "failure to provide such information caused actual prejudice to defendant's handling of the claim."

APPELLANT'S CONTENTION

Kaur contends on this appeal that the jury's special findings that she failed to comply with the cooperation clause, and that this failure was prejudicial to FIE, are not supported by substantial evidence. As we shall explain, we disagree and will affirm the judgment.

FACTS

The fire that destroyed appellant's home on Sagittarius Avenue in Ceres was an arson fire. Gasoline had been used as an accelerant. At the time of the fire appellant was 50 years old and lived at the home with her 20-year-old son Navepreet Sangerha and her 15-year-old minor son. One of the significant issues in the investigation of the claim was whether appellant herself intentionally caused the fire or intentionally arranged for the destruction of her home and its contents.

On September 29, 2005, FIE sent appellant a letter requesting various items, including "[d]ocumentation which reflects Your financial status as of the date of the loss and for the three years prior thereto, including all bank account statements (personal and business), tax returns for the years 2003 and 2004 (personal and for any business in which you have an interest), credit card statements, profit and loss statements, balance sheets, financial statements, personal financial statements, loan applications. W-2's and 1099's, or other documentation reflecting your income, assets, expenses and liabilities or debts for that time frame" and "[t]he personal and business telephone bills for you, your sons, and your husband (whether for a cell phone or otherwise) which would reflect any telephone calls from June 15, 2005 to September 1, 2005."

The requested documents were not produced. The insurer renewed its request, in writing, seven more times in letters dated November 3, 2005, January 18, February 16, April 3, April 17, May 14 and May 16, 2006. The first two of these written requests were addressed to appellant herself, and the last six were sent to appellant's counsel after she became represented by counsel. The requested documents still were not produced. On June 21, 2006, the insurer denied appellant's claim. One of the stated grounds for the denial was that the "policy contains express provisions which requires [*sic*] you to produce documentation" but "[y]ou ... did not secure and submit the requested materials." The denial letter quoted the language of the policy requiring the insured to produce requested documents and records, and the language of the policy stating "[w]e may not be sued unless there has been full compliance with all the terms of this policy," and further stated: "The documentation requested ... is probative to potential policy defenses. For example, the documentation requested, but not supplied bears upon the bona fides of the loss and claim, including the facts and circumstances surrounding the fires and whether there was a motive to state [*sic*] or set the fire." On the last page, the denial letter further stated:

> "If you continue to believe our analysis or decision is incorrect, or if you wish for fire Insurance Exchange to consider additional information or documentation, please forward a written statement as to the basis for your position and any additional information or documentation you wish for us to consider. Rest assured that all information or material you provide will be given careful consideration. We hope that any questions or problems you have may be resolved by contacting the undersigned on behalf of Fire Insurance Exchange."

Appellant did not contact the insurer or submit any additional documentation. She filed suit against respondent on July 26, 2006.

A jury heard appellant's claims of breach of contract, negligent misrepresentation, and breach of the implied covenant of good faith and fair dealing. The parties agreed, however, that if in fact appellant did not comply with the cooperation terms and

conditions of the policy by providing FIE with all relevant, requested information, and if that failure to comply was prejudicial to FIE's handling of the claim, this was a complete defense to appellant's entire action. The jury's special verdict found just that.

DISCUSSION

"Under the substantial evidence rule, 'the power of the appellate [body] begins and ends with a determination whether there is any substantial evidence, contradicted or uncontradicted, which supports the finding.' (*Kimble v. Board of Education* (1987) 192 Cal.App.3d 1423, 1427 [238 Cal.Rptr. 160].) Evidence is 'substantial' for purposes of this standard of review if it is 'of "ponderable legal significance," "reasonable in nature, credible, and of solid value" .… [Citations.]' (*Grappo v. Coventry Financial Corp*. (1991) 235 Cal.App.3d 496, 507 [286 Cal.Rptr. 714].)" (*Smith v. Selma Community Hospital* (2008) 164 Cal.App.4th 1478, 1516; see also *Crawford v. Southern Pac. Co.* (1935) 3 Cal.2d 427, 429; *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571; and 9 Witkin Cal. Procedure (5th ed. 2008) Appeal, § 365.)

"An insurer may assert defenses based upon a breach by the insured of a condition of THE policy such as a cooperation clause, but the breach cannot be a valid defense unless the insurer was substantially prejudiced thereby." (*Campbell v. Allstate Ins. Co*. (1963) 60 Cal.2d 303, 305; in accord, see also *Othman v. Globe Indemnity Compa*ny (9th Cir. 1985) 759 F.2d 1458, 1465.) Appellant makes no contention that for the entire time between the insurer's first (Sept. 29, 2005) request for the documents, and appellant's July 26, 2006 filing of this action, she was unable to produce the requested documents. Although there was evidence that appellant suffered from major depression at the time of the fire and for a considerable period of time thereafter, her doctor testified about her continuous and regular improvement between November of 2005 and April of 2006, when he found her to be "eukinetic" which "basically means normal." Thus even if there were a contention that appellant could not have done so much as sign her name to forms authorizing her bank and her phone company to release their records of her accounts, it

would not be supported by the evidence. In short, the jury could reasonably conclude based on the evidence presented that appellant intentionally and deliberately chose not to provide the requested documents, and instead chose to file suit against the insurer without having first provided the insurer with the requested documents.

Appellant's arguments with regard to the cooperation clause appear to be that (1) an insured satisfies the cooperation clause by providing the requested documents even after the insured has sued the insurer for failing to pay benefits under the policy, so long as the documents are provided during discovery and before trial, and (2) even if appellant here breached the cooperation clause by failing to provide the requested documents before suing the insurer, the breach was not prejudicial to the insurer because appellant provided the documents during discovery and before trial.

We are not persuaded by the first argument because one of the "Conditions" of the policy is "[w]e may not be sued unless there has been full compliance with all the terms of this policy." The purpose of the cooperation clause is to enable the insurer to obtain the information it needs in order to decide whether to pay the claim. By suing the insurer for nonpayment of the claim before providing the insurer with the documentation the insured is contractually obligated to provide to assist the insurer in the evaluation of that claim, the insured frustrates the purpose of the cooperation clause.

We are not persuaded by the second argument because prejudice was shown. One of the trial witnesses was appellant's counsel, Mr. Cowin, who testified about how the plaintiff was served with discovery requests in April of 2007, that Request number 35 requested phone records, that the request was objected to by appellant, that the parties sent letters back and forth on whether the objection was valid, that FIE filed a motion to compel further responses to the request, and that appellant then ultimately produced the cell phone records for the cellular telephone service shared by appellant and her sons. The insurer finally obtained these records in August of 2007, about TWO months before the first scheduled trial date. The insurer similarly had to utilize civil discovery

procedures to obtain appellant's bank records. Having to pay counsel, in litigation, to obtain documents through civil discovery that an insured is contractually obligated to provide simply upon request by the insurer is prejudice. Were we to conclude otherwise, we would essentially be eviscerating the cooperation clause from the policy, since there would be no adverse consequence to the insured for failing to comply with it.

Nor is there any issue here of the document requests not being reasonable. Respondent did not ask, for example, for the invitation list to appellant's minor son's birthday party. The documents requested pertained to a legitimate issue in the coverage dispute -- the magnitude of any financial motive appellant may have had to commit arson, and the whereabouts and contacts of appellant and her two sons around the time the fires were set. (It was undisputed that there were two fires. One was discovered at about 7:00 p.m. and the other ignited later that same evening after firefighters had extinguished the first blaze. It was also undisputed that appellant and her sons were either at the house or at nearby locations at the time of both fires.) Appellant's bank statement showed that she had $258.16 in a checking account on December 14, 2005. Phone records showed that appellant's older son had a call from her younger son late at night on July 27 at a time when the second fire may well have been blazing, even though appellant contended she and her sons were all at her nearby sister Ruby's house. Although this information does not of course conclusively establish anything, it was probative to a major coverage issue -- whether appellant intentionally caused the fire or intentionally arranged for the destruction of her home and property by fire.

The parties talk about other topics in their briefs, but the other topics have little or nothing to do with whether the jury's verdict is supported by substantial evidence. There was an issue of whether appellant failed to comply with the provision of the policy requiring the insured to submit to an examination under oath, but this was the subject of question 3 of the special verdict. The jury never reached this question. The first two questions of the special verdict pertained largely to appellant's bank records and

telephone records. Respondent's counsel made this clear in his closing argument to the jury. The jury's answers to the first two questions were the jury's verdict and resulted in the defense judgment. Question 4 pertained to the issue of whether appellant intentionally falsified her claims of property loss, but the jury never reached this issue either. Question 5 of the special verdict pertained to whether appellant was otherwise entitled to benefits under the policy if the cooperation clauses regarding the requested documents and the requested examination under oath did not bar recovery and if appellant did not intentionally falsify her claims of property loss (i.e., did appellant cause the fire?), but the jury did not have to reach this issue either.

DISPOSITION

The judgment is affirmed. Costs to respondent.

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Ardaiz, P.J.

WE CONCUR:

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Hill, J.

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Poochigian, J.