Tentative Rulings for December 9, 2021
Department 501

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

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Tentative Rulings for Department 501

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Tentative Ruling

Re: ***Cal LeDuc et al. v. Infinity Select Insurance Company et al.***
Superior Court Case No. 19CECG01278

Date: December 9, 2021 (Dept. 501)

Motion: by Defendant Academy West Insurance Services for Summary Judgment or, in the Alternative, Summary Adjudication

Tentative Ruling:

To deny the motion for summary adjudication of the eighth cause of action as the moving party has not met its burden of proof pursuant to Code of Civil Procedure section 437c, subdivision (p)(2).

Explanation:

The Underlying Case

In underlying Case No. 13CECG03811 entitled *Cal LeDuc; Tori Abby; Miley Abby, a minor by and through her Guardian ad litem, Tori Abby, Mandy Jobe, Lukus LeDuc, Jay LeDuc and Cal LeDuc as successor in interest to the estate of Marsha Kay LeDuc v. Mario Alberto Guerro; Daniel M. Canchola and Guerra Produce*, the defendants filed for bankruptcy protection on April 24, 2017, shortly before the initial trial date. The Plaintiffs petitioned for and were successful in obtaining a lifting of the stay as to the insurer of the defendants only. The case went to trial on October 5, 2017.

On the fifth day of testimony, the parties reached a settlement with the participation of an attorney for the defendants' insurer (Infinity Select Insurance Company). The settlement was placed on the record. (See Reporter's Transcript dated October 17, 2017 attached as Exh. 13 to the moving defendant's instant motion.) Later, a formal Settlement Agreement was drafted and signed by all parties including the attorney for Infinity. (See Exh. 13.) On March 27, 2018, plaintiffs filed a request for *dismissal* with prejudice but without waiver of costs and fees. The dismissal was entered on April 27, 2018.

Motion for Summary Adjudication of the Eighth Cause of Action

The parties agree that the only cause of action directed to the moving party is the eighth cause of action. That cause of action alleges "negligent failure to procure requested coverage." According to the Judicial Council of California Civil Jury Instructions for No. 2361 "Negligent Failure to Obtain Insurance Coverage," the essential factual elements are:

> [Name of plaintiff] claims that [he/she/nonbinary pronoun/it] was **harmed** by [name of defendant]'s negligent failure to obtain insurance requested by [him/her/nonbinary pronoun/it]. To establish this claim, [name of plaintiff] must prove all of the following:
> 1. That [name of plaintiff] requested [name of defendant] to obtain [describe requested insurance] and [name of defendant] promised to obtain that insurance for [him/her/nonbinary pronoun/it];
> 2. That [name of defendant] was negligent in failing to obtain the promised insurance;
> 3. That [name of plaintiff] was **harmed**; and
> 4. That [name of defendant]'s negligence was a substantial factor in causing [name of plaintiff]'s **harm**.

In support of its motion, defendant asserts that plaintiffs Guerra and Canchola had knowledge of the existence of a cause of action for negligent failure to obtain insurance coverage through their attorney (Joseph Cooper) who was chosen by the claims adjuster for Infinity Select Insurance Company to defend these plaintiffs against the lawsuit brought by Cal LeDuc, Tori Abby, Miley Abby, a minor by and through her Guardian ad litem, Tori Abby, Mandy Jobe, Lukus LeDuc, Jay LeDuc and Cal LeDuc as successor in interest to the estate of Marsha Kay LeDuc stemming from the vehicle collision. But, there are numerous problems with this assertion.

First, the case that the moving party relies upon (*Lazzarevich)* for its contention that the knowledge of Joseph Cooper is imputed to his client is not on point. That case involved a petition filed by a husband against his ex-wife to set aside a conveyance of a one-half interest in realty or, in the alternative, to have the property partitioned. The trial court denied the husband's petition and he appealed. The Supreme Court held that the action to set aside the conveyance was barred by the statute of limitations. Although the husband claimed that he thought he was still married when he made the conveyance, the evidence showed that his attorney had obtained entry of the final decree of divorce in 1933 and that John knew that he was longer married to Catherine when they reconciled in 1935. Catherine learned in 1945 of the entry of the decree and immediately informed John of that fact. In passing, the opinion mentions that "[o]rdinarily a person is held to know what his attorney knows and should communicate to him." (*Id*. at 50.) But, there was other evidence in the case that indicated that John knew he was divorced at the time that he made the conveyance. (*Ibid*.) The decision did not turn upon what John's attorney knew. (*Ibid*.)

Second, the *Lazzarevich* case did not involve knowledge of the existence of a cause of action. Rather, it involved knowledge of a divorce. It is axiomatic that a cause of action does not exist until one has suffered harm. The infliction of appreciable and actual harm, however uncertain in amount, is necessary to commence the statutory period: "[O]nce plaintiff has suffered actual and appreciable harm, neither the speculative nor uncertain character of damages nor the difficulty of proof will toll the period of limitation." (*Davies v. Krasna* (1975) 14 Cal.3d 502 at 514.) Here, Guerra and Canchola have pleaded that they suffered harm by filing bankruptcy. (See Complaint at p. 34 ¶ 106.) The instant Complaint was filed on **April 11, 2019**. The Complaint alleged a ninth cause of action for negligent failure to procure requested coverage.

Accordingly, the statute of limitations began to run on **April 24, 2017**. This falls within the two year statute of limitations for negligence. (Code Civ. Proc. § 335.1.)

Third, a summary judgment motion must show that the "material facts" are undisputed (Code Civ. Proc. § 437c, subd. (b)(1).) The pleadings serve as the "outer measure of materiality" in a summary judgment motion, and the motion may not be granted or denied on issues not raised by the pleadings. (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258; *Nieto v. Blue Shield of Calif. Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 74—"the pleadings determine the scope of relevant issues on a summary judgment motion"; *Hutton v. Fidelity Nat'l Title Co*. (2013) 213 Cal.App.4th 489 at 493—summary judgment defendant need only "negate plaintiff's theories of liability **as alleged** in the complaint; that is, a moving party need not refute liability on some theoretical possibility not included in the pleadings" (emphasis in original); *Johnson v. Raytheon Co., Inc.* (2019) 33 CA5th 617, 636.)

Here, plaintiffs have clearly pleaded that they were economically harmed by the filing of bankruptcy. (See Second Amended Complaint at p. 29 ¶ 98.) Therefore, it is inappropriate for the moving party to base their motion on the date that the opposing party and or their attorney appointed by the claims adjuster for the co-defendant insurance company learned that the appropriate policy had not been procured or the date that the attorney began to theorize that his clients had a cause of action for negligent failure to obtain insurance coverage. Again, it is axiomatic that the material facts are those pleaded. (See *Nieto v. Blue Shield of California Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60 at 74.)

"There is no obligation on the opposing party … to establish anything by affidavit unless and until the moving party has by affidavit stated facts establishing every element … necessary to sustain a judgment in his favor." (*Consumer Cause, Inc. v. SmileCare* (2001) 91 CA4th 454, 468, internal quotes omitted.) As a result, the opposing papers have not been considered nor has the reply. The evidentiary objections raised are moot.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: DTT on 12/8/2021.
(Judge's initials) (Date)