2022 WL 1309843
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

EVANSTON INSURANCE COMPANY

v.

WINSTAR PROPERTIES, INC., et al.

Case No. 2:18-cv-07740-RGK-KES
|
Filed 04/14/2022

Attorneys and Law Firms

Terrence R. McInnis, James Hazlehurst, Troutman Pepper Hamilton Sanders LLP, Irvine, CA, for Evanston Insurance Company.

Ariella Evelyn Perry, Christopher David Barnes, Jonathan C. Teller, Wilshire Law Firm, Los Angeles, CA, for Winstar Properties, Inc, et al.

Proceedings: (IN CHAMBERS) Order Re: Court Trial

R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

***1** On September 5, 2018, Evanston Insurance Company ("Plaintiff") filed a Complaint seeking a declaratory judgment that it had no duty to defend and no duty to indemnify Winstar Properties, Inc. ("Winstar") and Manhattan Manor, LLC ("Manhattan Manor") (collectively, "Defendants") in an underlying lawsuit. (ECF No. 1.) Plaintiff also sought reimbursement of the expenses it incurred defending the underlying lawsuit. (*Id.*) On October 24, 2019, the Court granted Plaintiff's first Motion for Summary Judgment and entered judgment for Plaintiff on all claims. (ECF No. 74.) Defendants appealed.

On May 24, 2021, the Ninth Circuit affirmed the Court's ruling that Plaintiff had no duty to defend or indemnify Defendants, but reversed and remanded on Plaintiff's reimbursement claim, holding that "fact issues exist as to whether Evanston is entitled to recover ... costs." (9th Cir. Memo. at 3, ECF No. 87.) The Ninth Circuit instructed the Court to determine two issues: (1) whether Plaintiff had sent, and Defendants received, an initial reservation of rights letter on July 20, 2017; and (2) if not, whether the defenses of waiver and estoppel would apply to prevent Plaintiff's claim for reimbursement. (9th Cir. Memo. at 3, 6.)

The Court held a one-day bench trial on March 29, 2022. After full consideration of the parties' arguments and the evidence presented at trial, the Court **ENTERS JUDGMENT** for Plaintiff.

II. FINDINGS OF FACT [1]

The complete facts of this case are described in the Court's Order regarding Plaintiff's first Motion for Summary Judgment. (ECF No. 74.) The findings of fact below are related only to the issues on remand.

Plaintiff is an insurance provider. Defendant Winstar is the management company for a residential apartment building in Los Angeles, California (the "Property"). Defendant Manhattan Manor is the owner of the Property. Plaintiff insured Winstar under Tenant Discrimination Liability Insurance Policy No. TD808189 (the "Policy"), with a policy period of June 30, 2016, to June 30, 2017. The Policy was issued only to Winstar, and Manhattan Manor was neither a Named Insured nor an Additional Insured.

On June 28, 2016, several tenants living in the Property filed a lawsuit (the "Underlying Action") against Defendants, alleging discrimination. Defendants did not tender the Underlying Action to Plaintiff until July 17, 2017, when Randle Frankel, a retail insurance broker working on Defendants' behalf, emailed Markel Services, Inc. ("Markel") to tender the Underlying Action to them. Markel is Plaintiff's claims services manager; it is responsible for handling insurance claims tendered to Plaintiff from inception to resolution, maintaining the claim files, evaluating coverage, and issuing coverage correspondence on Plaintiff's behalf. After receiving the claim, Plaintiff drafted a letter that acknowledged receipt of the Underlying Action and reserved all rights under the Policy (the "July 2017 Letter"). The July 2017 Letter states: "Nothing in this letter shall be construed as a waiver of any rights or defenses that Evanston Insurance Company may have under the policy, nor as an admission of any liability whatsoever of Evanston Insurance Company. Evanston Insurance Company reserves all rights under the policy, at law, and in equity, including the right to disclaim

coverage in whole or in part." Plaintiff inserted the July 2017 Letter into Defendants' claim file, but the parties dispute whether the letter was actually mailed by Plaintiff, and if it was, whether Defendants received it. [2]

***2** Plaintiff did not confirm or deny coverage until September 2017, when Frankel reached back out on behalf of Defendants. At that time, Plaintiff's claims manager Lisa Unger ("Unger") wrote that Plaintiff accepted coverage and would help defend the Underlying Action. Plaintiff defended the action along with another insurance company, Scottsdale Insurance Company ("Scottsdale"). Between September 2017 and February 2018, Plaintiff participated in settlement negotiations and trial preparation.

On February 16, 2018, Evanston sent a letter (the "February 2018 Letter") to Winstar, reserving rights to deny coverage "in the event of any judgment against Winstar or Manhattan Manor" in the Underlying Action. Neither party disputes that the February 2018 letter was sent or received. Included in the February 2018 Letter was a reservation of the "right to seek reimbursement of any amounts incurred for defense and indemnity of non-covered claims."

After the February 2018 Letter was sent, the parties to the Underlying Action participated in at least two more mandatory settlement conferences ("MSCs"). The MSCs were attended by, amongst others, Unger and Allan Stem ("Stem"), Winstar's founding principle. Stern states that at these MSCs, Unger repeatedly informed him that Markel would "not abandon" Defendants, notwithstanding the February 2018 Letter. Ultimately, after one mistrial, a jury found Defendants liable and awarded the plaintiffs in the Underlying Action $1,100,000.00 in damages.

Over the course of the entire representation, Evanston incurred $83,227.52 in defense costs.

III. CONCLUSIONS OF LAW

The only remaining claim is for reimbursement of costs. Plaintiff is entitled to reimbursement of the costs it expended defending the Underlying Action if it can prove, by a preponderance of the evidence: (1) that the defense costs can be allocated solely to claims that are not even potentially covered by the Policy; and (2) that it reserved its right to recover the defense costs paid but never had an obligation to furnish. *See Buss v. Super. Ct.*, 16 Cal. 4th 35, 57–58 (1997); *see also Scottsdale Ins. Co. v. MV Transp.*, 36 Cal. 4th 643, 658 (2005) ("By law applied in hindsight, courts can determine that no potential for coverage, and thus no duty to defend, ever existed. If that conclusion is reached, the insurer, having reserved its right, may recover from its insured the costs it expended to provide a defense which ... it was never obliged to furnish.")

The first element is not at issue, as the Ninth Circuit held that this Court "correctly determined that Evanston did not have a duty to defend" the Underlying Action, as the alleged wrongful discrimination took place entirely before the Policy's coverage period. (9th Cir. Memo. at 3.) As to the second element, there is no dispute between the parties that Plaintiff sent, and Defendants received, the February 2018 Letter, which reserved Plaintiff's rights. The fact issue on remand, then, centers around the July 2017 Letter. If Plaintiff sent, and Defendants received, the July 2017 Letter, Plaintiff is unquestionably entitled to reimbursement of all its costs. By contrast, if Plaintiff cannot show that it notified Defendants of its reservation of rights in July 2017, Plaintiff may not be entitled to reimbursement of costs expended between July 2017 and February 2018, due to either waiver or estoppel.

A. Mailing and Receipt of the July 2017 Letter

Because the analysis ends if the Court finds that Plaintiff adequately reserved its rights in July 2017, the Court begins with that issue. The parties fiercely dispute whether Plaintiff sent the Letter, particularly because Plaintiff has no direct evidence of mailing. When faced with "inconclusive evidence[ ] whether or not [mailing and] receipt has actually been accomplished," courts apply the mailbox rule. *Schikore v. BankAmerica Supp. Ret. Plan*, 269 F.3d 956, 961 (9th Cir. 2001). The rule "provides that the proper and timely mailing of a document raises a rebuttable presumption that the document has been received by the addressee in the usual time." *Id.* When analyzing, the Court must review the evidence to "determine whether [the sending party] has presented sufficient evidence of mailing to invoke the presumption of receipt and, if so, whether the [receiving party] has presented sufficient evidence of non-receipt to rebut the presumption." *Id.* at 963. The Court analyzes each side's evidence in turn.

1. *Whether Plaintiff Presented Sufficient Evidence of Mailing to Raise the Mailbox Presumption*

***3** A party may use either direct or circumstantial evidence to raise the mailbox presumption, "including [evidence of] customary mailing practices used in the sender's business." *Turner v. Dep't of Educ. of Hawaii*, 855 F. Supp. 2d 1155, 1167 (D. Hawaii 2012); *see Lewis v. United States*, 144 F.3d 1220, 1222 (9th Cir. 1998) (analyzing circumstantial evidence to apply the mailbox rule). Although a strong presumption of receipt exists where a letter is sent by certified mail, that presumption weakens if the letter is sent via regular mail. *See Lupyan v. Corinthian Colleges, Inc.*, 761 F.3d 314, 319 (3d Cir. 2014). Nonetheless, a party can successfully establish that it has mailed a letter even under this weaker presumption. *See Mahon v. Credit Bureau of Placer Cty., Inc.*, 171 F.3d 1197, 1201 (9th Cir. 1999) ("The Credit Bureau's standard business practice established that the ... [n]otice was sent.")

Here, Plaintiff presented testimony by Shekar Adiga ("Adiga"), Senior Director at Markel who managed Markel's Management Liability Claims Team during the relevant time period. Adiga testified that between July 2017 and September 2018 (i.e., the claim period for the Underlying Action), his division at Markel had a specific custom and practice triggered by an insured's tender of a claim. Upon receipt, Markel would issue an initial letter, described as an acknowledgement and reservation of rights letter. Adiga would use Markel's computer system, Primus, to generate the letter, and then email the letter to the assigned claims manager. The claims manager would then print the letter, scan it, archive it in the claim file, and then immediately place a copy of the letter in the company's outgoing mail tray for postage via U.S. mail. In other words, according to Markel's custom, a piece of correspondence is only placed in the client's electronic claim file if it has actually been mailed. This custom extends to letters that Markel sent but were returned undeliverable; in such a scenario, both the original letter and the envelope of the undelivered mail item would be scanned into the claim file.

Adiga then testified that the claims file for the Underlying Action indicated that Unger, Defendants' claims manager, followed Markel's mailing custom upon receipt of the claim:

- Upon initial tender of the claim to Markel, Adiga generated the acknowledgement and reservation of rights letter and instructed Unger to send it. (*See* Trial Ex. 10 at 10-000001.)
- The letter was archived in the claim file on that day, which would only occur if Unger actually mailed the letter.
- When Unger accessed the claim file during her initial substantive coverage review in September 2017, she added a note stating that she had sent the letter as instructed. (*Id.*)
- Nowhere in the claim file does it indicate that the letter was returned undelivered. (*See generally id.*)
- Adiga testified that Unger had never once failed to send correspondence when she indicated successful mailing in the claims file.
- Finally, despite Plaintiff referencing the July 2017 Letter in the February 2018 Letter, Defendants never complained about not receiving the July 2017 Letter until the filing of the instant lawsuit.

There is, however, some evidence indicating that the letter may not have been sent, despite Markel's customs:

- While Unger confirmed that she sent the July 2017 Letter, she did so on September 11, 2017—two months after she was instructed to send the letter. According to Adiga, however, claim notes are not always contemporaneous with the action taken.
- The claim file contains no scan of the envelope that purportedly contained the July 2017 Letter, nor does it contain a screenshot of the Letter. Adiga testified that due to the high volume of claims that Markel receives, its custom is to scan in the letter only, not the ancillary mailing accoutrements.

***4** • Finally, although Unger was instructed to prepare a reservation of rights letter regarding punitive damages coverage on October 5, 2017, no such letter was sent until February 16, 2018. (*See* Trial Ex. 10 at 10-000008.) However, unlike the July 20, 2017 instruction to "[s]end" the acknowledgement letter, the October 5 instruction directed Unger only to "*[p]repare*" a reservation of rights letter on punitive damages (Trial Ex. 10 at 10-000009 (emphasis added).)

Plaintiff's evidentiary burden is preponderance of the evidence. And, although it is a close call, Plaintiff has shown by a sufficient margin that it is more likely than not that the July 2017 Letter was mailed. Adiga's testimony regarding Markel's custom and practice was comprehensive. Nothing in the claim file indicates that Unger failed to follow Markel's customs; rather, the claims letter was archived on July 20,

2017, and Unger acknowledged that she had sent the Letter as instructed. The countervailing evidence creates some doubt. But the reasonable explanations proffered lead the Court to find that Plaintiff carried its burden to show that it mailed the July 2017 Letter, thereby raising the mailbox presumption.

2. *Whether Defendants Presented Sufficient Evidence of Non-Receipt to Rebut the Mailbox Presumption*

When rebutting the mailbox rule's presumption of receipt, a purported recipient must do more than merely deny receipt. *See Chavez v. Bank of Am.*, 2011 WL 4712204, at *6 (N.D. Cal. Oct. 7, 2021) ("[I]n the ordinary common law context, when there is evidence of mailing, it can only be rebutted by actual evidence of non-receipt."). A party seeking to rebut the presumption must "describe in detail [its] procedures for receiving, sorting, and distributing mail, to show that these procedures were properly followed at the time when the document in question might conceivably have been delivered by the postal service, to provide evidence that [it has] conducted a thorough search for the document at the addressee's physical facility, and to establish that had the document been received around the time the [sender] asserted it was mailed, it would presently be at the location searched." *Schikore*, 269 F.3d at 964. While proper mailing of a document is naturally not proof-positive that it was received, the mere fact that the document cannot currently be found in the intended recipient's records is not dispositive proof of non-receipt. *See Jones v. United States*, 226 F.2d 24, 27 (9th Cir. 1955).

Defendants offered two witnesses to show they did not receive the July 2017 Letter: (1) Frankel, Defendants' retail insurance broker; and (2) Stern, Winstar's founding principal:

- Frankel testified that his office tendered Defendants' claim to a wholesale broker, Bill Stracio, on July 17, 2017. Stracio then sent the claim to Markel on the same date. (*See* Trial Ex. 120.) Nonetheless, Defendants informed Frankel in early September 2017 that Markel had yet to contact Defendants about whether Evanston would provide coverage. (*See id.*)

- Neither Frankel nor Bill Stracio currently have the July 2017 Letter in their files. Frankel testified that it is his custom to include every correspondence he sees in the relevant claim file.

- Defendants had moved office buildings prior to tendering the claim, and Frankel's office informed Markel of the new address on July 17, 2017. Nonetheless, Plaintiff repeatedly addressed correspondence to Defendants' older, outdated address.

***5** - Stern stated that it was Defendants' custom to sort through all incoming mail and immediately put it into either a physical or electronic file.

- Stern also testified that he had never seen the July 2017 Letter, even though Winstar officers searched through Winstar's files after the instant lawsuit was filed.

- Winstar employees have found all other correspondence with Plaintiff in either an electronic or physical file related to the claim.

Defendants' evidence, however, is undermined by credibility issues. For example, despite Frankel's insistence that he filed away all correspondence and documents related to the Claim, Plaintiff established that Frankel failed to include at least one email about the claim in his file.[3] (*See* Trial Ex. 121.) And although Frankel made much of the fact that Plaintiff continually sent correspondence to Defendants' outdated address, he muddied that assertion by stating that Defendants presumably forwarded mail from the old address to the new. Finally, the July 2017 Letter was (undisputedly) not addressed to Frankel or his company. Rather, it was addressed only to Rachel Teller at Winstar and Bill Stracio's wholesale insurance brokerage company. (*See* Trial Ex. 8.)

Stem's testimony was also problematic. His certitude regarding Defendants' mailing and filing practices was undermined by his admission that he was not entirely sure how the process worked. The fact that he had never seen the July 2017 Letter was weakened by his admission that he also had never seen the February 2018 Letter, a document that all parties agree was received by Winstar, until the day of the Court Trial. Finally, he stated that he was not involved in any aspect of the claims process aside from settlement conferences for the Underlying Action. Indeed, he was admittedly not aware of basic coverage facts, including that Plaintiff shared coverage of the claim with another insurer.

The credibility issues presented by Defendants' witnesses impel a finding that Defendants did not carry their burden to rebut the mailbox presumption. Almost all of the testimony

tending to show non-receipt was undermined by the fact that Frankel's document retention policies were called into question and that Stern's involvement with Defendants' day-to-day operations (particularly those related to insurance claims) was arms-length at best. Because Defendants did not successfully rebut the presumption of receipt raised by Plaintiff, the mailbox rule operates to legally establish that the "document was received by the addressee in the usual time." *Schikore*, 269 F.3d at 961.

3. *Conclusion*

Plaintiff has established that the July 2017 Letter was sent, and Defendants did not successfully carry their burden to show that it was not received. Because the Ninth Circuit already held that the reservation of rights language in the Letter was legally adequate and the Underlying Action was not covered by the Policy, Plaintiff has proved its reimbursement claim. Because the only named insured on the Policy is Winstar and not Manhattan Manor, because the Letters reserving Plaintiff's rights were sent only to Winstar, and because all electronic correspondence was between Plaintiff and Winstar, the Court holds that only Winstar is obligated to reimburse Plaintiff.

B. Waiver and Estoppel Defenses

***6** Although the Court's judgment rests on its finding that Plaintiff mailed the July 2017 Letter, the Court briefly addresses Defendants' affirmative defenses to note the following: even if Plaintiff had failed to show that the July 2017 Letter was sent, it would have been entitled to reimbursement.

When an insurance policy clearly provides no coverage for a claim, the insurer retains its rights unless it makes clear by its actions that it is providing an unconditional defense to the insured. *See Ringler Assocs. Inc. v. Maryland Cas. Co.*, 80 Cal. App. 4th 1165, 1189 (2000). In California, an insured who submits a claim not covered by the policy does not "automatically receive coverage," even where the insurer undertakes a defense without immediately reserving its rights. *Id.* Rather, the insured must show either "intentional relinquishment (for waiver)" or "reliance (for estoppel)." *Id.* At trial, Defendants failed to provide sufficient evidence to establish either.

1. *Waiver*

A party that asserts a waiver defense bears the burden of demonstrating that the insurer intentionally gave up its rights. *Ringler*, 80 Cal. App. 4th at 1188–89. Here, even assuming *arguendo* that Plaintiff could not show that it mailed the July 2017 Letter, it is clear that Plaintiff at least *intended* to do so. After all, upon receipt of the claim, Adiga instructed Unger in writing to "[s]end ack [sic] letter." (Trial Ex. 10.) The fact that Unger did not refer to the July 2017 Letter or its reservation language in subsequent conversations with Defendants is not evidence of contrary intent. *See ProCentury Ins. Co. v. Ezor*, 2011 WL 13217686, at *6 (C.D. Cal. July 25, 2011) ("Plaintiff's silence regarding coverage defenses is insufficient to establish an intentional waiver.")

2. *Estoppel*

To prove estoppel, Defendants must show that they detrimentally relied on the insurer's conduct. *Ringler*, 80 Cal. App. 4th at 1190, and they failed to do so. Stern testified in a conclusory manner that he "really relied" on statements by Unger that Plaintiff would "have [his] back." But he did not explain *how* he relied on them, or what detrimental action he took based on that reliance. And Plaintiff did "have [his] back": it defended the case to its conclusion.

Stem's testimony aside, Defendants argue that, but for Unger's representations, they would have accepted a $60,000 settlement offer made before the trial in the Underlying Action rather than proceed to trial. But that offer came from only one plaintiff, and Defendants did not show that the other plaintiff was willing to settle. Indeed, the opposite appears to be true, and it seemed highly likely that the Underlying Action would have gone to trial as to that remaining plaintiff. Further, Plaintiff's February 2018 Letter made clear that Defendants were not bound by Plaintiff's instructions and were free to settle the matter at their own expense. (Trial Ex. 9 at 9-000010.) Defendants therefore failed to show that they incurred additional defense costs because of their reliance on Plaintiff, and as such, Defendants failed to prove a critical element of their estoppel defense.

IV. CONCLUSION

For the foregoing reasons, the Court **ENTERS JUDGMENT** for Plaintiff. Plaintiff is entitled to reimbursement of costs

in the amount of $83,227.52. This Judgment is enforceable against Winstar only. Plaintiff must lodge a proposed judgment consistent with this Order by **April 22, 2022.**

***7 IT IS SO ORDERED.**

All Citations

Slip Copy, 2022 WL 1309843

Footnotes

1 This opinion serves as the findings of fact and conclusions of law required by Federal Rule of Civil Procedure ("Rule") 52. Fed. R. Civ. P. 52. Any finding of fact that actually constitutes a conclusion of law is adopted as such, and vice-versa.

2 The parties do not, and cannot, dispute that if the July 2017 Letter were sent, it would operate as a proper reservation of Plaintiff's right to reimbursement. The Ninth Circuit stated in its remand order that the July 2017 Letter "constitutes an adequate reservation of rights as a matter of law." (9th Cir. Memo. at 5 (*citing State Farm Fire & Cas. Co. v. Jioras*, 29 Cal. Rptr. 2d 840, 844 (Ct. App. 1994)).)

3 The email at issue was a conversation between Frankel's employee and Stracio's employee. However. Frankel was copied on the email, and he testified that it was his custom to include *all* emails (even those he was only copied on) in the file.

End of Document