Filed 10/22/18 Bulandi v. Southern California Permanente Medical Group CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

FIONA BULANADI et al., Plaintiffs and Appellants, v. SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP et al., Defendants and Respondents.	B280482 (Los Angeles County Super. Ct. No. BC609754)

Appeal from a judgment of the Los Angeles Superior Court, Richard Fruin, Judge. Reversed and remanded with directions.

WLA Legal Services, Inc. and Steven Zelig for Plaintiffs and Appellants.

Sheppard, Mullin, Richter & Hampton, Moe Keshavarzi, Scott Sveslosky, and David Dworsky for Defendants and Respondents.

INTRODUCTION

Fiona Bulanadi and her husband, Robert Bulanadi, appeal from a judgment of dismissal entered after the trial court sustained without leave to amend demurrers to the first amended complaint by Fiona's employer, Southern California Permanente Medical Group (Permanente Medical Group), several entities involved in the administration of Fiona's workers' compensation claim,[1] a claims adjuster, Sedgwick Claims Management Services, Inc., and Sedgwick's employee, Fia Kyono. The trial court ruled the Workers' Compensation Act barred all of the Bulanadis' causes of action. We reverse the judgment and direct the trial court to overrule the demurrer to all causes of action other than fraud. As to that cause of action, we direct the trial court to sustain the demurrer with leave to amend to allow the Bulanadis to plead, if they can, fraud with the requisite specificity.

---

[1] The first amended complaint named as defendants Kaiser Foundation Health Plan, Kaiser Permanente Medical Center, KPMC, and Kaiser. We refer to these entities collectively as "Kaiser." According to the defendants, Kaiser Permanente Medical Center and KPMC are not legal entities but the names of the buildings where Fiona worked.

FACTUAL AND PROCEDURAL BACKGROUND

According to the allegations of the first amended complaint, which on demurrer we accept as true (*Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1100), Permanente Medical Group induced Fiona to accept employment with the company and to remain employed there by repeatedly assuring her it would pay her workers' compensation benefits, if and when it became necessary. Representatives of Permanente Medical Group assured Fiona, orally and "in paperwork that was provided to her," that "if she was injured on the job that she could count on the prompt provision of worker[s'] compensation benefits."

On February 7, 2014 a car hit Fiona while she was walking on a footpath at a Kaiser facility. Fiona was on the footpath because Permanente Medical Group required its employees to "take walks and engage in invigorating activities during lunches and breaks."

Fiona filed a workers' compensation claim. Permanente Medical Group gave the claim to Kaiser Foundation Health Plan, which in turn assigned it to Sedgwick. Sedgwick sent Fiona a letter falsely identifying Kaiser Foundation Health Plan as her employer, purporting to deny her workers' compensation claim, but suggesting the claim was "still open." According to Fiona, the defendants investigated her workers' compensation claim in bad faith, looked for ways to avoid paying her benefits, and denied the claim for patently false reasons.

Fiona filed this action, alleging various causes of action against various defendants. Fiona sued Permanente Medical

Group for "damages for being willfully uninsured or not permissibly self-insured," breach of her employment contract, and unfair business practices.[2] She sued all of the defendants for fraud, negligent misrepresentation, and intentional infliction of emotional distress. She sued Sedgwick, Kyono, and Kaiser for interference with contract, and she sued Kaiser for premises liability negligence. Robert sued for loss of consortium as part of the premises liability negligence cause of action.

The defendants demurred to all of the Bulanadis' causes of action on the ground they were barred by the exclusive remedy provision of the Workers' Compensation Act (Lab. Code, §§ 3600, 3601, 3602).[3] The defendants also argued Fiona had not pleaded her fraud cause of action with the requisite specificity. The trial court took judicial notice Permanente Medical Group was permissibly self-insured, ruled workers' compensation was the Bulanadis' exclusive remedy, and sustained the demurrer to all causes of action on that ground. The Bulanadis timely appealed from the ensuing judgment.

---

[2] Fiona also alleged and withdrew a cause of action against Permanente Medical Group for breach of the implied covenant of good faith and fair dealing.

[3] Undesignated statutory references are to the Labor Code.

A. *The Trial Court Erred in Ruling on Demurrer the Bulanadis' Causes of Action Were Barred by Workers' Compensation Exclusivity*

1. *Workers' Compensation Exclusivity*

The primary issue raised by the demurrer was whether Fiona's employer had workers' compensation insurance or was permissibly self-insured when Fiona was injured. Fiona alleged Permanente Medical Group was willfully uninsured or not permissibly self-insured. If that allegation is true, her employer is not protected by workers' compensation exclusivity, and Fiona may bring a civil action for damages for her work-related injuries. If that allegation is not true, at least some of Fiona's causes of action may be barred by the Workers' Compensation Act.

Private employers must secure the payment of workers' compensation. (§ 3700; see *Taylor v. Department of Industrial Relations, etc.* (2016) 4 Cal.App.5th 801, 804 ["'[e]very employer except the state must secure the payment of workers' compensation"']; *Le Parc Community Assn. v. Workers' Comp. Appeals Bd.* (2003) 110 Cal.App.4th 1161, 1172 [""'[t]he price that must be paid by each employer for immunity from tort liability is the purchase of a workers' compensation policy"'"].) A private employer may secure the payment of workers' compensation in several ways, including purchasing insurance or securing a certificate of consent to self-insure from the Department of Industrial Relations (DIR). (§ 3700, subds. (a), (b); see *Taylor,* at p. 804 [a private employer may secure the payment of workers'

compensation "'either by obtaining insurance against liability from a duly authorized insurer or by securing from the [DIR] a certificate of consent to self-insure'"]; *Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 984 ["[s]ection 3700 provides an employer two methods to secure the payment of [workers'] compensation," purchase insurance or "obtain from a certificate of consent to self-insure"].) The duty to secure payment of compensation "must be discharged before the necessity for payment of any award arises." (*Self-Insurers' Security Fund v. ESIS, Inc.* (1988) 204 Cal.App.3d 1148, 1156; see *Bradshaw v. Park* (1994) 29 Cal.App.4th 1267, 1274 [the employer's duty to secure payment of workers' compensation "begins with the inception of the status as employer and does not depend upon the making of a claim"].)

Workers' compensation is generally the exclusive remedy for an employee injured in the course and scope of employment. (§§ 3600, subd. (a), 3602; see *King v. CompPartners, Inc.* (2018) 5 Cal.5th 1039, 1046 ["[b]y statute, California's workers' compensation system provides an injured employee's 'exclusive' remedy against an employer for compensable work-related injuries"]; *Marsh & McLennon, Inc. v. Superior Court* (1989) 49 Cal.3d 1, 5 ["the right to recover workers' compensation benefits is 'the sole and exclusive remedy' available to an injured employee against his employer"].) If, however, an employer is uninsured or not permissibly self-insured when an employee is injured, workers' compensation exclusivity does not bar the employee's action for damages against the employer. (§§ 3706, 3715, subd. (a); see *Privette v. Superior Court* (1993) 5 Cal.4th

689, 698 ["[t]o encourage employers to obtain workers' compensation insurance for their employees, the [Workers' Compensation] Act's 'exclusive remedy' clause does not apply in favor of employers that fail to obtain such insurance, and consequently they are not immune from tort liability for such injuries"]; *Chakmakjian v. Lowe* (1949) 33 Cal.2d 308, 310 ["[u]nder section 3706 . . . the injured employee may bring an action for damages in any case where his employer failed to carry compensation insurance"]; *Le Parc Community Assn. v. Workers' Comp. Appeals Bd.*, *supra*, 110 Cal.App.4th at p. 1172 ["section 3706 . . . authorizes an injured employee to pursue ordinary tort claims in the superior court against an employer who does not carry insurance or has not otherwise secured the payment of compensation"].)

An employee may pursue a workers' compensation claim and an action for damages concurrently (§§ 3706, 3715; *Le Parc Community Assn. v. Workers' Comp. Appeals Bd.*, *supra,* 110 Cal.App.4th at pp. 1173-1174 & fn. 10), at least until the employee determines whether the employer was insured or permissibly self-insured. (See *Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1178 ["the exclusivity rule will bar appellant's superior court action unless he can establish that [the employer] failed 'to secure the payment of compensation'"]; cf. *Campos Food Fair v. Superior Court* (1987) 193 Cal.App.3rd 965, 967 [employer was entitled to summary judgment in action under section 3706 where the employer provided a declaration stating "it had a workers' compensation policy in full force and effect at the time [the employee] was injured"].) An employee pursuing a

civil action must plead and prove the employer's failure to insure. (See *Doney v. Tambouratgis* (1979) 23 Cal.3d 91, 99, fn. 11 [it is the "[p]laintiff's obligation to plead and prove [a] violation of section 3700 by his [employer's] failure to carry workers' compensation insurance"]; *Campos Food Fair,* at p. 968 ["[i]n a statutory action under section 3706, it is the '*plaintiff's* obligation to plead and prove violation of section 3700 by his [defendant employer's] failure to carry workers' compensation insurance'"]; *Gibbs v. American Airlines, Inc.* (1999) 74 Cal.App.4th 1, 12 [a complaint alleging a work-related injury is subject to demurrer "unless it states additional facts that negate application of the exclusive remedy rule"]; *Rymer,* at p. 1178 ["[i]t is appellant's burden to show there was no coverage"].)[4]

2. *Judicial Notice*

In ruling on a demurrer, a trial court may take judicial notice of relevant matters. (Code Civ. Proc., § 430.30, subd. (a); *Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.* (2016) 1 Cal.5th 994, 1010; see *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924 [for purposes of reviewing a ruling on a demurrer, "[w]e may . . . consider matters subject to judicial notice"].) The court may disregard

---

[4] Defendants briefly argue, without citing any authority, that Fiona's allegation the defendants adjusted and denied her workers' compensation claim conflicts with her allegation Permanente Medical Group was uninsured. Because at this stage Fiona may both pursue workers' compensation benefits and a civil action against an uninsured employer, her allegations are in the alternative and do not conflict.

allegations in a pleading if they are contrary to judicially noticeable facts. (*Kalnoki v. First American Trustee Servicing Solutions, LLC* (2017) 8 Cal.App.5th 23, 38-39; *Los Globos Corp. v. City of Los Angeles* (2017) 17 Cal.App.5th 627, 632.)

A court may take judicial notice of a state agency's "[o]fficial acts." (Evid. Code, §§ 452, subd. (c), 459, subd. (a).) The court, however, may only take judicial notice of the truth of facts in a document that are "not reasonably subject to dispute." (*Id.*, § 452, subd. (h); see *Apple Inc. v. Superior Court* (2017) 18 Cal.App.5th 222, 241 ["judicial notice of a document does not extend to the truthfulness of its contents or the interpretation of statements contained therein, if those matters are reasonably disputable"]; *Richtek USA, Inc. v. uPI Semiconductor Corp.* (2015) 242 Cal.App.4th 651, 660 [""""[j]udicial notice of matters upon demurrer will be dispositive only in those instances where there is not or cannot be a factual dispute concerning that which is sought to be judicially noticed""""]; *C.R. v. Tenet Healthcare Corp.* (2009) 169 Cal.App.4th 1094, 1103-1104 ["the contents of a document may only be accepted ""where there is not or cannot be a factual dispute concerning that which is sought to be judicially noticed"""]."] We review the trial court's ruling on a request for judicial notice for an abuse of discretion. (See *CREED-21 v. City of San Diego* (2015) 234 Cal.App.4th 488, 520; *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 264.)

3. *The Trial Court Abused Its Discretion in Taking Judicial Notice Permanente Medical Group Was Self-Insured*

The trial court ruled on demurrer that Permanente Medical Group was self-insured by taking judicial notice of two documents: (1) a DIR certificate of consent to self-insure issued to Permanente Medical Group in 1965 and (2) a document in portable document format posted on the DIR website listing Permanente Medical Group, among others, as a self-insured employer. Because these documents did not indisputably establish Permanente Medical Group was self-insured, however, the trial court erred.

Even if the trial court could take judicial notice of the existence of Permanente Medical Group's 1965 DIR certificate to self-insure, the court could not take judicial notice Permanente Medical Group was permissibly self-insured on the date of Fiona's injury. A DIR certificate "may be given upon [the employer] furnishing proof satisfactory to the Director of Industrial Relations of ability to self-insure and to pay any compensation that may become due to his or her employees." (§ 3700, subd. (b).) The certificate is effective after the employer has submitted an application and all information or documents required by DIR regulations and the DIR has deemed the application complete. (Cal. Code Regs., tit. 8, § 15203.9, subd. (b)). The certificate is valid until revoked by order of the Director (Cal. Code Regs., tit. 8, § 15203.9, subd. (c)), who may revoke the certificate "at any time for good cause after a hearing" (§ 3702, subd. (a)).

The DIR certificate Permanente Medical Group submitted in support of its demurrer stated that, as of January 1, 1965, Permanente Medical Group "has complied with the requirements of the Director of Industrial Relations under the provisions of Section 3700 to 3705, inclusive, of the Labor Code of the State of California and is hereby granted this Certificate of Consent to Self-Insure." The certificate states, however, that it "may be revoked at any time for good cause," including for the employer's "impairment of solvency," inability to fulfill obligations, habitually inducing claimants to accept less than due compensation, discharging compensation in a dishonest manner, or noncompliance with applicable state regulations.

The Bulanadis did not allege when or how Permanente Medical Group applied for and obtained the certificate, how long it was effective, whether it was ever revoked, or whether it was in effect at the time of Fiona's accident. They did not allege that Permanente Medical Group was in compliance with its obligations and with state regulations. The defendants did not submit any evidence on these issues, nor, on demurrer, could they. (See *Minnick v. Automotive Creations, Inc.* (2017) 13 Cal.App.5th 1000, 1009 ["[i]n ruling on a demurrer, the court considers the allegations, and not the evidence"]; *Richtek USA, Inc. v. uPI Semiconductor Corp., supra,* 242 Cal.App.4th at p. 660 ["'[a] demurrer is simply not the appropriate procedure for determining the truth of disputed facts'"].) The certificate did not indisputably establish Permanente Medical Group was self-insured on February 7, 2014, when Fiona was injured. Thus, the trial court abused its discretion in taking judicial notice that

Permanente Medical Group was self-insured based on the January 1, 1965 certificate of consent to self-insure.

The undated document posted on the DIR website listing Permanente Medical Group as a self-insured employer fares no better on demurrer. The Bulanadis do not allege when the DIR created the document or posted it on the website, how often the DIR updates the information on its website, or the dates to which the document is applicable. The defendants did not submit any evidence on these issues, nor, on demurrer, could they. The document did not indisputably establish Permanente Medical Group was self-insured on February 7, 2014, when Fiona was injured. Thus, the trial court abused its discretion in taking judicial notice Permanente Medical Group was self-insured based on the document on the DIR's website. (See *Richtek USA, Inc. v. uPI Semiconductor Corp., supra,* 242 Cal.App.4th at p. 660 [a ""hearing on demurrer may not be turned into a contested evidentiary hearing through the guise of having the court take judicial notice of documents whose truthfulness or proper interpretation are disputable""]; *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 115 ["a court cannot by means of judicial notice convert a demurrer into an incomplete evidentiary hearing in which the demurring party can present documentary evidence and the opposing party is bound by what that evidence appears to show"].)

The cases cited by the defendants are distinguishable. In *Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743 the plaintiff "did not allege or argue in the trial court that the [judicially noticed] contract was inauthentic or otherwise

reasonably subject to dispute." (*Id.* at p. 746.) In *Shaw v. People ex rel. Chiang* (2009) 175 Cal.App.4th 577, where the court took judicial notice of information on the state Department of Transportation website describing the department's structure and defining "mass transportation," none of the parties disputed the accuracy of the information. (*Id.* at p. 606, fn. 10.) Unlike the plaintiffs in these cases, the Bulanadis vigorously dispute the accuracy of the information the trial court judicially noticed. And the Bulanadis correctly argue that nothing in either document allowed the court to take judicial notice Permanente Medical Group was in fact permissibly self-insured on the date of Fiona's accident. Therefore, the trial court erred in sustaining the demurrer on the ground that workers' compensation exclusivity barred the Bulanadis' complaint.[5]

---

[5] The defendants did not argue in their demurrer, and the trial court did not consider, whether the causes of action for premises liability, intentional infliction of emotional distress, or negligent misrepresentation failed to state claims for reasons other than workers' compensation exclusivity. Kaiser, Sedgwick, and Kyono did argue in the trial court and argue on appeal that, because "they are not parties to the insurance contract and thus, do not owe any duties to" the Bulanadis, they "cannot be held liable for alleged breaches of the insurance agreement to which they are not a party." The Bulanadis, however, did not sue Kaiser, Sedgwick, and Kyono (or any other defendant) for breach of the insurance contract.

B. *Fiona Did Not Plead Her Fraud Cause of Action with Sufficient Specificity, But She Is Entitled to Leave To Amend*

The elements of a cause of action for fraud are (1) a misrepresentation, (2) knowledge of its falsity, (3) intent to defraud or induce the plaintiff's reliance on the misrepresentation, (4) justifiable reliance, and (5) resulting damage. (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1255; *Geraghty v. Shalizi* (2017) 8 Cal.App.5th 593, 597.) "To withstand demurrer, facts constituting every element of fraud must be alleged with particularity." (*Kalnoki v. First American Trustee Servicing Solutions, LLC*, *supra*, 8 Cal.App.5th at p. 35; see *Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 182 ["to survive a demurrer to [a] complaint, [a plaintiff] must alleged fraud with specificity"].) "To assert a cause of action for fraud against a corporation, a plaintiff must allege the name of the person who allegedly made the fraudulent representation, his or her authority to speak, to whom he or she spoke, what was said and when it was said. [Citation.] General or conclusory allegations will not suffice to plead a cause of action for fraud." (*Kalnoki,* at p. 35; accord, *Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1166-1167; *Hamilton v. Greenwich Investors XXVI, LLC* (2011) 195 Cal.App.4th 1602, 1614.)

Fiona alleged that "representatives" of Permanente Medical Group, "personnel representing Permanente Medical Group," and "members of human resources" repeatedly told her "she could count on the prompt provision of workers' compensation

benefits." She even identified three of the individuals she claims made these statements (Jocelyn Guillermo, Jaime Reiter-Jackson and Howard Ammerman) and their apparent authority as managers or supervisors, although she also alleged there were "others according to proof." Fiona also alleged that she was induced to enter into the employment contract "because of representations and assurances of a representative of the human resource department of [Permanente Medical Group], whose name [p]laintiff cannot presently recall, but will be subject to further investigation and discovery," and that the representations were made "at the Kaiser facility in Woodland Hills, California." These allegations provided some of the details of her fraud cause of action.

But not enough. Fiona did not allege with sufficient specificity the identities of all of the individuals she claimed made the misrepresentations, what the individuals said, or when or how they made the statements she attributes to them. She alleged in only general terms the substance of the statements; i.e., that workers' compensation benefits would be promptly available. Fiona also did not specify the dates or times the partially-named, partially-unnamed individuals made the alleged misrepresentations, other than to allege generally that the individuals made the statements throughout her employment.

It is true, as the Bulanadis state, that the requirement of specificity is relaxed when the defendant has superior knowledge of the facts. (*Daniels v. Select Portfolio Servicing, Inc.*, *supra*, 246 Cal.App.4th at p. 1167; see *Tenet Healthsystem Desert, Inc. v. Blue Cross of California* (2016) 245 Cal.App.4th 821, 838 [""less

particularity is required when the facts lie more in the knowledge of the opposite party"""]; *Orcilla v. Big Sur, Inc.* (2016) 244 Cal.App.4th 982, 1008 ["'the requirement of specificity is relaxed when the allegations indicate that "the defendant must necessarily possess full information concerning the facts of the controversy" [citations] or "when the facts lie more in the knowledge of the'" defendant"].) But Fiona should know, perhaps even better than the defendants, which individuals made the alleged misrepresentations to her and when and how (i.e., orally or in writing) they made them. Because """there is a reasonable possibility that the defect can be cured by amendment""" (*Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.*, *supra*, 1 Cal.5th 994 at p. 1010), Fiona is entitled to an opportunity to amend to allege, if she can, the particulars of her fraud cause of action.

DISPOSITION

The judgment is reversed. The matter is remanded with directions for the trial court to vacate its order sustaining the demurrer without leave to amend and to enter a new order (1) sustaining the demurrer to the cause of action for breach of the implied covenant of good faith and fair dealing without leave to amend, (2) sustaining the demurrer to the cause of action for fraud with 20 days leave to amend, and (3) otherwise overruling the demurrer. The Bulanadis are to recover their costs on appeal.

SEGAL, J.

We concur:

ZELON, Acting P. J.

FEUER, J.