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INSURANCE

Bad Faith : Miscellaneous

SUBROGATION

LOS ANGELES COUNTY SUPERIOR COURT

Murray Co. v. Ulico Standard of America Casualty Company, No. BC130568, Downtown. Ricardo A. Torres. Bench trial: 1.5 days. Verdict/judgment: 7/16/96.

VERDICT/JUDGMENT: NONSUIT

Nonsuit judgment in favor of defendant and cross-complainant Ulico Standard of America Casualty Company aka USA Casualty and against plaintiff and cross-defendant Murray Co. Judgment in the amount of \$125,507 in favor of USA Casualty and against Murray Co. on its cross-complaint.

TRIAL COUNSEL

Plaintiff: Bruce J. Tackowiak, Roxborough, Pomerance & Gallegos, Los Angeles. Marc R. Levine, Levine & Eriksen, Orange.

Defendant: Brian H. Krikorian, Nemecek & Cole, Sherman Oaks. Craig G. Staub, Nemecek & Cole, Sherman Oaks.

FACTS/CONTENTIONS

According to defendant: Plaintiff claimed that USA Casualty acted in bad faith in the way it handled a workers compensation claim and in the way it pursued subrogation against the claim. The plaintiff was Murray Co., a plumbing and heating subcontractor. The defendant was Ulico Standard of America Casualty Company aka USA Casualty, a workers compensation insurance carrier.

Murray alleged that approximately six workers compensation claims filed were purportedly "mishandled" in bad faith by USA Casualty. Only one of those claims, the claim of Michael Rendich (Rendich), was the focal point for Murray's "bad faith" action. Rendich was injured in approximately October 1992 while operating a man-lift. At the time of the injury, Rendich was employed by Murray and had been on Murray's payroll. Murray, however, apparently had entered into an agreement with the general contractor, McCarthy Construction Company (McCarthy), to hire Rendich as an accommodation on this particular job. An entity known as Sheedy Hoist (Sheedy) owned and leased to McCarthy the man-lift which Rendich operated and which allegedly injured Rendich. Due to the fact that Rendich was employed by and on the payroll of Murray when he was injured, Rendich filed a workers compensation claim against Murray which Murray tendered to USA Casualty. USA Casualty ultimately entered into a compromise and release agreement with Rendich, thereby settling his claim for permanent injuries in the sum of \$39,800.

Rendich subsequently filed a civil suit against McCarthy and Sheedy alleging that they were third party tortfeasors who were responsible for his injuries. In an effort to subrogate and recover for Murray some of the monies which USA Casualty paid to Rendich to settle his claim, USA Casualty entered into a subrogation agreement with Rendich whereby USA Casualty would receive approximately one-third of any recovery obtained by Rendich against McCarthy and/or Sheedy. Sheedy, however, obtained a defense verdict and McCarthy prevailed on a motion for summary judgment. Since Rendich lost his civil actions against Sheedy and McCarthy, USA Casualty did not recover any monies by way of its subrogation efforts. Murray alleged that USA Casualty's conduct constituted "bad faith" since it failed to file a subrogation action directly against McCarthy and Sheedy for recovery and that McCarthy, who was supposed to be the actual employer, should have contributed to the loss.

USA Casualty contended that it acted in good faith in the handling of all of Murray's claims and especially the Rendich claim. USA Casualty contended that pursuant to the decision of *New Plumbing Contractors v. Nationwide Mutual Insurance* (1992) 7 Cal.App.4th 1088, 9 Cal.Rptr.2d 469 an insurer had no duty to pursue subrogation in the workers compensation context against a potentially liable third party. Notwithstanding the law in *New Plumbing*, USA Casualty contended that it aggressively and appropriately took all steps to subrogate against the claim of Rendich. USA Casualty asserted that it monitored Rendich's lawsuit, was in direct contact with Rendich's civil lawyer and ultimately entered into a sliding-scale agreement with Rendich in which USA Casualty would recover one-third of any recovery Rendich obtained from McCarthy or Sheedy. It was USA Casualty's position that this was an acceptable means by which it could subrogate the claim.

USA Casualty also contended that the evidence showed that Murray's own controller, John Odem, provided a declaration on behalf of McCarthy and against Rendich which was used to defeat Rendich's claim against McCarthy. As such, Murray essentially defeated its own claim. USA Casualty finally contended that under the law the liability among employers for a workers compensation obligation was based upon whose payroll the employee was on. Accordingly, since Rendich was on Murray's payroll, Murray would be primarily responsible for the claim and could not seek direct contribution from McCarthy.

USA Casualty filed a cross-complaint against Murray seeking to recover unpaid premiums. On or about April 1, 1992 Pacific States Casualty Company (PSCC) issued a policy of workers compensation insurance to Murray. The policy period was April 1, 1992 through March 31, 1993. From December 1992 through March 1993 Murray failed to pay the standard premium for the policy. As a result, the policy was canceled on or about March 31, 1993 for nonpayment. At the time of the cancellation, Murray owed approximately \$131,401 in unpaid premium. Subsequent thereto PSCC was

placed into receivership by the California Insurance Commissioner. On June 18, 1993 USA Casualty was assigned all of the assets of PSCC including PSCC's accounts receivable and the right to collect premiums under the workers compensation policies issued, including the policy issued to Murray. As a result of this and related transactions, USA Casualty also serviced the claims under the policy and had the right to prosecute in order to recover its basic premium as an account receivable.

The policy provided for the insurer to conduct a final audit and three retrospective premium calculations. After performing the final audit and the three retrospective premium calculations, it was determined that Murray was entitled to a credit of approximately \$42,788. As a result, after the three retrospective premium calculations and the final audit, the amount owed by Murray was decreased to approximately \$93,527, which was the amount sought in the cross-complaint. Murray did not dispute that it owed the premiums or that it knowingly failed to pay them when they were due. It contended, however, that USA Casualty was barred from recovering the outstanding premiums pursuant to Insurance Code section 1063.2 which prohibited the California Insurance Guaranty Association (CIGA) from obtaining additional funds from insureds of insolvent carriers to pay claims. USA Casualty claimed that the premiums represented account receivables which it had purchased from the insolvent estate.

CLAIMED INJURIES

NA

CLAIMED DAMAGES

According to defendant: Complaint: Damages were not articulated but represented at least an offset to the premium claimed by USA Casualty to be due. Cross-complaint: \$93,527 in premiums together with prejudgment interest and court costs.

SETTLEMENT DISCUSSIONS

According to defendant: USA Casualty made a CCP 998 demand for \$79,000. Murray offered to pay the sum of \$25,000 in exchange for an assignment of the Rendich claim and USA Casualty sharing in the cost and recovering from McCarthy. USA Casualty countered by offering to accept \$74,000 in exchange for a full assignment of the claim to Murray. Murray rejected this offer.

TRIAL EXPERTS

Not reported.

COMMENTS

According to defendant: The court's preliminary indication was that the New Plumbing decision precluded a bad faith action. Nonetheless, the court was swayed by the testimony of Murray's controller, John Odem, who testified that USA Casualty was never apprised that Rendich was hired as an accommodation to McCarthy Construction and further that

Odem had contributed testimony to McCarthy to defeat Rendich's third party claim. The court further found that the premiums owed were an account receivable and an asset purchased by USA Casualty and not barred by Insurance Code section 1063.2. Murray has appealed the judgment.