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DECISION LOOKS AT BAD FAITH IN LANDLORD'S INSURANCE POLICY

Mosley v. Pacific Specialty Insurance Company (2020) _ Cal.App.5th _ (Fourth Dist., Div. 2)

The Mosleys rented out a home they own in Cambria, which they insured with Pacific Specialty Insurance Company (PSIC). Without the Mosleys' knowledge, the tenant started growing marijuana in the home. To support his marijuana-growing operation, he re-routed the home's electrical system to steal power from a main utility line. This caused a fuse to blow, which started a fire that damaged the house. PSIC denied coverage, citing a provision in the policy that excluded any loss associated with "[t]he growing of plants" or the "manufacture, production, operation or processing of ... plant materials."

The Mosleys sued PSIC for denying coverage. The trial court granted summary judgment in PSIC's favor, finding that PSIC properly denied coverage because the Mosleys had control over their tenant's conduct. Reversed in part; affirmed in part. While the exclusion in the policy for losses "resulting from" the growing of plants applied to preclude coverage, the court agreed that the policy was void because it failed to provide the minimum level of coverage mandated by Insurance Code section 2070. That provision generally requires fire policies in California to be on the standard form set forth in Insurance Code section 2071, but permits insurers to deviate from the form "provided, that coverage with respect to the peril of fire, when viewed in its entirety, is substantially equivalent to or more favorable to the insured than that contained in such standard form fire insurance policy." (Ins. Code, § 2070.)

Section 2071 provides, in relevant part, that an insurer "shall not be liable for loss occurring ... while the hazard is increased by any means within the control or knowledge of the insured." The trial court found that the Policy was valid and enforceable because it provided "substantially equivalent" coverage to section 2070's standard form because, like the standard form, the Policy limits coverage for hazards increased by means within the insured's control or knowledge. The trial court thus found that PSIC was not liable for the loss caused by the fire because Lopez's marijuana growing

operation, as well as the electrical alterations he made to the property, increased a hazard "within the control or knowledge" of the Mosleys.

PSIC implicitly conceded that the Mosleys had no knowledge of the tenant's marijuana growing operation but argued that they had control over it because they "had control over what occurred in their home." No California decisions address what constitutes a "hazard ... increased by any means within the control ... of the insured" under section 2071. The court therefore looked to decisions of sister-state courts construing their states' version of section 2071.

Those decisions stand for the proposition that an insured increases a hazard "within its control" *only if* the insured is aware of the hazard or reasonably could have discovered it through exercising ordinary care or diligence. PSIC failed to cite, nor could the court locate, any authority that suggests a landlord-insured is strictly liable for a hazard created by the insured's tenant even if the insured is unaware of the hazard.

It is undisputed the Mosleys did not know about the tenant's marijuana growing operation or his altering the property's electrical system. There is likewise no evidence as to whether the Mosleys could have discovered the marijuana growing operation "by exercising ordinary care or diligence." On this record, the issue of whether the tenant's conduct was "within the control" of the Mosleys is a fact issue for the jury to decide because the record is silent as to what, if anything, the Mosleys reasonably could have done to prevent or discover Lopez's marijuana growing operation.

To the extent PSIC's interpretation of the Policy renders the Mosleys strictly liable for Lopez's conduct, the Policy is void under section 2071. By holding the Mosleys responsible for the damage Lopez caused, irrespective of the Mosleys' knowledge of his conduct or their responsibility for it, the Policy subjects the Mosleys to increased liability – and less favorable coverage that is not "substantially equivalent" to coverage provided under section 2071.

At oral argument, PSIC argued that the Mosleys had forfeited any argument that their tenant's conduct was not within

their knowledge or control because they did not address it in the trial court and their opening brief on appeal only addressed it in passing. But since the trial court's order granting summary judgment turned on its conclusion that the tenant's conduct was within the Mosleys' control, the court was required to address that issue.

The fact that the Mosleys did not oppose PSIC's argument that the tenant's conduct was within their control or knowledge did not mean the trial court properly granted summary judgment on that basis. A party is entitled to summary judgment only if it meets its initial burden of showing there are no triable issues of fact and the moving party is entitled to judgment as a matter of law. That is true even if the opposing party fails to file any opposition to the motion. "For the reasons explained above, we conclude PSIC failed to meet its initial burden because an issue of fact remains as to whether [the tenant's] conduct was within their 'control or knowledge.'" PSIC's motion for summary judgment therefore should have been denied – regardless of what the Mosleys did or did not argue in their opposition – because the burden never shifted to them.

Although this finding required reversal of the summary judgment on the breach-of-contract claim, the court affirmed the dismissal of the bad-faith claim. It concluded that even if its interpretation of the policy was wrong, PSIC acted reasonably in denying the Mosleys' claim. Because there was no clear, controlling California law that establishes whether PSIC properly denied coverage – an issue that turns on whether the tenant's conduct was within the Mosleys' control, which remains to be determined. Under the unique circumstances presented and the lack of guiding California precedent, the court concluded that PSIC reasonably construed its policy to deny coverage.

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