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See Fed. Rule of Appellate Procedure 32.1
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decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals, Ninth Circuit.

Scott G. KELLY; John T.
DeWald, Plaintiffs-Appellants,
v.
STARR INDEMNITY & LIABILITY COMPANY,
a Texas Corporation, Defendant-Appellee.

No. 17-56334
|
Argued and Submitted March
7, 2019 Pasadena, California
|
Filed April 29, 2019

Synopsis

Background: Insureds brought action against directors and officers (D&O) liability insurer to recover for breach of contract by failing to defend insureds against investor's claim to recover on promissory notes. The United States District Court for the Southern District of California. No. 3:15-cv-02900-JM-AGS, Jeffrey T. Miller, J., 2017 WL 3457145, entered summary judgment in favor of insurer. Insureds appealed.

[Holding:] The Court of Appeals held that factual issues as to whether investor's demand letter represented claim for wrongful act and whether insured made material misrepresentation on policy application precluded summary judgment.

Affirmed in part, reversed in part, and remanded.

West Headnotes (1)

[1] Federal Civil Procedure

Genuine issues of material fact as to whether investor's demand letter to collect on promissory notes represented claim for wrongful act and whether insured made material misrepresentation on insurance policy application precluded summary judgment for directors and officers (D&O) liability insurer that claim was first made against insured prior to policy period.

Cases that cite this headnote

Attorneys and Law Firms

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Appeal from the United States District Court for the Southern District of California, Jeffrey T. Miller, District Judge, Presiding, D.C. No. 3:15-cv-02900-JM-AGS

Before: M. SMITH and OWENS, Circuit Judges, and SETTLE, * District Judge.

MEMORANDUM **

***1** Plaintiffs-Appellants Scott G. Kelly and John T. DeWald ("Plaintiffs") appeal the district court's order denying their motion for summary judgment and granting the motion for summary judgment filed by Defendant-Appellee Starr Indemnity & Liability Company ("Starr"). We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm in part and reverse in part.

Plaintiffs operated a real estate investment and development firm that created numerous subsidiary entities to manage projects, assets, and liabilities. One of their investors, Kenneth Brehnan, loaned Plaintiffs' companies approximately $ 359,875 and received promissory notes in exchange. On August 12, 2010, Brehnan emailed Plaintiffs a demand letter (the "Brehnan

Demand") in which he provided "a reminder of Notes that are due" and conveyed the following warning: "I expect all of these Notes to be paid off at [the] beginning of September 2010.... I would like to try not to proceed with legal remedy ... as being recommended by my legal team...." Importantly, Brehnan demanded payment on contracts with the companies and did not allege or assert misconduct by Plaintiffs as directors and officers of those companies.

In May 2011, DeWald applied for a claims-made directors and officers insurance policy (the "Policy") with Starr. Based on the application, Starr issued the Policy effective May 11, 2011 to May 11, 2012. In November 2011, Brehnan's attorney sent a more detailed demand letter and warned that Brehnan may bring claims of "breach of contract, breach of fiduciary duties, fraud, and securities fraud" against Plaintiffs. Plaintiffs contacted Starr to obtain defense. Starr, which at that time did not know of the Brehnan Demand, agreed to defend the claim subject to a reservation of rights while it investigated. In April 2012, Brehnan provided Plaintiffs with a draft complaint. In August 2012, he formally filed suit. Both complaints specifically mentioned the Brehnan Demand. After reviewing the April draft complaint, Starr disclaimed coverage, a position it reaffirmed after reviewing the finalized complaint that was filed in August. Plaintiffs settled with Brehnan for $ 350,000, and subsequently filed suit against Starr, alleging breach of contract and negligence and claiming that Starr had a duty to defend them in the action against Brehnan. On opposing motions for summary judgment, the district court concluded that the Brehnan Demand was a claim first made prior to inception of the Policy and therefore Starr had no duty to defend or indemnify the claim.

"Interpretation of an insurance policy is a question of law and follows the general rules of contract interpretation." *MacKinnon v. Truck Ins. Exch.*, 31 Cal.4th 635, 3 Cal.Rptr.3d 228, 73 P.3d 1205, 1212 (2003). "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." Cal. Civ. Code § 1638. The Policy provides indemnification for losses "arising from a Claim first made during the Policy Period ... against such Insured Person for any Wrongful Act...." The Policy defines a "wrongful act" as "any actual or alleged act, error, omission, neglect, breach of duty, breach of trust, misstatement, or misleading statement by [Plaintiffs]." Under this clear language, the district court erred in concluding that the Brehnan Demand constituted a claim made for a wrongful act. Instead, Brehnan demanded money owed pursuant to contracts with Plaintiffs' companies, which at most establishes a question of fact whether the claim would be covered by the Policy. Therefore, we reverse the district court's grant of summary judgment in favor of Starr.

***2** "In reviewing decisions of the district court, we may affirm on any ground finding support in the record. If the decision below is correct, it must be affirmed, even if the district court relied on the wrong grounds or the wrong reasoning." *Jackson v. S. Cal. Gas. Co.*, 881 F.2d 638, 643 (9th Cir. 1989) (citations omitted). Starr argues that we should uphold the district court's judgment because (1) Plaintiffs made a material misrepresentation in the application for insurance and (2) multiple exclusions bar coverage. Starr, however, fails to show that any one of these theories is dispositive as a matter of law based on the current record. For example, because it is unclear whether the Brehnan Demand constituted a claim that would be covered by the Policy, we cannot conclude that DeWald made a material misrepresentation when he failed to disclose it in the application despite being asked about circumstances that might lead to potential claims. Brehnan alleged that Plaintiffs created fake companies to hide money from investors and that they repeatedly misrepresented their companies' financial affairs to influence additional investments—alleged activities that predate the Policy and would form a stronger basis for a finding of material misrepresentation —but the record before us does not establish these facts such that we can conclude that Starr has presented an adequate ground to uphold the district court's decision as a matter of law.

Finally, we also conclude that Plaintiffs have failed to establish that they are entitled to a ruling on the duty to defend. If Starr obtains evidence of nonexistent companies or material misrepresentations that predate the Policy, then Starr could potentially establish an entitlement to equitable reformation of the contract to exclude any claim made by Brehnan. *See, e.g.*, *Resure, Inc. v. Superior Court*, 42 Cal.App.4th 156, 49 Cal.Rptr.2d 354, 357–58 (1996) ("It has long been held that rescission is not the sole remedy for an insurer who has been subjected to misrepresentations and concealment of material facts by an applicant."). We therefore affirm the district court's denial of Plaintiffs' motion for summary judgment and

find no reason to enter either full or partial judgment for either party.

Each party shall bear its own costs on appeal.

AFFIRMED IN PART; REVERSED IN PART; and REMANDED.

All Citations

--- Fed.Appx. ----, 2019 WL 1895825

Footnotes

* The Honorable Benjamin H. Settle, United States District Judge for the Western District of Washington, sitting by designation.

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.