

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

ROGER HESS,

Plaintiff and Appellant,

v.

DOUGLAS LAMBERT et al.,

Defendants and Respondents.

B133978

(Super. Ct. No. BC189556)

COURT OF APPEAL - SECOND DISTRICT

F I L E D

MAY 31 2001

JOSEPH A. LANE

Clerk

Dec. 11, 2001

APPEAL from judgments of the Superior Court of Los Angeles County, Edward M. Ross, Judge. Affirmed.

Horton Barbaro & Reilly, Ned P. Reilly; Even, Crandall, Wade, Lowe & Gates, James L. Crandall, Rosemarie B. Heard and Nikola J. Bates for Plaintiff and Appellant.

Barbanel Treuer & Dantzler, Alan H. Barbanel, Stephen D. Treuer, Stephen V. Kovarik; Bright & Powell and Gary Bright for Defendant and Respondent Douglas Lambert.

Wilson, Kenna & Borys, Lawrence Borys and Charles N. Hargraves for Defendant and Respondent General Star National Insurance Company.

This is a breach of contract action against an insurance broker and a bad faith action against an insurance company. The trial court sustained demurrers without leave to amend and dismissed the action as to both defendants. We affirm.

FACTS

A. The Underlying Action

In 1993, Roger Hess owned the vessel *Charisma*, which he chartered to scuba diving groups. Through his insurance broker (Douglas Insurance Group), Hess purchased a "Marine Policy of Insurance" to cover "third party liabilities" arising while the boat was "being used as a passenger charter vessel." The policy was issued by C.E. Heath Compensation and Liability Insurance Company (Heath). While the Heath policy was in effect, the *Charisma* was chartered by the Open Water Habitat Marine School. While the *Charisma* was chartered by the School, Susan Gamet was injured on board the *Charisma* (more specifically, while reboarding the boat after scuba diving).

In 1994, Gamet sued Hess and the School (and an instructor at the school) in Orange County Superior Court. Hess tendered the defense of Gamet's action to Heath and to the School's insurer, General Star National Insurance Company. Heath denied coverage, pointing to an express "scuba diving exclusion" in Hess's policy. General Star, in turn, refused to defend Hess on the ground that he was not a named insured or an additional insured under the School's policy.

In 1997, Gamet's claims against the School were resolved by the School's motion for summary judgment made on the ground that Gamet had signed comprehensive releases and assumption of the risk documents that established

a complete defense to her lawsuit. Later that year, Gamet's claims against Hess were resolved by a verdict in favor of Hess.

B. The Coverage and Bad Faith Action

In 1998, Hess sued Douglas (his broker), alleging that the broker had breached an oral contract when he sold him a policy that excluded coverage for Hess's primary business activity (charters for scuba diving groups);¹ General Star (the School's insurer), alleging breach of contract and breach of an implied covenant and bad faith on the theory that Hess was an "insured" under the School's policy; and Heath (his own insurer), alleging that it had wrongly denied coverage. At some point, Hess settled with Heath and (Heath is not a party to this appeal).

Following a series of demurrers by Douglas and General Star, Hess filed several amended complaints. Ultimately, the trial court sustained demurrers without leave to amend by both defendants, to the third amended complaint as to Douglas, and to the fourth amended complaint as to General Star. Hess appeals from the judgments of dismissal thereafter entered.

DISCUSSION

I.

Douglas's demurrer to Hess's third amended complaint was made and sustained on the ground that Hess's claim for breach of an oral contract was

¹ Douglas Insurance Group and Douglas Lambert, doing business as Douglas Insurance Group, are included in our references to Douglas.

barred by the two-year statute of limitations. Hess contends that ruling was wrong. We disagree.

Generously construed, Hess's pleading alleges that he "entered into contracts" with Douglas, pursuant to which Douglas agreed to "provide [Hess] with a Marine Insurance Policy, including third party personal injury liability coverage [for scuba divers]," and that Douglas breached those contracts by selling Hess a policy that excluded coverage for Hess's primary business activity. On demurrer, Douglas claimed the breach, if there was one, occurred in July 1993 (when Hess purchased the Heath policy); and that Hess was injured no later than October 1994 (when Heath refused to defend the Gamet action and denied coverage, as a result of which Hess incurred fees and costs). It follows, claimed Douglas, that Hess's complaint -- filed in April 1998 -- was untimely. The trial court agreed with Douglas and so do we.

We reject Hess's contention that his claim was saved by the doctrine of equitable tolling recognized in *Lambert v. Commonwealth Land Title Ins. Co.* (1991) 53 Cal.3d 1072. *Lambert* -- an insured's action against his insurer alleging a wrongful refusal to defend a third-party action -- is expressly limited to claims against *an insurer* for breach of the *continuing* duty to defend imposed under an insurance policy *until the underlying third-party action is concluded* -- because it would be too "harsh" to require an insured to defend the underlying action and, at his own expense, simultaneously prosecute a separate action against the insurer. (*Id.* at pp. 1078-1079.) Douglas was the broker, not the insurer, and Hess does not allege otherwise. A broker does not have a duty to defend. Hess's claim against Douglas is for breach of a contract to procure an

insurance policy, not breach of any duty arising from the insurer-insured relationship.

In *Jones v. Hyatt* (Md. 1999) 741 A.2d 1099, the Court of Appeals of Maryland rejected a virtually identical claim and refused to extend the doctrine of equitable tolling to cover an insurance broker: "A liability insurer's contractual duty to defend an insured . . . is a continuing duty that runs throughout the course of the underlying tort litigation against the insured. . . . Moreover, a breach of the duty to defend can be cured at any time prior to termination of the underlying litigation. . . . [¶] In contrast, a contract to obtain insurance is ordinarily breached immediately upon the agent's or broker's failure to procure the insurance in a timely manner. The promise of the agent or broker is not to provide a defense or to pay a judgment. Instead, the promise is to obtain an insurance policy, and the breach occurs when the agent or broker does not timely obtain that policy. This breach cannot be cured after the insurance applicant commits a tort for which he or she rightfully believes that insurance coverage has been obtained. The consequence of the agent's failure to procure the insurance prior to the accidental tort is that the client will not be insured. There will be no insurer-furnished defense or indemnity." (*Id.* at pp. 1104-1105.)

We summarily reject Hess's claim that he had a *written* contract with Douglas and, therefore, four years within which to institute suit. First, Hess did not allege a written contract. Second, the "broker of record" letter that Hess says is sufficient to constitute a written contract is a mere invitation from the broker, and nothing more than a "to whom it may concern" notice to prospective insurers of the procedure for submitting insurance proposals. (*Fincke v. United*

States (Ct. Cl. 1982) 675 F.2d 289, 294.) The letter was nothing more than a notice to the world that Douglas had been authorized by Hess to shop for insurance on Hess's behalf; it cannot constitute a contract because it does not express the obligation sued upon. (*Murphy v. Hartford Acc. & Indem. Co.* (1960) 177 Cal.App.2d 539, 543.)

II.

In his fourth amended complaint, Hess attempted to allege two causes of action against General Star -- breach of contract and breach of an implied covenant of good faith and fair dealing -- both resting on a claim that Hess was an additional named insured under the policy that General Star had sold to the School. General Star's demurrers to both causes of action were sustained on the ground that the language of its policy defeated Hess's claim. Those rulings were correct.

The General Star policy (which was attached and incorporated into Hess's complaint) provided: "We will pay those sums that the insured becomes legally obligated to pay as damages because of any 'occurrence' that is a result of any negligent act, error or omission in the rendering or failure to render 'professional services'" "Professional services" were defined as "[t]hose services rendered by certified instructors, assistant instructors, divemasters, snorkel or swim instructors." Quite plainly, "professional services" did not include the owner of a vessel chartered to the School.

Under the heading, "Who Is An Insured," the policy provided: "Each of the following is an insured under this insurance to the extent set forth below: [¶] (A) The named insured shall be the organization stated in the declarations of the

policy; and [¶] (B) Anyone to whom a certificate of insurance has been issued under this policy; [¶] (C) Any additional insured named by endorsement or certificate to this policy. It is hereby understood and agreed that this policy is extended to include the interest of additional insureds, solely, however, with respect to their interest in activities conducted by the named insured hereunder, but shall not operate to increase the limit of liability hereunder." An endorsement amended the "named insured" to include "all instructors that are added by certificate and included in monthly [bureau] reports." Hess does not claim to fit within any of these categories. He does not allege that he was an instructor, a certificate holder, or someone included in the referenced reports.²

Hess's argument ignores the policy. He simply claims that because General Star provided a defense to an individual affiliated with the school (Michael Pratt), and because Pratt and Hess were both defendants in Gamet's personal injury action, it should follow that both of them were covered. Not surprisingly, no authority is cited for this proposition. We know of none.

The demurrers were properly sustained.

² At oral argument, Hess's lawyer relied on a "certificate of insurance" to show that Hess could be an "additional insured" under the General Star policy. Counsel's reliance is misplaced. The effective date of the certificate post-dates the accident by more than a year -- and there are no allegations to suggest there was a similar certificate in effect in 1993.

DISPOSITION

The judgments of dismissal are affirmed. Respondents are awarded costs of appeal.

NOT TO BE PUBLISHED.

VOGEL (MIRIAM A.), J.

We concur:

SPENCER, P.J.

MALLANO, J.