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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

ANNE MARSELIS, Plaintiff and Appellant, v. ALLSTATE INSURANCE COMPANY, Defendant and Respondent.	
ANNE MARSELIS, Plaintiff and Respondent, v. ALLSTATE INSURANCE COMPANY, Defendant and Appellant.	A100860, A101787, & A102439 (Alameda County Super. Ct. No. 8024730)

The statute of limitations for actions on insurance claims is equitably tolled from the time the insured notifies the insurer of the claim until coverage is denied. (*Prudential-LMI Com. Insurance v. Superior Court* (1990) 51 Cal.3d 674, 693 (*Prudential-LMI*).) In the case before us, an insured contends the tolling rule applies even when a claim is paid, unless the insurer gives the insured an unequivocal written statement that the claim is closed. We reject this effort to extend the rule stated in *Prudential-LMI*. No court has

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts 2 and 3.

endorsed such an approach, and it would be antithetical to the rationale of the equitable tolling rule.

These related appeals, which we have consolidated, arise from a coverage dispute between Anne Marselis and her homeowner's insurer, Allstate Insurance Company. In the first appeal (A100860), Marselis challenges the trial court's finding that the statute of limitations barred her claim against Allstate. Marselis contends the statute was equitably tolled under the rule established in *Prudential-LMI*. Alternatively, she argues Allstate was equitably estopped from relying on the statute. She further claims the court erred by summarily adjudicating her claim for punitive damages and denying her motion for a new trial.

In the second appeal (A101787), Marselis disputes the trial court's award of attorney fees to Allstate. The third appeal (A102439) is by Allstate, from an order granting Marselis's motion to tax costs.

In the published portion of our opinion, we affirm the judgment in favor of Allstate. In the unpublished portion, we affirm the court's orders on fees and costs.

DISCUSSION

1. *The Statute of Limitations Issue*

We take the facts from the court's statement of decision, which Marselis does not dispute. Marselis correctly notes that her argument on equitable tolling can be resolved without an extended examination of the facts. After the Loma Prieta earthquake on October 17, 1989, Marselis made a claim on which Allstate paid $90,633.75 for structural damage and $1,521 for engineering services. The claim was limited to damage to the roof and chimney of Marselis's house. The payments were made on February 25, 1990 as the result of an agreement Allstate reached with Marselis and her contractor.

Marselis applied to the Small Business Administration (SBA) for a loan in 1990, informing the SBA that her insurance claim had been resolved and she expected no further payments from Allstate. However, after hearing about generous insurance

settlements following the Oakland Hills fire in October 1991, Marselis asked Allstate to reopen her file on November 24, 1992. After a court trial limited to the statute of limitations defense, the court concluded the one-year statute of limitations for an action seeking recovery on an insurance claim expired no later than February 25, 1991. (Ins. Code, § 2071 [one-year limitation]; see also Ins. Code, § 2070 [limitation must be included in all fire insurance policies].)

In *Prudential-LMI*, our Supreme Court ruled that the one-year limitations period, which begins running at the "inception of the loss" (Ins. Code, § 2071), is equitably tolled "from the time an insured gives notice of the damage to his insurer, pursuant to applicable policy notice provisions, until coverage is denied." (*Id*., 51 Cal.3d at p. 693.) The reason for the tolling rule is to avoid penalizing the insured for the time consumed by the insurer investigating the claim, while preserving the " 'central idea of the limitation provision [that] an insured will only have 12 months to institute suit.' " (*Ibid*., quoting *Peloso v. Hartford Fire Insurance Co*. (1970) 267 A.2d 498, 501-502.)

Marselis argues that since coverage was not denied on her original claim, and she did not receive an unequivocal written statement from Allstate informing her the claim was closed, the statute was tolled even after she received payment on the claim. This reading of *Prudential-LMI* is irreconcilable with the reasons underlying the tolling rule. Since no claim was being investigated by Allstate after it paid Marselis, she was in no sense "penalized" for time consumed by her insurer's investigation. And the "central idea" of the limitations period would disappear entirely if an insured could preserve the right to bring suit for an indefinite period after receiving full payment on her claim.

Nothing justifies judicial extension of the equitable tolling rule to create a right to reopen claims that have been paid. Marselis cites no law suggesting the tolling rule applies in her situation. She relies on *Aliberti v. Allstate Ins. Co.* (1999) 74 Cal.App.4th 138, but there the court merely reaffirmed the necessity of a written *denial* of a claim. (*Id*. at p. 146.) She also contends her position is supported by *Campanelli v. Allstate Ins. Co.* (C.D.Cal 2000) 85 F.Supp.2d 980 (reversed on other grounds by *Campanelli v. Allstate Ins. Co.* (9th Cir. 2003) 322 F.3d 1086). There, Allstate did provide written

notice that the claim was closed after payment, but the court never indicated such notice was legally required. (*Campanelli v. Allstate Ins. Co.*, *supra*, 85 F.Supp.2d at pp. 981, 984.) It observed: "As a practical matter, the one-year period begins to run from the date the insurer denies coverage or settles the claim." (*Id*. at p. 984.) Marselis fails to convince us that written notice is required to confirm a settlement, as it is for denial of a claim. After settlement, there is no pending claim to which the tolling rule might apply. Here, there was no question of partial settlement; the court noted that Marselis had "represented to the SBA, under threat of civil and criminal penalties, that her claim was no longer pending by April 1990 and she expected no further recovery from Allstate."

If an insured is unsatisfied with a settlement, the tolling of the limitations period during the time spent by the insurer investigating the claim provides the insured with ample opportunity to press a further claim. We also note that if an insured has any additional bona fide claims that were not discovered before the expiration of the limitations period governing an initial claim, the right to bring suit is preserved by the delayed discovery rule discussed in *Prudential-LMI*. (51 Cal.3d at pp. 686-687.)

Marselis further contends the trial court erroneously rejected her equitable estoppel argument. However, Marselis fails to identify any conduct by Allstate during the limitation period that might support a finding of estoppel. "[C]onduct by the insurer after the limitation period has run — such as failing to cite the limitation provision when it denies the claim, failing to advise the insured of the existence of the limitation provision, or failing to specifically plead the time bar as a defense — cannot, as a matter of law, amount to a waiver or estoppel. [Citation.]" (*Prudential-LMI*, *supra*, 51 Cal.3d at p. 690, fn. 5.) The trial court rejected, on credibility grounds, Marselis's testimony that an Allstate adjuster (who died before her action was filed) told her the February 1990 payments were only partial. The court noted that all the other contemporaneous evidence contradicted the claim of partial payment.

Marselis does not contest these findings. Instead, she contends the court erred by ruling that Allstate owed her no duty to inform her of the statute of limitations or its intent to rely on the statute. However, the court's finding on this point was clearly

correct (whether or not the court properly determined that Allstate representatives *did* inform Marselis of the statute in November and December of 1990, a finding Marselis disputes for the first time in her reply brief). Marselis had no earthquake damage claim pending with Allstate for over a year after her original claim was paid. In that circumstance, Allstate could hardly have been expected to advise her of the limitations period for an action on her policy, or of its intent to invoke the statute.

The judgment for Allstate on its statute of limitations defense must be affirmed. Consequently, we need not address Marselis's punitive damages argument. Nor do we separately address her challenge to the denial of her motion for a new trial, because she raises no argument in support of that challenge other than those we have rejected above.

2. *The Attorney Fee Award*

Allstate served Marselis with a set of requests for admissions, all of which she denied. Allstate filed a post-trial motion for an award of attorney fees under Code of Civil Procedure section 2033, subdivision (o). After hearing argument and receiving several rounds of briefing, the trial court awarded Allstate $157,000 of the $300,251.50 it had requested. Marselis disputes the award on various grounds, none of them meritorious.

Code of Civil Procedure section 2033, subdivision (o) provides: "If a party fails to admit the genuineness of any document or the truth of any matter when requested to do so under this section, and if the party requesting that admission thereafter proves the genuineness of that document or the truth of that matter, the party requesting the admission may move the court for an order requiring the party to whom the request was directed to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make this order unless it finds that (1) an objection to the request was sustained or a response to it was waived under subdivision (*l*), (2) the admission sought was of no substantial importance, (3) the party failing to make the admission had reasonable ground to believe that that party would prevail on the matter, or (4) there was other good reason for the failure to admit."

We review the trial court's findings on whether fees are warranted, and the amount of a fee award, for abuse of discretion. (*Brooks v. American Broadcasting Co.* (1986) 179 Cal.App.3d 500, 508.) Allstate's motion was based on Marselis's refusal to admit 12 requests. The court based its award on 10 of these.

Request No. 9 asked Marselis: "Admit you did not commence this action within one year of the Loma Prieta earthquake." The earthquake was October 17, 1989; the complaint was filed August 25, 1998. Marselis contends she had a good faith, reasonable belief that she did file her complaint within a year of the earthquake, because she thought the year was tolled between the time she made her claim and the time Allstate unequivocally denied the claim in writing, on August 26, 1997. Even if this belief were correct as a matter of law, it would not have justified Marselis's denial. The statute of limitations may be tolled, but not the passage of time. Marselis argues that if this view is taken, the request was "of no substantial importance." We disagree — the timing of Marselis's filing was centrally important to Allstate's statute of limitations defense. (See *Brooks v. American Broadcasting Co.*, *supra*, 179 Cal.App.3d at p. 509 [to be "of substantial importance," request should have "some direct relationship to one of the central issues in the case"].)

Request No. 14 asked Marselis: "Admit you had no communication with any Allstate employee concerning your Loma Prieta earthquake claim between September 15, 1991 and September 15, 1992." Marselis refers us to evidence of a number of communications that she admits were outside the period referred to in the request. She argues this "demonstrated a pattern of frequent communication." This is hardly sufficient to establish a good faith basis for denying the request.

Marselis further claims she anticipated her own testimony at trial would support the denial. However, the testimony to which she refers us is extremely sketchy. It alludes to her contacts with Max Bond, the adjuster who had died before trial. In its statement of decision, the court said it viewed her testimony regarding these contacts "with grave skepticism," noting it was "[u]ncorroborated," "lacking in credibility," "evasive and unresponsive." The testimony on which she relies also refers vaguely to

contacts with other Allstate employees whose names she was unable to remember. The court noted that Marselis failed to produce any notes, correspondence, or telephone records to document these contacts, and concluded her "testimony is not credible." This testimony fails to provide "reasonable ground to believe that that party would prevail on the matter" as contemplated by Code of Civil Procedure section 2033, subdivision (o).

Marselis also contends Request No. 14 lacked "substantial importance" because it was unrelated to the equitable tolling issue. However, she fails to support this claim with any argument. Clearly, the request was relevant to the issues of whether Marselis had a pending claim, and whether Allstate made statements that might support her estoppel and waiver arguments.

Marselis next contests the court's findings on Requests 15 through 19:

"Admit you made no claim to Allstate before October 1, 1992 for Additional Living Expense (as that term is used in your Allstate Deluxe Homeowners Policy at issue herein) resulting from the Loma Prieta Earthquake." (Request No. 15.)

"Admit you made no claim to Allstate before October 1, 1992 for lost rent resulting from the Loma Prieta Earthquake." (Request No. 16.)

"Admit you made no claim to Allstate before October 1, 1992 for damage to your property sustained while in storage at Berkeley Self Storage." (Request No. 17.)

"Admit you made no claim to Allstate before October 1, 1992 for water damage to your home at 2724-2726 College Avenue resulting from the Loma Prieta Earthquake." (Request No. 18.)

"Admit you made no claim to Allstate before October 1, 1992 for damage to the foundation of your home at 2724-2726 College Avenue resulting from the Loma Prieta Earthquake." (Request No. 19.)

Marselis claims Allstate failed to prove the truth of these matters. Not so. In its statement of decision, the court found that "[a]ccording to plaintiff's contractor (Seth Melchert) and engineer (Joshua Kardon), the earthquake damaged only the roof and chimney." The court then noted that "[e]ven if her testimony is believed, [Marselis] wrote and called Allstate on and off for nearly three years after Bond's February 25, 1990

payment [for the roof and chimney damage], but neither submitted any additional claims nor took stronger action."

Marselis also argues she had good reason for denying these claims. She refers us to fragmentary deposition testimony in which she claimed she informed Max Bond, in January and February of an unidentified year, of "damage to the few things that were in the house" and "that there had been water in the storage lockers that were Berkeley Self-Storage." She said she asked Bond to "help me find a place to stay in the East Bay because the construction of my home was going — was going to take a lot longer than what [the excerpt ends at this point]" The trial court clearly found this evidence insufficient to show that Marselis had made "claims" for any of these items. It found that "[t]he evidence shows Allstate paid the only claim plaintiff had made by February 25, 1990," and that "Plaintiff did not even ask to 'reopen' her file until November 24, 1992." The court observed Marselis testify at trial. We cannot say it was an abuse of discretion to find she had no reasonable grounds for denying these requests.

Marselis attempts to rely on testimony from her insurance expert, to the effect that she was not required to make specific claims, but merely to present an undifferentiated "earthquake claim." She then adds that Allstate treated all her claims under a single claim number, and did not mention the specific claims covered by requests 15 through 19 in the denial letter it eventually issued. We cannot see how these matters provided Marselis any reason for denying the requests.

Request No. 20 asked Marselis: "Admit that, as of April 11, 1990, you were not expecting any further payments from Allstate for your Loma Prieta earthquake claim." Marselis contends again that her own testimony provided grounds for denying this request, supported by exhibits showing foundation damage in March 1990 and her November 24, 1992 letter referring to "claims that have been left open so long." The trial court rejected this version of the events, noting that Marselis told the Small Business Administration in April 1990 that her claim was no longer pending and she expected no further payments from Allstate. Given this strong evidence contradicting Marselis's

testimony, which she fails to acknowledge in her briefs, the court did not abuse its discretion in finding her denial unjustified.

Request No. 27 asked Marselis: "Admit that, as of October 19, 1991, you were satisfied with Allstate's payments on your Loma Prieta earthquake claim." Marselis argues this request, like Request No. 20, merely asked for her subjective belief and could be denied based on her own expected testimony. The statement of decision includes a finding that "[u]ncontradicted testimony by Charles Strahan and Jill Strelo, the latter based on plaintiff's own written and oral representations, proved plaintiff only decided to 'reopen' her claim — a term plaintiff herself used repeatedly in writing — after hearing of generous settlements after the October 1991 Oakland Hills firestorm. Plaintiff voiced no criticism of Allstate between 1990 and 1992 . . . ." The court did not abuse its discretion by rejecting Marselis's testimony and finding she lacked a good reason to deny Request No. 27.

For the first time in her reply brief, Marselis argues that her subjective expectations in April 1990 and her satisfaction in October 1991 were irrelevant to the equitable tolling issue. Both points, however, were relevant to determining whether Marselis had any claim pending and whether Allstate had any duty to communicate with her on a pending claim. These matters had substantial importance to the equitable tolling, estoppel, and waiver claims raised by Marselis.

Finally, Marselis contends the award was erroneous because Allstate failed to sufficiently correlate its fees billed with the matters covered by the requests for admission. She claims the bills were not segregated between the phases of trial, that Allstate's undifferentiated "block billing" format was improper, and that some bills were for time spent on general trial preparation. Marselis's arguments on these points are not supported by the few record references she provides. Before ruling on the fee motion, the trial court permitted Marselis to submit supplemental briefing on precisely these issues. At the following hearing, the court stated it was very familiar with the billing methods used by Allstate, and had reviewed them "line by line." The court indicated it was not prepared to award fees for time spent on administrative matters or duplicative services.

"The 'experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong' — meaning that it abused its discretion. (*Serrano v. Priest* (1977) 20 Cal.3d 25, 49 []; *Fed-Mart Corp. v. Pell Enterprises, Inc.* (1980) 111 Cal.App.3d 215, 228 [] [an appellate court will interfere with a determination of reasonable attorney fees 'only where there has been a manifest abuse of discretion'].)" (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.) Marselis fails to show the court abused its discretion by awarding Allstate $157,000 in fees, which was considerably less than Allstate sought.

3. *The Denial of Expert Witness Fees*

Before trial, Allstate served Marselis with an offer of compromise under Code of Civil Procedure section 998. Allstate offered Marselis $10,000 in exchange for a dismissal of her action, and a general release "in favor of Allstate, including its agents, employees, attorneys and all persons acting on its behalf, as to all claims related to the subject matter of this lawsuit." Marselis did not accept the offer. After prevailing at trial, Allstate filed a costs memorandum including a claim for expert witness fees. Marselis moved to tax Allstate's costs, contending the offer of compromise was defective in two regards: $10,000 was only a token offer, and the offer was uncertain because the general release would have required her to dismiss a pending assault and battery action against Allstate's law firm and two of is employees, which arose out of an altercation occurring when Marselis and her husband visited the firm in an attempt to serve a subpoena related to Marselis's action against Allstate.

The trial court granted the motion to tax costs, finding that the offer was a token one, and ambiguous in that it could be read to require dismissal of her claims against Allstate's attorneys. Allstate appeals from that ruling. We agree the offer was too ambiguous to be effective.

Allstate does not deny that, if its offer could be construed to apply to the assault and battery action, it would be ineffective. (See *Valentino v. Elliott Sav-On Gas, Inc.*

(1988) 201 Cal.App.3d 692, 700-701.) Allstate argues only that the offer cannot be construed to include the assault and battery action, because it was specifically limited to "claims related to the subject matter of this lawsuit." We disagree. Because the alleged assault and battery occurred during an attempted service of process in Marselis's action against Allstate, and because the offer particularly required Marselis to release not only Allstate but also its attorneys, it might be construed to include Marselis's assault and battery claims. While the "subject matter" of the instant action was Marselis's coverage dispute with Allstate, the events surrounding the attempt to serve process were arguably "related to" that subject.

The court properly granted the motion to tax costs.

DISPOSITION

The judgment, the fee award, and the order on the motion to tax costs are affirmed. The parties shall bear their own costs on appeal.

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Parrilli, J.

We concur:

_____
McGuiness, P. J.

_____
Corrigan, J.

Trial Court:	Superior Court, Alameda County
Trial Judge:	Honorable Henry E. Needham
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