

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

TODD GELFAND,
Plaintiff,
v.
NORTH AMERICAN CAPACITY
INSURANCE COMPANY,
Defendant.

No. C-12-4819 EMC

**ORDER GRANTING DEFENDANT’S
MOTION FOR PARTIAL SUMMARY
JUDGMENT**
(Docket No. 21)

_____ /

Plaintiff Todd Gelfand, trustee of the Reata Trust (“Reata”), brought a state-court action (later removed to this Court) to confirm an arbitration award issued against Paragon, the contractor who built Reata’s residence. The state court confirmed the arbitration award. In the case at bar, Reata sues Northern American Capacity Insurance Company (“NAC”), the contractor’s insurer, to recover the full amount of the judgment against Paragon. Currently pending before the Court is NAC’s motion for partial summary judgment. The key issue is whether Reata can recover directly from NAC that portion of the judgment consisting of attorney’s fees and costs awarded against Paragon, the insured.

Having considered the parties’ briefs and accompanying submissions, as well as the argument of counsel, the Court hereby **GRANTS** Defendant NAC’s motion for partial summary judgment.

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1 **I. FACTUAL & PROCEDURAL BACKGROUND**

2 Paragon General Contractors & Cabinetmakers, Inc. (“Paragon”) constructed a luxury home
3 in Half Moon Bay owned by Reata. *See* Docket No. 21-3 (Decl. of A. Carl Yaeckel (“Yaeckel
4 Decl.”), Ex. 1) (Complaint (“Compl.”) ¶ 1). Later, alleging construction defects, Reata sued
5 Paragon in arbitration in 2001. *Id.* ¶ 28.

6 NAC issued a commercial general liability insurance policy (“Policy”) to Paragon. *Id.* ¶14.
7 NAC retained counsel to defend Paragon in arbitration. *See* Docket No. 21-3 (Yaeckel Decl., Ex. 1)
8 (Compl. ¶ 29). During arbitration, Paragon filed for Chapter 7 bankruptcy. *See id.* ¶ 32.

9 In December 2010, the arbitrator awarded Reata \$1,390,774.19,¹ which included an award of
10 \$585,404.27 in attorney’s fees and \$35,767.21 in costs. *Id.* at ¶ 6. Reata petitioned to confirm the
11 award in state court. *See* Docket No. 22-2 (Heimberger Decl. ¶ 21). The state court confirmed the
12 award, *see* Docket No. 22-2 (Heimberger Decl., Ex. I) (Order Confirming Award), and entered
13 judgment for Reata, *see* Docket No. 22-2 (Heimberger Decl., Ex. J) (Judgment Confirming Award).
14 Shortly after entering judgment, the state court awarded Reata \$25,000 in additional attorney’s fees²
15 and \$2,080 in costs expended to confirm the award. In January 2013, NAC paid Reata \$210,687 in
16 partial satisfaction of the judgment relating to some of the property damage alleged by Reata. *See*
17 Docket No. 22-17 (Heimberger Decl., Ex. O).

18 In August 2012, Reata brought the current action against NAC to recover fees and costs
19 awarded by the state court judgment which confirmed the arbitration award. *See* Docket No. 21-3
20 (Yaeckel Decl., Ex. 1) (Compl. ¶ 7, at pg. JNI00013). Reata’s complaint asserts three causes of
21 action: (1) “Direct Action of Judgment Creditor Pursuant to Cal. Ins. Code § 11580”; (2) “Breach of
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23

24 ¹ *See* Docket No. 22-3 (Heimberger Decl., Ex. A) (Arbitration Award at p. 18). Reata has
25 moved the Court to take judicial notice of nine documents, including the Arbitration Award. The
26 Court grants the Reata’s request as to this document, and as to Exhibits B, I, J, and L to the
27 Heimberger Decl. Reata’s request for judicial notice is uncontested. Moreover, courts may consider
28 judicial notice of such matters when ruling on a summary judgment motion. *See* FRE 201(b);
Bennett v. Medtronic, Inc., 285 F.3d 801 n. 2 (9th Cir. 2002) (granting request for judicial notice of
Tennessee state court proceedings).

² *See* Docket No. 22-2 (Heimberger Decl., Ex. L) (Order re Attorney’s Fees).

1 Insurance Contract”; and (3) “Breach of the Implied Covenant of Good Faith and Fair Dealing.” *See*
2 *id.* at ¶¶ 58, 70, and 76.

3 NAC removed to federal court based on diversity. Currently before the Court is NAC
4 motion for partial summary judgment. The issue is whether Reata, a third-party judgment creditor
5 of the insured, may enforce directly against NAC that portion of the underlying judgment awarding
6 attorney’s fees and costs against the insured.

7 **II. DISCUSSION**

8 A. Legal Standard

9 Federal Rule of Civil Procedure 56(c) provides that summary judgment shall be rendered “if
10 the pleadings, depositions, answers to interrogatories, and admissions on file, together with the
11 affidavits, if any, show that there is no genuine issue as to any material fact and that the moving
12 party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). An issue of fact is genuine
13 only if there is sufficient evidence for a reasonable jury to find for the nonmoving party. *See*
14 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). “The mere existence of a scintilla of
15 evidence . . . will be insufficient; there must be evidence on which the jury could reasonably find for
16 the [nonmoving party].” *Id.* at 252. At the summary judgment stage, evidence must be viewed in
17 the light most favorable to the nonmoving party and all justifiable inferences are to be drawn in the
18 nonmovant’s favor. *See id.* at 255.

19 In the current case, NAC, a defendant, has moved for partial summary judgment on the issue
20 of whether Reata, a third-party judgment creditor, may recover a portion of the underlying judgment
21 consisting of attorney’s fees and costs awarded in arbitration below. Because Reata has the ultimate
22 burden of proof, NAC may prevail on its motion for summary judgment simply by pointing to
23 Reata’s failure “to make a showing sufficient to establish the existence of an element essential to
24 [its] case.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

25 B. Calif. Ins. Code Section 11580

26 Reata did not obtain an assignment from Paragon of any claim for indemnification against
27 NAC. Instead, Reata’s suit against NAC to recover on the judgment against Paragon is predicated
28 solely upon Calif. Ins. Code Section 11580. That section provides that an insurance policy must

1 contain a provision (among others) allowing third-party judgment creditors, under certain
2 circumstances, to recover on a judgment against the insured directly from the insurer:

3 “ ... whenever judgment is secured against the insured or the executor
4 or administrator of a deceased insured in an action based upon bodily
5 injury, death, or property damage, then an action may be brought
6 against the insurer on the policy and subject to its terms and
7 limitations, by such judgment creditor to recover on the judgment.”

8 Calif. Insurance Code Section 11580(b)(2). *See* Croskey, et al., Cal. Practice Guide: Insurance
9 Litigation, ¶ 15:1028, p. 15-177.

10 For Reata to recover directly from NAC under Section 11580, the amount of the underlying
11 judgment against Paragon, including the award of attorney’s fees and costs, Reata must establish
12 both: (a) that the award against Paragon is covered under the terms of the policy issued by NAC;
13 and (b) Reata, as a third-party judgment creditor, may enforce the policy term at issue as a third-
14 party beneficiary thereto. *See Clark v. CIGA*, 200 Cal. App. 4th 391 (2011); *San Diego Hous.*
15 *Comm’n. v. Indus. Indem. Co.*, 95 Cal. App. 4th 669 (2002).

16 C. Coverage

17 NAC contends that fees and costs are covered by the NAC policy, if at all, only as either: (a)
18 “damages” under the Insuring Clause; or (b) “costs” under the Supplementary Payments Provision
19 (“SPP”). Reata responds that the No Action Clause instead constitutes the relevant coverage
20 provision. The Court finds the award of fees and costs in the arbitration constitute “costs” under the
21 SPP.

22 1. Damages

23 The Insuring Clause provides:

24 “[NAC] will pay those sums that [Paragon] becomes legally liable
25 obligated to pay as **damages** for bodily injury or property damage to
26 which this Insurance applies.”

27 *See* Docket No. 21-3 (Yaeckel Decl., Ex. 1) (Ex. A to Compl. at JNI00046).

28 The definition of “damage” under the policy is inapposite. Under the policy, “Damage
means the estimated money equivalent for loss or injury sustained.” *Id.* at JNI00053. Attorney’s
fees and costs simply do not fall within the scope of “loss or injury sustained,” an expression that
envisions loss to the insured arising from bodily injury or property loss.

1 In interpreting a similar insurance provision, the Court in *Prichard v. Liberty Mut. Ins. Co.*
2 found that awarded attorney’s fees was “inconsistent with the concept of damages.” 84 Cal. App.
3 4th 890, 912 (citing *Cutler-Orosi Unified Sch. Dist. v. Tulare Cnty. Sch. etc. Auth.*, 31 Cal. App. 4th
4 617, 631 [1994]); *San Diego Hous. Comm’n. v. Indus. Indem. Co.*, 95 Cal. App. 4th 669 (2002);
5 *Combs v. State Farm Fire & Cas. Co.*, 143 Cal.App.4th 1338, 1345 (2006). See *AIU Ins. Co. v.*
6 *Super. Ct.*, 51 Cal.3d 807, 826-27 (1990). See also Croskey, et al., Cal. Practice Guide: Insurance
7 Litigation, ¶ 7:160.4, p. 7A-77 (Rutter Group 2012) (“fee awards are not ‘damages’ under a CGL
8 policy”).

9 Reata cites *APL Co. Pte. Ltd. v. Valley Forge Ins. Co.*, 754 F. Supp. 2d 1084 (N.D. Cal.
10 2010) as holding to the contrary. The Court disagrees. In *APL*, the court interpreted the insurance
11 policy as obligating the insurer to pay for attorney’s fees awarded to a third-party judgment creditor
12 in the underlying litigation. The court noted the policy obligated the insurer to “pay as damages
13 because of ‘bodily injury,’ ‘property damage,’ ‘personal injury,’ or ‘advertising injury’” [citations
14 omitted], *id.* at 1094, and construed damages as encompassing compensation in money recovered for
15 loss or detriment, including “remunerative payment made to an aggrieved party.” *Id.* Critical to its
16 determination that a fee award was covered as damages under the policy was that the English rule
17 (wherein the losing party pays fees) applied to the case. *Id.* By contrast, the current case is not
18 governed by the English rule. In the absence of such rule, the California state court cases cited
19 above, rather than *APL*, applies. Accordingly, attorney’s fees and costs awarded in the underlying
20 case are not “damages” within the meaning of the NAC insurance policy.

21 2. Supplementary Payments Provision

22 Instead, the award of fees and costs in the underlying case constitute “costs” under the SPP.
23 The Insuring Clause, in relevant part, provides:

24 “[Other than damages], [n]o other obligation or liability to pay sums or
25 perform acts or services is covered unless explicitly provided for
under SUPPLEMENTARY PAYMENTS - COVERAGES A AND
B.”

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1 And, the Supplementary Payments Provision provides:

2 **[SUPPLEMENTARY PAYMENTS PROVISION]**

3 “[NAC] will pay with respect to any claim or suit [NAC]
4 defend[s]...[a]ll costs awarded against [Paragon] in the suit.”

5 The California courts have held that attorney’s fees and costs awarded to a third-party
6 claimant against the insured are covered as “costs” under insurance policies comparable to the
7 policy and the SPP clause. *See Ins. Co. of N. Am. v. Nat’l Am. Ins. Co.*, costs are statutorily defined.
8 *See Ins. Co. of N. Am. v. Nat’l Am. Ins. Co.*, 37 Cal. App. 4th 195, 206-207 (1995); *San Diego*
9 *Housing Comm’n, supra*, 95 Cal. App. 4th at 684 (2002); *see also Clark, supra*, 200 Cal. App. 4th at
10 398 (quoting *San Diego Housing*, 95 Cal. App. 4th at 685 (2002)); California Civil Code Section
11 1033.5(a)(10) (“Attorney’s fees when authorized by any of the following: (A) contract, (B) statute,
12 or (C) law”).

13 3. No Action Clause

14 Reata argues that the No Action Clause, when interpreted along with other provisions,
15 provides coverage of the entire judgment, including attorney’s fees and costs, and affords Reata the
16 right to sue NAC therefor. The No Action Clause provides:

17 “No person or organization has a right under this Coverage Part: [t]o
18 sue [NAC] on this Coverage Part unless all of its terms have been fully
19 complied with.”

20 “A person or organization may sue [NAC] to recover on an agreed
21 settlement or on a final judgment against an insured obtained after an
22 actual trial; but [NAC] will not be liable for damages that are not
23 payable under the terms of this Coverage Part or that are in excess of
24 the applicable limit of insurance.”

25 *See* Docket No. 21-3 (Yaeckel Decl., Ex. 1) (Ex. A to Compl. at JNI00051). In essence, Reata
26 contends that since there is a judgment entered against Paragon, this clause permits Reata to sue
27 NAC to recover the entire amount of the judgment.

28 The Court disagrees. The No Action Clause does not adjust the substantive scope of
coverage, nor does it create affirmative rights in third-party judgment creditors. Instead, by its plain
terms, the No Action Clause is only a procedural limitation on any suit against NAC brought by
third parties. This is clear from the first sentence: “No person or organization has a right under this

1 Coverage Part: [t]o sue [NAC] on this Coverage Part unless all of its terms have been fully complied
2 with.” The relevant condition that must be satisfied is that a final judgment has been rendered. *See*
3 Croskey, et al., Cal. Practice Guide: Insurance Litigation, Ch. 15-K, ¶ 15:1037, p. 15-179 (Rutter
4 Group 2012) (“‘no action’ clauses typically require a ‘final judgment’ or that the insured’s
5 obligation shall have been ‘finally determined’”). The mere fact of a judgment in the underlying
6 case does not confer coverage.

7 D. Third-Party Beneficiary

8 Once coverage is determined to exist, the only remaining issue is whether the third-party
9 judgment creditor may enforce coverage; to do so, it must be deemed a third-party beneficiary to the
10 insurance policy provision at issue under *San Diego Housing* and *Clark*.

11 In *San Diego Housing*, plaintiff brought a construction defect action against a general
12 contractor. Plaintiff proceeded against the insurer under Section 11580 to recover on a default
13 judgment, including an award of attorney’s fees and costs. The trial court held that plaintiff could
14 recover on the entire judgment, including costs covered by the Supplementary Payments Provision,
15 despite its status as a third-party beneficiary of the insurance policy. *See San Diego Housing*, 95
16 Cal. App. 4th at 677. The Court of Appeal modified the award to exclude amounts that were
17 covered by the Supplementary Payments Provision. The Court of Appeal reasoned that Section
18 11580 creates a beneficiary relationship between the judgment creditor and the insurer, but only as
19 to those policy terms created for his benefit. *Id.* at 691-92. The court then reasoned that costs
20 covered by the Supplementary Payments Provision were “clearly linked” to the insurer’s duty to
21 defend (in contrast to the insurer’s duty to indemnify) the insured. *Id.* at 691. The court concluded
22 that the third-party judgment creditor is only an “incidental beneficiary” of the duty to defend. *Id.* at
23 692 (citing *Harper v. Wasau Ins. Co.*, 56 Cal. App. 4th 1079, 1089 (1997)). As such, the judgment
24 creditor was not an intended third-party beneficiary of the duty to defend and thus cannot recover on
25 the fee award of fees and costs which are covered solely under that duty. Accordingly, the creditor
26 could not sue the insurer under Section 11580 for fees and costs.

27 Similarly, in *Clark*, the plaintiff obtained a personal-injury judgment against an insured.
28 Because the insurer had dissolved, the California Insurance Guarantee Association (“CIGA”) issued

1 a check in partial satisfaction of the judgment. Plaintiff then brought an action under Section 11580
2 to recover the deficiency. The trial court held that a third-party judgment creditor may not enforce
3 an award of costs and interest in a direct action against an insurer under Section 11580, absent an
4 assignment of that right to the third-party judgment creditor. *See Clark, supra*, 200 Cal. App. 4th at
5 394. Accordingly, the trial court granted summary judgment for CIGA. The Court of Appeal
6 affirmed, concluding that since a judgment creditor is only an “incidental beneficiary” and not a
7 third-party beneficiary of the Supplementary Payments Provision, costs and interest awarded on a
8 judgment are not recoverable under Section 11580. *See id.* at 397-98. The court cited *San Diego*
9 *Housing* in support of its holding.

10 This Court is unaware of binding or persuasive authority that has disapproved of either *San*
11 *Diego Housing* or *Clark*. A number of courts have relied on their reasoning in unpublished
12 opinions.³ *See e.g., Sensation Leather, Inc. v. CIGA*, No. BC203086, 2008 WL 5050436, *4 (Cal.
13 App. 2d Dist. 2008) (affirming denial of interest on judgment awarded to third-party judgment
14 creditor); *Garamendi v. Golden Eagle Ins. Co.*, No. A102489, 2004 WL 1814163, *7 (Cal. App. 1st
15 Dist. 2004) (reversing trial-court order forcing insurer to accept indemnity claim made by third-party
16 judgment credit because claimant had no recourse without an assignment); *Martinez v. Lincoln Gen.*
17 *Ins. Co.*, No. 07-CV-7569 (MLR), 2009 WL 6337983, *5 (C.D. Cal. Aug. 27, 2009), *rev'd on other*
18 *grounds*, 417 Fed. Appx. 711 (9th Cir. 2011) (unpublished). *See Croskey, et al., Cal. Practice*
19 *Guide: Insurance Litigation*, Ch. 15-K, ¶ 15:1042, pg. 15-181 (Rutter Group 2012) (notwithstanding
20 Section 11580, judgment creditor may not recover costs under the supplementary payments
21 provision).

22 Key to the holdings of *San Diego Housing* and *Clark* is the notion that an insurer’s duty to
23 pay “costs” under the Supplementary Payments Provision is “clearly linked” to an insurer’s duty to

25 ³ California Rule of the Court 8.1115 provides that unpublished opinions “must not be cited
26 or relied on by a court or a party in any other action.” This Court, however, has cited these
27 unpublished California opinions not as decisional law or for its persuasive value. *See Ortiz-*
28 *Sandoval v. Gomez*, 81 F.3d 891, 895 (9th Cir. 1996) (taking note of unpublished California opinion
but not as “decisional law”); *Vizcarra-Ayala v. Mukasey*, 514 F.3d 870, 876 (9th Cir. 2008) (citing
unpublished California opinions only to show Calif. Penal Code section 475(c), which penalizes
forgery, had been applied outside of the generic definition of “forgery”).

1 defend, under which a third-party judgment creditor is only an incidental beneficiary, as opposed to
2 its duty to indemnify, under which it is the intended beneficiary. In *Prichard*, for example, the court
3 interpreted policy language nearly identical to portions of the Supplementary Payments Provision at
4 issue here as relating to the insurer’s duty to defend (and not its duty to indemnify):

5 “We will pay, with respect to any claim or ‘suit’ *we defend*: [¶]...[¶] 5.
6 All costs taxed against the insured in the ‘suit.’”

7 *Prichard*, 84 Cal. App. 4th at 911. In particular, the court noted: “As the italicized words indicate
8 [(i.e., “*we defend*”)], the supplementary payments provision providing ‘costs taxed’ is a function of
9 the insurer’s defense obligation, not is indemnity obligation.” *Id.* Similarly, Justice Croskey of the
10 Second Appellate District noted that the words “in suits we defend” is typically interpreted to mean
11 “the insurer’s obligation to pay an award of costs against the insured [is] dependent on the defense
12 duty.” *State Farm Gen. Ins. Co. v. Mintarsih*, 175 Cal. App. 4th 274, 285-85 (2009).

13 To be sure, the Court recognizes an argument that an insurer’s duty to pay fees and costs
14 under the Supplementary Payments Provision, once incorporated into a final judgment against the
15 insured, seems akin to the duty to indemnify. “[P]roviding a defense is hardly the same as
16 indemnifying the insured for the other party’s costs and attorney fees that the insured becomes
17 obligated to pay only as the result of being found liable for the underlying misconduct.” *Combs v.*
18 *State Farm Fire & Cas. Co.*, 13 Cal. App. 4th 1338, 1345-46 (2008). However, the California
19 courts that have addressed the precise issue at bar, *Prichard*, *San Diego Housing*, and *Clark*, have
20 consistently held against the third-party creditors on this question. The Court is obliged to follow
21 these cases as the best indicators of how the California Supreme Court would rule. Therefore, given
22 the current state of California law, as articulated by *San Diego Housing* and *Clark*, Reata, as the
23 third-party judgment creditor, may not recover directly from NAC fees and costs covered solely
24 under the policy’s SPP.

25 Reata argues that nonetheless, as a factual matter, the parties intended it as a third-party
26 beneficiary in this case. However, the determinations in *San Diego Housing* and *Clark* relevant to
27 NAC’s motion for summary judgment here – that (a) “costs” under the SPP are linked to the duty to
28 defend, and (b) a third-party judgment creditor is only an incidental beneficiary of that duty – appear

1 to have been resolved as questions of law. Moreover, even if either determination were a question
2 of fact, Plaintiff has adduced no material facts distinguishing the policy at issue here from the
3 supplementary payments provision at issue in *San Diego Housing*. In particular, Plaintiff has not
4 offered evidence probative on the issue of whether the parties, *at the time of formation*, intended
5 third-party judgment creditors, like itself, to be the intended beneficiaries of the SPP.⁴


6 **III. CONCLUSION**

7 For the foregoing reasons, the Court grants Defendant's motion for partial summary
8 judgment. More specifically, the Court concludes that, absent an assignment from the insured,
9 Plaintiff may not enforce directly against NAC the award of attorney's fees and costs against
10 Paragon.

11 This order disposes of Docket No. 21.

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13 IT IS SO ORDERED.

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15 Dated: July 5, 2013

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17 _____
EDWARD M. CHEN
United States District Judge

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19 _____
20 ⁴ Plaintiffs contend that two pieces of evidence support their interpretation that NAC is
21 responsible for fees and costs under the policy: (1) NAC's decision to raise its "allocated loss
22 adjustment expense," a measure of the insurer's estimated coverage risk, to account for the
23 prevailing party fee award; and (2) NAC's decision to fight the prevailing party fee awarded in
24 arbitration. *See* Docket Nos. 22-16 (Heimberger Decl., Ex. N), 22-9 (Heimberger Decl., Ex. G); 22-
25 13 (Heimberger Decl., Ex. K). At the outset, the Court notes that Reata does not contend the intent
26 of the parties was that judgment creditors would be intended beneficiaries of the SPP, which would
27 rebut the conclusion that Reata is only an incidental beneficiary. In any case, the Court finds that
28 such evidence would not create a genuine issue of material fact precluding summary judgment even
if the matters were not categorically questions of law. In particular, such evidence is not probative
of the party's intention at the time of formation concerning whether judgment creditors were
intended beneficiaries of the Supplementary Payments Provision. Thus, unlike in *City of Hope Nat'l
Med. Ctr. v. Genentech, Inc.*, which Reata cites approvingly, the conduct in question here occurred
well *after* the dispute had already arisen. *City of Hope*, 43 Cal. 4th 375, 349 (2008) (party's conduct
after contract formation but before dispute arose admissible to resolve ambiguities in agreement).
Moreover, a decision to raise the allocated loss adjustment expense, for example, merely may
indicate caution on the part of the insurer rather than an admission that it could be directly liable to
Reata. Nor does such evidence create an ambiguity in the relevant policy language, especially since
Reata fails to identify what specific policy term is rendered ambiguous by this evidence.