

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NAVIGATORS SPECIALTY INSURANCE COMPANY,)	Case No. 13-cv-03499-SC
)	
Plaintiff,)	ORDER GRANTING DEFENDANT ST. PAUL'S MOTION FOR SUMMARY JUDGMENT
)	
v.)	
)	
ST. PAUL SURPLUS LINES INSURANCE COMPANY; LIBERTY SURPLUS INSURANCE CORPORATION; et al.,)	
)	
Defendants.)	
)	
)	

Now before the Court is Defendant St. Paul Surplus Lines Insurance Company's ("St. Paul") motion for summary judgment.¹ ECF No. 69 ("Mot."). The motion is fully briefed,² and the Court finds it suitable for disposition without oral argument pursuant to Civil Local Rule 7-1(b). The undisputed facts establish that St. Paul's underwriter and agent -- Crouse and Associates ("Crouse") -- did

¹ The original motion for summary judgment was filed jointly by Defendants St. Paul and Travelers Property Casualty Company of America ("Travelers"). By virtue of Navigators' dismissal of Travelers (ECF No. 89), the portion of the motion pertaining to Travelers is no longer before the Court.

² There have been multiple rounds of briefing on this motion. ECF Nos. 69 ("Mot."); 79 ("Opp'n"); 80 ("Reply"); 102 ("Pl. First Suppl. Br."); 105 ("Def. First Suppl. Br."); 112 ("Pl. Second Suppl. Br."); 113 ("Def. Second Suppl. Br.").

1 not have the authority to delegate its agency powers to insurance
2 broker California Financial Insurance Services ("California
3 Financial"). As a result, the Court finds that Navigator's named
4 insured -- McDevitt & McDevitt ("McDevitt") -- was not an
5 additional insured with respect to the St. Paul insurance policy
6 held by Sunrise Windows ("Sunrise"). St. Paul therefore did not
7 have a duty to defend or indemnify McDevitt, and Navigators is not
8 entitled to declaratory relief, equitable contribution, or
9 equitable subrogation as a matter of law. Accordingly, St. Paul's
10 motion for summary judgment is GRANTED.

11
12 **I. BACKGROUND AND LITIGATION HISTORY**

13 The details of this case have been set out in multiple orders,
14 are well known to the parties, and therefore will not be repeated
15 in their entirety here. ECF Nos. 36, 86, 95, 100, 108. The facts
16 pertinent to the instant motion are as follows:

17 This is an insurance dispute arising from two underlying
18 construction defect lawsuits (known as the "3820 Cypress Action"
19 and the "PRBO Action"). Both lawsuits allege that a building in
20 Petaluma, California contains construction defects, and both
21 lawsuits have been consolidated in state court (collectively "the
22 Underlying Actions"). McDevitt, the general contractor for the
23 building, was insured by Navigators. St. Paul -- pursuant to a
24 policy issued by its underwriter and agent, Crouse -- insured
25 Sunrise, a subcontractor responsible for windows. This case
26 relates to the policies St. Paul issued to Sunrise (the "Sunrise
27 Policies").

28 Navigators alleges that it is entitled to declaratory relief,

1 equitable contribution, and equitable subrogation arising out of
2 St. Paul's alleged breach of its duty to defend and indemnify
3 Navigators' named insured, McDevitt, against the Underlying
4 Actions. Navigators claims that St. Paul had a duty to defend
5 McDevitt because McDevitt is allegedly listed as an additional
6 insured on an additional insured endorsement to the Sunrise
7 Policies. Importantly, California Financial, Sunrise's insurance
8 broker, is the one that allegedly issued the additional insured
9 endorsement. See Opp'n at 6 ("Navigators argues that the broker,
10 California Financial, issued the endorsement with either actual or
11 ostensible authority"). Viewing the evidence in the light
12 most favorably to Navigators, St. Paul's motion for summary
13 judgment turns on whether, under the law of agency in California,
14 California Financial had the authority to issue the additional
15 insured endorsement on St. Paul's behalf. The Court ordered
16 additional discovery and two rounds of supplemental briefing on
17 this issue.

18 The parties' first set of supplemental briefs focused on
19 whether California Financial was authorized by St. Paul's agent,
20 Crouse, to issue the additional insured endorsement -- in other
21 words, whether California Financial was St. Paul's authorized sub-
22 agent. Navigators' first supplemental brief focuses almost
23 exclusively on a conversation between representatives of Crouse and
24 California Financial during which Crouse allegedly gave California
25 Financial permission to issue additional insured endorsements on
26 St. Paul's behalf. However, because Navigators failed to address
27 whether Crouse had the authority to delegate its agency powers to
28 California Financial in the first place, a second round of

1 supplemental briefing was ordered on that particular issue. ECF
2 No. 109. The parties' briefs have been reviewed, and the Court now
3 finds St. Paul's motion suitable for disposition.
4

5 **II. LEGAL STANDARD**

6 Entry of summary judgment is proper "if the movant shows that
7 there is no genuine dispute as to any material fact and the movant
8 is entitled to judgment as a matter of law." Fed. R. Civ. P.
9 56(a). "In order to carry its burden of production, the moving
10 party must either produce evidence negating an essential element of
11 the nonmoving party's claim or defense or show that the nonmoving
12 party does not have enough evidence of an essential element to
13 carry its ultimate burden of persuasion at trial." Nissan Fire &
14 Marine Ins. Co., Ltd. v. Fritz Cos., Inc., 210 F.3d 1099, 1102 (9th
15 Cir. 2000). "The evidence of the nonmovant is to be believed, and
16 all justifiable inferences are to be drawn in his favor." Anderson
17 v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Summary judgment
18 should be entered against a party that fails to make a showing
19 sufficient to establish the existence of an element essential to
20 its case. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).
21

22 **III. DISCUSSION**

23 The central issue in this case -- whether St. Paul is bound by
24 an alleged additional insured endorsement naming McDevitt as an
25 additional insured -- is a matter of California agency law. The
26 principal in this case is St. Paul. See Restatement (Second) of
27 Agency § 1 (1958) ("The one for whom action is to be taken is the
28 principal."). There is no dispute that Crouse is St. Paul's

1 authorized agent and that it was empowered to issue additional
2 insured endorsements on St. Paul's behalf. See Mot. at 9.
3 Navigators claims that Crouse delegated its authority to issue
4 additional insured endorsements to California Financial. See Pl.
5 First Suppl. Br. at 1-5. In other words, Navigators is arguing
6 that California Financial was St. Paul's authorized sub-agent. See
7 id. § 5 ("A subagent is a person appointed by an agent empowered to
8 do so, to perform functions undertaken by the agent for the
9 principal").

10 Section 2349 of the California Civil Code governs an agent's
11 ability to delegate its powers to a sub-agent:

12 An agent, unless specially forbidden by his principal to
13 do so, can delegate his powers to another person in any
14 of the following cases, and in no others:

- 15 1. When the act to be done is purely mechanical;
- 16 2. When it is such as the agent cannot himself, and the
17 sub-agent can lawfully perform;
- 18 3. When it is the usage of the place to delegate such
19 powers; or,
- 20 4. When such delegation is specially authorized by the
21 principal.

22 Cal. Civ. Code § 2349 (emphasis added). Navigators argues that
23 this case falls under the third category -- that it was "the usage
24 of the place to delegate" the power to issue additional insured
25 endorsements to a sub-agent. Id.

26 The phrase "usage of the place to delegate such powers" in
27 Section 2349 refers to situations where "[t]he authority to appoint
28 a subagent may be inferred from the employment of the agent in a
position of general authority." Trane Co. v. Gilbert, 267 Cal.
App. 2d 720, 726-27 (1968). Specifically, it refers to situations

1 where, "in view of business custom and usage . . . [the granting of
2 agency authority to an agent] ordinarily includes authority to
3 appoint other agents." Id. (citations omitted) (emphasis added).
4 Thus, in order to meet the requirements of Section 2349, Navigators
5 would need to provide evidence that it is the custom and usage of
6 the insurance industry for insurance companies (such as St. Paul)
7 to grant authority to insurance underwriters (such as Crouse) to
8 appoint insurance brokers (such as California Financial) as sub-
9 agents. Navigators does not attempt to make that argument. Even
10 if it had, it is clearly not the custom and usage. See Cal. Ins.
11 Code §§ 33, 1623 (defining an "insurance broker" as a "person who,
12 for compensation and on behalf of another person, transacts
13 insurance other than life with, but not on behalf of, an insurer.")
14 (emphasis added); Marsh & McLennan of Calif., Inc. v. City of Los
15 Angeles, 62 Cal. App. 3d 108, 118 (1976) (holding that insurance
16 brokers are not agents of insurance companies); Carlton v. St. Paul
17 Mercury Ins. Co., 30 Cal. App. 4th 1450, 1457 (1994) (holding that
18 a broker acts only on behalf of the client or insured and not the
19 insurer); Rios v. Scottsdale Insurance Company, 119 Cal. App. 4th
20 1020, 1029 (2004) (holding that a broker has no authority to alter
21 the terms of coverage or to present a policy other than that
22 offered by the insurer); Schultz Steel Co. v. Hartford Ace. &
23 Indem. Co., 187 Cal. App. 3d 513, 522-23 (1986) (holding that a
24 broker's misrepresentation as to the scope of an insurance policy
25 cannot be imputed to the insurer).

26 Instead of arguing that it is the custom and usage in the
27 insurance industry to appoint insurance brokers as subagents,
28 Navigators claims that "it was the custom and practice by and

1 between California Financial and Crouse to so delegate."³ Pl.
2 Second Suppl. Br. at 3 (emphasis added). The custom and practice
3 between California Financial and Crouse would be relevant if
4 Navigators was attempting to establish that California Financial
5 had the authority to act as Crouse's agent. See generally,
6 Restatement (Third) Of Agency § 2.01 (2006) (explaining how actual
7 authority can be impliedly conferred by a principal based on prior
8 interactions between the principal and the agent). A custom and
9 practice between California Financial and Crouse, however, does
10 nothing to establish California Financial's authority to act on
11 behalf of St. Paul.⁴ Thus, this case does not fall within one of
12 the four categories set out in Section 2349.

13 Even if this case fell within one of the four categories of
14 cases set out in Section 2349, Crouse still would not have had the
15 authority to appoint California Financial as a sub-agent because
16 Crouse was "specially forbidden by [St. Paul] to do so." Cal. Civ.
17 Code § 2349. St. Paul's letter of authority to Crouse specifically
18 and unambiguously forbids Crouse from delegating its agency powers.

19 _____
20 ³ As evidence, Navigators points to the deposition of Linda
21 Friedlin, an officer at California Financial. Ms. Friedlin
22 testified that a Crouse employee told her that California Financial
23 could issue additional insured endorsements on St. Paul's behalf
24 because requests for additional insured endorsements were "backing
25 up." Id.

26 ⁴ Navigators' analysis is crippled early in its supplemental brief
27 by its erroneous designation of Crouse as the principal and
28 California Financial as the agent. Pl. Second Suppl. Br. at 1.
This case has to do with whether St. Paul is bound by the
additional insured endorsement, not Crouse. Thus, St. Paul is the
principal, and the question is whether California Financial acted
as St. Paul's authorized sub-agent. At other points in its brief,
Navigators also seems to assume that the agent of one's agent is
necessarily one's sub-agent. Not so. In order to bind the
principal, the delegation of authority to a purported sub-agent
must comply with section 2349.

1 ECF No. 105-1, Ex. A at 2 ("Without the prior express written
2 approval of [St. Paul], [Crouse] shall not: . . . Delegate or
3 assign any of the rights or powers conferred under this Letter of
4 Authority to any other individual or entity.").

5 Navigators also argues that "[a]n ostensible agency exists
6 when evidence shows a principal -- Crouse -- has allowed a third
7 person -- McDevitt -- to believe the agent -- California Financial
8 -- acted with its authority." Pl. Suppl. Br. at 1. In making that
9 argument, Navigators is essentially claiming that Crouse, as the
10 purported principal, is bound by the additional insured
11 endorsement. Even if that were true, Crouse is not a party to this
12 suit, and Navigators' argument is immaterial as to whether St. Paul
13 was bound by the additional insured endorsement. If Navigators'
14 meant to argue that, as St. Paul's agent, Crouse had the ostensible
15 authority to appoint a sub-agent, Navigators would be wrong. As
16 already discussed, the ability to delegate agency powers to sub-
17 agents is governed by Section 2349, and those requirements have not
18 been met. Cal. Civ. Code § 2349; see also J.L. v. Children's
19 Institute, Inc., 177 Cal. App. 4th 388, 403-04 (2009) (holding that
20 ostensible agency can only be established based on "the statements
21 or acts of the principal") (emphasis added); Chicago Title Ins. Co.
22 v. AMZ Ins. Services, Inc., 188 Cal. App. 4th 401, 426-27 (2010)
23 (holding that for ostensible agency to arise from the silence of
24 the principal, the principal must know that the ostensible agent is
25 holding himself out as having agency authority).

26

27 **IV. CONCLUSION**

28 Based on the forgoing, McDevitt is not an additional insured

1 under the Sunrise Policies; therefore, there is no potential for
2 coverage by St. Paul for the Underlying Actions against McDevitt.
3 Because there is no potential for coverage, St. Paul had no duty to
4 defend or indemnify McDevitt. Without a duty to defend or
5 indemnify, as a matter of law, Navigators is not entitled to any
6 relief on its causes of action against St. Paul. Accordingly, St.
7 Paul's motion for summary judgment is GRANTED.

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9 IT IS SO ORDERED.

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11 Dated: July 9, 2015



12 UNITED STATES DISTRICT JUDGE
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