

FILED

SEP 11 2017

SAN LUIS OBISPO SUPERIOR COURT
BY: Melanie Miller
Melanie Miller, Deputy Clerk

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

JESSICA BATH, individually, and as
guardian *ad litem* for JACK BATH,

Plaintiff,

v.

BLUE SHIELD OF CALIFORNIA,

Defendant.

CASE NO. CV12-0743

**RULING AND ORDER DENYING
CROSS-MOTIONS FOR SUMMARY
JUDGMENT AND SUMMARY
ADJUDICATION**

I. INTRODUCTION

Jessica Bath (Bath), individually and as guardian ad litem for her son Jack, brings this action against California Physicians' Service dba Blue Shield of California (Blue Shield), alleging that Blue Shield wrongfully terminated her medical insurance coverage. The Complaint includes causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, and unfair business practices (UCL). Now before the Court are voluminous, competing motions for summary judgment and summary adjudication.

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1 Not every case needs to be tested by way of a summary judgment motion. In *Nazir v.*
2 *United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 289-90, the Court of Appeal made note of
3 the rising summary judgment problem as follows:

4 The deficiencies in summary judgment papers can appear in a variety of
5 places, and the approaches taken by the courts to address the deficiencies can
6 vary as well, limited only by the inspiration or creativity of the particular law
7 and motion judge-and, of course, due process. There is no universal solution,
8 no panacea, and we do not even attempt to offer suggestions. We write here
9 only to confirm the existence of the inherent power, to remind trial courts of
10 it, and to encourage them to use it when appropriate.

11 Since 2010, the approach embraced by Department 9 has been set forth on page 2,
12 paragraph IV.D., of its Standing Case Management Order:

13 **The parties must “preview” complicated law and motions matters with**
14 **the Court at CMCs. This procedure will obviate or narrow the scope of**
15 **summary judgment motions and other matters that depend heavily on**
16 **controverted facts, and it will save time and effort of all involved. Counsel**
17 **should read and be familiar with *Van Ness v. Port San Luis Harbor***
18 ***District, CV13-0369, and *Ponce v. Matich, 14CVP0132*, two summary***
19 **judgment rulings posted on the website for D9. (Judge Crandall).**
20 (Emphasis added.)

21 It is unfortunate that experienced counsel for both parties did not preview these
22 motions in detail with the Court before filing them as required by the Standing Case
23 Management Order. Equally as important, the Standing Case Management Order makes
24 reference to two rulings posted on the Department 9 Tentative Ruling website which focus on
25 the *right way* and the *wrong way* to bring issues before the Court on summary judgment.

26 As the Court will discuss more fully below, motions that present, respectively, 57 and
27 50 supposedly-undisputed material facts, are virtually “dead on arrival.” A banker’s box of
28 deposition transcripts accompanies these motions. If the motion papers had been printed out,
they would likely stack nearly four feet high. Plainly, trying the case on paper is the wrong
way to do it. A trial will be necessary.

1 **II. DISCUSSION**

2 **A. Blue Shield's Motion**

3 Blue Shield moves for summary judgment/adjudication on the grounds that Bath's
4 action fails as a matter of law because the insurance agreement gave Blue Shield the right to
5 prospectively cancel Bath's coverage due to intentional and material misrepresentations
6 made on her application.¹ Blue Shield also seeks summary adjudication of the good faith and
7 fair dealing claim, UCL cause of action, and prayer for punitive damages.

8 Blue Shield sets forth 57 undisputed material facts (UMFs). Blue Shield identifies
9 multiple questions on the application that ask whether the applicant has or had certain
10 medical conditions or treatment. Blue Shield points out that Bath answered "no" to a number
11 of questions about her medical history, neglected to report medical visits, and failed to list
12 prescription medication. Blue Shield then cites to evidence affirming that Bath had been
13 treated for certain health conditions including panic attacks, and was prescribed medication
14 for depression and anxiety. Blue Shield states that, had it known the full truth of Bath's
15 medical history, it would not have issued coverage for her.

16 The insurance agreement provides that it can be cancelled for false representations or
17 concealment of material facts in any application at any time before or after issuance of the
18 agreement. Cancellation in such instances is effective as of the original effective date of
19 coverage. A January 1, 2003 endorsement provides that Blue Shield can terminate the
20 agreement for cause immediately upon written notice of material information that is false, or
21 misrepresented information provided on the enrollment application.

22 Blue Shield cites to deposition testimony from Bath affirming that she was aware
23 coverage would be based on her medical history and that William Barnes, the agent that
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25 ¹ Blue Shield, as the moving party, has the initial burden to make a prima facie showing that there are no
26 triable issues of material fact and that it is entitled to a judgment as a matter of law. (*Aguilar v. Atlantic*
27 *Richfield Co.* (2001) 25 Cal.4th 826, 850) If Blue Shield makes a prima facie showing then the burden
28 shifts to Bath to produce admissible evidence showing that a triable issue of material fact exists. [CCP
§437c(p)(2)] A defendant moving for summary adjudication must "show" that there is a complete defense
to a cause of action or that one or more elements of a cause of action cannot be established. [CCP
§437c(p)(2)]

1 assisted her in preparing the application, asked her about her medical history. Bath disclosed
2 to Barnes her medical history and her medications. Bath listened to what Barnes told her to
3 do and went along with his advice. Bath denies that she was being asked to lie. Bath also
4 did not look over the application before signing it.

5 According to Blue Shield, these facts, as a matter of law, establish that it had
6 authority under the January 1, 2003 endorsement to immediately and prospectively cancel
7 Bath's coverage.

8 Bath disputes that Blue Shield had the contractual authority to prospectively cancel
9 her coverage and disputes that any alleged misrepresentations were either intentional or
10 material. According to Bath, the new cancellation language in the endorsement is not
11 applicable because: 1) she was not properly notified of the change; 2) the provision cannot be
12 applied retroactively to misrepresentations that occurred prior to its adoption; 3) to
13 retroactively apply the provision would make the agreement illusory; and, 4) Blue Shield
14 waived its right to prospectively cancel coverage.

15 In response, Blue Shield claims it had the right to rescind coverage back to its
16 inception and to terminate coverage going forward. Blue Shield believes the endorsement
17 gave it the right to immediately cancel Bath's coverage. Blue Shield also argues there is no
18 "clear and conspicuous" requirement related to the endorsement because the change actually
19 increased coverage. Blue Shield emphasizes the language of the endorsement states it is to
20 take effect on the subscriber's effective date and disputes that the agreement is illusory or
21 that it waived its right to prospectively cancel coverage. Blue Shield argues that, under the
22 original terms of the agreement, it had the right to prospectively cancel coverage and,
23 relatedly, has a common law right to cancel the agreement because of the alleged fraud.

24 The Court need not consider whether Blue Shield had the authority to prospectively
25 cancel coverage because there are triable issues of material fact as to whether Bath made
26 intentional and material misrepresentations to justify termination of coverage.

27 Bath provides evidence that affirms Barnes filled out the application and asked Bath
28 about her medical history. Bath informed Barnes that she had suffered from anxiety and

1 depression, and was taking Celexa, and had taken Paxil and BuSpar. Bath contends she
2 trusted Barnes to complete the application appropriately based on the information she
3 disclosed to him. (UMF nos. 4, 6, 8, 9, 11, 13, 16, 18, 20, 22, 37, 48, 49, 50, 51, 52, 53, 54,
4 56 and Bath's AMF nos. 135-140, 149, 150, 159-160, 164, 173, 180, 188-190)

5 As to materiality, there are triable issues of material fact as to whether Blue Shield
6 misapplied the applicable *Milliman* guidelines in its coverage determinations and re-review.
7 (Bath's AMF nos. 191- 209, 211-212, 250-260)

8 Blue Shield responds that Barnes is an independent contractor and was Bath's agent
9 such that Bath ratified his actions and is therefore bound by his misrepresentations.
10 However, Barnes filled out the application and was informed by Bath of her medical history
11 such that there are triable issues of fact and questions of law as to whether Bath made
12 intentional misrepresentations on the application.

13 Relying on the original 57 UMFs, Blue Shield argues that Bath's claims are also
14 barred by the doctrine of unclean hands. Because there are triable issues of material fact, the
15 Court cannot conclude, as a matter of law, that Bath is barred by unclean hands. (UMF nos.
16 4, 6, 8, 9, 11, 13, 16, 18, 20, 22, 37, 48, 49, 50, 51, 52, 53, 54, 56 and 84)

17 As to summary adjudication of the second cause of action for breach of the implied
18 covenant of good faith and fair dealing, the Court cannot conclude as a matter of law that
19 Blue Shield acted reasonably. Triable issues of material fact exist. There are also triable
20 issues of material fact as to whether Jack suffered damages. (UMF no. 61) As to the statute
21 of limitations, the Court has already ruled that the claim is not time-barred.

22 As to the UCL cause of action, there are triable issues of material fact as to whether
23 Blue Shield properly re-reviewed Bath's file under the appropriate standards, and triable
24 issues as to any unlawful, fraudulent, or unfair conduct. (UMF nos. 4, 6, 8, 9, 11, 13, 16, 18,
25 20, 22, 37, 48, 49, 50, 51, 52, 53, 54, 56 and 76-81) These same triable issues of material
26 fact also preclude summarily adjudicating the punitive damages claim. (UMF no. 83)

27 Blue Shield's motion for summary judgment/adjudication is denied.²
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² The parties' respective motions to seal confidential records and exhibits are granted.

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B. Bath's Motion for Summary Adjudication

Bath moves for summary adjudication as to two of Blue Shield's affirmative defenses. These are essentially the same arguments that Bath raised in opposition to Blue Shield's motion discussed above. Bath contends that Blue Shield waived its right to rescind coverage and had no right to prospectively cancel the policy.³

As discussed above, Bath asserts that the cancellation language in the January 1, 2003 endorsement is not applicable because: 1) she was not properly notified of the change; 2) the provision cannot be applied retroactively to misrepresentations that occurred prior to its adoption; 3) to retroactively apply the provision would make the agreement illusory; and, 4) Blue Shield waived its right to prospectively cancel coverage.

Bath sets forth 50 UMFs in support of her motion. Blue Shield produces sufficient evidence to create a triable issue of material fact as to the alleged policies and investigation practices of Blue Shield's Underwriting Investigations Unit and how it handled the investigation into Bath's alleged misrepresentations. (UMF nos. 1-6, 18, 19, 21, 22, 29 and 30)

Blue Shield successfully disputes Bath's interpretation of Blue Shield's power and authority under the terms of the original agreement and the January 1, 2003 endorsement. (UMF nos. 41, 42, and 43) As to the endorsement, Blue Shield adequately disputes Bath's assertion that she was not properly notified of the endorsement. (UMF nos. 45, 46, and 48) Blue Shield also sets forth additional independent reasons why it had the authority to prospectively cancel Bath's coverage.

There are triable issues of material fact such that the Court is precluded from ruling as a matter of law that Bath is entitled to summary adjudication on Blue Shield's fourth affirmative defense as it relates to its right to prospectively cancel Bath's coverage. Bath's motion for summary adjudication is denied.

³ Blue Shield has dismissed the fourth affirmative defense as it relates to any right of equitable rescission such that the only remaining issue is whether Blue Shield could prospectively cancel coverage.

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3 **III. CONCLUSION**

4 The Court has come to expect nothing but the best from counsel, and these motions
5 are no exception: the briefing and argument were outstanding. However, the major premise
6 of the D9 Standing Case Management Order is to force discussions about motions like these
7 before such motions are filed. In this manner the Court can guide the process. Motions laden
8 with compound issues and dozens of supposedly undisputed facts are highly unlikely to
9 succeed.

10 Particularly in this age of highly-underfunded local court budgets, inadequate
11 staffing, and strained resources, the Court simply cannot dedicate sufficient time to wade
12 through boxes of depositions and reams of paper in order to provide the parties with detailed
13 rulings on the multiple issues presented. It is a luxury that the San Luis Obispo Superior
14 Court can no longer afford.

15 The cross-motions for summary adjudication and summary judgment are denied.

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17 Dated: September 11, 2017

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20 CHARLES S. CRANDALL
21 Judge of the Superior Court
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**STATE OF CALIFORNIA, COUNTY OF SAN LUIS OBISPO
CERTIFICATE OF MAILING**

Jessica Bath vs. Blue Shield Of California Life & Health	CV120743
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Don A Ernst
Ernst Law Group
1020 Palm Street
San Luis Obispo CA 93401

John M LeBlanc
Manatt Phelps & Phillips LLP
11355 W Olympic Boulevard
Los Angeles CA 90064

I, Melanie Miller, Deputy Clerk of the Superior Court of the State of California, County of San Luis Obispo, do hereby certify that I am over the age of 18 and not a party to this action. Under penalty of perjury, I hereby certify that on **09/11/2017** I deposited in the United States mail at San Luis Obispo, California, first class postage prepaid, in a sealed envelope, a copy of the attached **Ruling and Order Denying Cross-Motions for Summary Judgment/ Adjudication**. The foregoing document was addressed to each of the above parties.

OR

If counsel has a pickup box in the Courthouse a copy was placed in said pickup box this date.

Dated: 9/11/2017

Michael Powell, Clerk of the Court

By: /s/ Melanie Miller Deputy Clerk
Melanie Miller