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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

BLAKE KOCH,

Plaintiff and Appellant,

v.

MARKEL INSURANCE COMPANY
et al.,

Defendants and Respondents.

B213610

(consolidated with B215545)

(Los Angeles County
Super. Ct. No. LC 079920)

APPEAL from orders of the Superior Court of Los Angeles County.

James A. Kaddo, Judge. Reversed with directions.

Bill Daniels Law Offices and William A. Daniels; the Ehrlich Law Firm and Jeffrey Isaac Ehrlich for Plaintiff and Appellant.

Berman, Berman, Berman; Spencer A. Schneider, Larry W. Mitchell and Karen E. Adelman for Defendant and Respondent Markel Insurance Company.

Lewis Brisbois Bisgaard & Smith; Roy G. Weatherup, Jeffrey J. Christovich, Caroline E. Chan and Brian Slome for Defendants and Respondents Frederick Blum, the Bradford Agency and Steve Kopstein.

Blake Koch sued his business liability insurer, Markel Insurance Company (Markel), for refusing to defend or indemnify him in a personal injury lawsuit. Koch also sued Frederick Blum, the Bradford Agency and Steve Kopstein (Blum Defendants) for negligently failing to procure insurance coverage to protect him from personal injury suits. The superior court sustained without leave to amend demurrers to Koch's third amended complaint (TAC). Koch appealed from the subsequent orders signed by the court dismissing the action.¹ Koch asserts the TAC properly alleged causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing against Markel and a cause of action for negligence against the Blum Defendants. We reverse with directions.

FACTUAL AND PROCEDURAL SYNOPSIS

I. Allegations of the TAC

A. Koch Purchases Insurance

Koch is an automobile mechanic. In 2001, Koch purchased an auto repair business called "Gene and Jim's Auto Repair" (the Garage Business). Around the same time, Koch purchased real property on which to operate the Garage Business (the Garage Property).

The former owners of the Garage Business and Garage Property introduced Koch to Steve Kopstein, an insurance broker employed by Fred Blum and the Bradford Agency.

Kopstein told Koch that his insurance practice as well as that of Blum was primarily writing garage-keepers coverage for businesses and properties such as Koch's.

¹ Markel filed a motion to dismiss this appeal on the basis Koch lacked standing to pursue the appeal because he had filed a voluntary petition for Chapter 7 bankruptcy. Subsequently, Koch provided a copy of the order closing the bankruptcy case, and Markel withdrew its motion to dismiss.

Kopstein told Koch that he wanted to sell Koch insurance coverage for Koch's new business and property and represented to Koch that selling garage policies was a specialized area of insurance in which he and Blum were well qualified because of their extensive experience.

Kopstein added that because the field was specialized, it was easy to make mistakes, and he presented himself as an expert in the field. Kopstein represented that Blum was an Automotive Service Council (ASC) preferred insurance provider. Koch is a member of the ASC, and Kopstein's representation further suggested Kopstein and Blum were experts in this area of insurance. Kopstein also told Koch that because he and Blum were insurance brokers, they would shop among the different carriers each year to obtain the best policies for Koch's needs.

On behalf of Blum, Kopstein promised Koch that he would not sell Koch the cheapest policies, but would instead provide the best policies for the best price. Although Koch already had an insurance broker with whom he had worked on prior occasions, Koch decided to allow the Blum Defendants to put together his insurance package based on their representation that they had special expertise in this area.

Koch told Kopstein that he was purchasing the Garage Property as an individual and wanted to make sure it was protected by insurance. Koch told Kopstein that he was particularly concerned with obtaining coverage for slip-and-fall lawsuits. Koch advised the Blum Defendants that he was not familiar with commercial insurance and the Garage Property was the first commercial property he had owned.

Kopstein assured Koch that his property would be protected against personal injury lawsuits, and Koch relied on that assurance to decide the Blum Defendants could put together an insurance package that would fully protect the Garage Business and Garage Property.

The Blum Defendants sold Koch two policies. One was a garage-keepers policy issued by Markel. The other was a worker's compensation policy issued by Preferred Employers Insurance (PFE). The Blum Defendants were Markel's appointed agents,

duly registered with the California Department of Insurance. The Blum Defendants acted as both agents and brokers when obtaining the Markel coverage, but only as brokers in obtaining the PFE policy.

Kopstein told Koch that he had shopped around and determined the policies with Markel and PFE were the best policies for Koch's needs and that together, the two policies would provide insurance coverage for the Garage Business and the Garage Property. Had the Blum Defendants advised Koch that he required different or additional coverage, Koch would have purchased it.

Kopstein partially completed the Markel application before meeting with Koch at the Garage Property. Kopstein brought the form to the meeting, asked Koch questions about Koch's business, which Koch answered truthfully, completed the application, and then presented the application to Koch for his signature. Kopstein did not explain any aspect of the application to Koch and did not give Koch a chance to read the application before signing it. Until Koch filed this lawsuit, he never had a copy of the application.

Koch told Kopstein there were two aspects to his business -- he did general auto repair and, in addition, he did custom engine work. The Blum Defendants regularly inspected the Garage Property, and it would have been obvious to anyone with the kind of expertise they represented they had that Koch's business consisted of both general auto repair and custom work.

B. Koch Divides His Business

In early 2003, Koch sought to expand his business by purchasing another garage called Adair's Automotive. At the same time, Koch decided to separate the two aspects of his business into two separate businesses. Koch was concerned that the customers of his custom engine business might be more inclined to complain than the general repair customers because they had higher expectations for the work. Koch wanted to avoid complaints from the custom side of the business tarnishing the general repair side.

Koch formed a corporation -- Gene & Jim's Auto Repair, Inc. (the Corporation), which would conduct the general auto repair part of the business. Koch continued to do the custom engine work as a sole proprietorship. The two businesses had separate identities and kept separate books and bank accounts, but both operated out of the same location, the Garage Property, which Koch personally owned. At all times, Koch maintained valid business licenses and corporate registration for his respective businesses.

In June 2003, Koch advised the Blum Defendants about the change in the structure of his businesses, including the formation of the Corporation, and requested they make the necessary adjustments in his coverage. The Blum Defendants promised the appropriate changes would be made.

In October 2003, Kopstein renewed Koch's coverage. As was his regular practice, Kopstein completed much of the renewal application at his office and then brought it to Koch's business to complete and be signed. Koch accurately answered all the questions Kopstein put to him. Because Kopstein came to the business during regular business hours, while Koch was occupied with customers and the press of work, Koch did not read the application when Kopstein presented it to him for signature. Koch simply signed it. Koch was not given a copy of the application.

The application named as the insured Koch, dba Gene and Jim's Auto Repair. Although the Blum Defendants were aware of the Corporation before the renewal application was prepared, they did not seek coverage for the Corporation. The Blum Defendants sought payment of a deposit along with the renewal application. Koch paid the deposit with one of the Corporation's checks.

No later than November 2003, Blum specifically requested that the PFE worker's compensation policy be amended to name the Corporation as an insured. The Blum Defendants never advised Koch that the Corporation was not an insured under the Markel policy or that his new business structure could create a coverage gap. Markel issued the

renewal policy effective November 2003 with Koch, dba Gene and Jim's Auto Repair as the named insured.

C. The Personal Injury Lawsuit

In January 2004, Michael Patrick fell while at work at the Garage Property and was injured. Patrick was employed by the Corporation as a smog technician and mechanic; he was not, and never had been, an employee of Koch or his custom car business.

After Patrick's accident, Koch reviewed his PFE worker's compensation policy and noticed the Corporation was not listed as an insured. Koch contacted the Blum Defendants, and they arranged to have the policy amended to list the Corporation as the insured and to exclude Koch as an individual. Patrick applied for, and received, worker's compensation benefits paid under the PFE worker's compensation policy.

At the same time, Koch asked the Blum Defendants whether any other changes had to be made in his coverage to ensure that both he and his property would be covered. The Blum Defendants stated no changes were necessary and did not advise Koch about any potential coverage gaps.

In October 2005, Patrick and his wife filed suit (the Patrick Lawsuit) against Koch in Koch's capacity as the owner of the Garage Property, on theories of negligence and premises liability. Koch tendered the defense of the lawsuit to Markel, which denied coverage and refused to defend or indemnify. After Markel denied coverage, Koch asked Kopstein what had gone wrong, and Kopstein replied it appeared Koch had bought the wrong policy. Koch had to undertake his own defense without adequate resources.

II. Procedural Summary

Koch filed this action against Markel, Blum and the Bradford Agency in December 2007. The court sustained with leave to amend the demurrers filed to the

complaint and first and second amended complaints. Koch added Kopstein as a Doe defendant in September 2008.

Markel, Blum and Bradford Agency filed demurrers and motions to strike the TAC. Kopstein did not demur or join the other demurrers. After taking the motions under consideration, the court issued an order sustaining the demurrers without leave to amend and denying Kopstein's motion to strike the Doe amendment.

The parties presented to the court a stipulation that if Kopstein, who was acting at all times as an agent for Blum and the Bradford Agency, had filed his own demurrer on the same grounds as the other Blum Defendants, the court also would have sustained it without leave to amend. The parties agreed the court could enter an order sustaining the demurrer as if Kopstein had joined therein. On February 24, 2009, the court entered an order on the stipulation and dismissed the case against Kopstein.

On January 7, 2009, Koch filed a notice of appeal from the order dismissing his claims against Markel, Blum and the Bradford Agency. Although the notice was premature, it was timely under California Rules of Court, rule 8.104(e) because on January 13, 2009, Markel submitted an order signed by the court dismissing the claims against it. On March 11, 2009, the court signed and entered an order dismissing the action in its entirety against all defendants. Koch then filed a timely notice of appeal of the dismissal of his claims against Kopstein. This court granted Koch's motion to consolidate the two appeals.

DISCUSSION

I. Standard of Review

A court's decision to dismiss an action after sustaining a demurrer without leave to amend is reviewed de novo. (*Ortega v. Contra Costa Community College Dist.* (2007) 156 Cal.App.4th 1073, 1080.) "In reviewing the pleadings, we are not bound by the determination of the trial court, but are required to render our independent judgment on whether a cause of action has been stated." (*Hoffman v. State Farm Fire & Casualty Co.* (1993) 16 Cal.App.4th 184, 189.) "Our only task in reviewing a ruling on a demurrer is

to determine whether the complaint states a cause of action. Accordingly, we assume that the complaint's properly pleaded material allegations are true and give the complaint a reasonable interpretation by reading it as a whole and all its parts in their context. We do not, however, assume the truth of contentions, deductions, or conclusions of fact or law." (Citations omitted.) (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.) "Additionally, to the extent the factual allegations conflict with the content of the exhibits to the complaint, we rely on and accept as true the contents of the exhibits and treat as surplusage the pleader's allegations as to the legal effect of the exhibits." (*Barnett v. Fireman's Fund Ins. Co.* (2001) 90 Cal.App.4th 500, 505.) When a demurrer is sustained without leave to amend, if the defect can be cured by amendment, the plaintiff must be given the opportunity to do so. (*Balikov v. Southern Cal. Gas Co.* (2001) 94 Cal.App.4th 816, 819-820.)

II. The Blum Defendants' Demurrer

A. Agent's Duty

The superior court sustained the Blum Defendants' demurrer on the basis the TAC failed to state a cause of action in that an insurance agent has only a general duty of care which does not include an obligation to procure a policy offering complete coverage, Koch did not plead a special relationship,² and by signing the application, Koch acknowledged it was accurate. On appeal, the Blum Defendants contend the TAC does not contain allegations demonstrating the existence of a special relationship or any other exception to the general rule. In particular, they claim Koch failed to allege an insurance policy was available for the property, failed to allege they knew the extent of his personal assets, and failed to allege he delegated to them the burden of determining the type and

² Citing *Jones v. Grewe* (1987) 189 Cal.App.3d 950, 956-957, the superior court stated that in order to plead a special relationship, Koch had to allege the broker knew/should know the extent of the insured's personal assets, a policy which would have covered the alleged loss was available to the insured, and the insured was willing to pay the additional premiums for the requested policy.

amount of coverage which would have given him complete protection from an employee's negligence action.

“At a minimum, an insurance agent has a duty to use reasonable care, diligence, and judgment in procuring the insurance requested by its client. An agent may assume additional duties by an agreement or by holding himself or herself out as having specific expertise. These duties do not disappear because the agent is also an agent for an insurer. Dual agencies are not uncommon, and do not negate the agent's duty to the client.” (Citation omitted.) (*Kurtz, Richards, Wilson & Co. v. Insurance Communicators Marketing Corp.* (1993) 12 Cal.App.4th 1249, 1257; see also *Paper Savers, Inc. v. Nacsa* (1996) 51 Cal.App.4th 1090, 1096, fn. 4 [“[W]here an agent holds himself out as a consultant and counselor, he does have a duty to advise the insured as to his insurance needs, particularly where such needs have been brought to the agent's attention.”].)

“[A]s a general proposition, an insurance agent does not have a duty to volunteer to an insured that the latter should procure additional or different insurance coverage. . . . The rule changes, however, when – but only when – one of the following three things happens: (a) the agent misrepresents the nature, extent or scope of the coverage being offered or provided . . . , (b) there is a request or inquiry by the insured for a particular type or extent of coverage . . . , or (c) the agent assumes an additional duty by either express agreement or by ‘holding himself out’ as having expertise in a given field of insurance being sought by the insured.” (Citations & fn. omitted.) (*Fitzpatrick v. Hayes* (1997) 57 Cal.App.4th 916, 927.)

Koch alleged the Blum Defendants held themselves out as experts (with extensive experience) in the field of garage-keepers insurance and stated that field was a specialized field, he requested coverage for slip and fall (i.e., personal injury) suits, including as the owner of the Garage Property, and the Blum Defendants assured him he had such coverage. Koch further alleged that had the Blum Defendants advised him he needed different or additional insurance, he would have purchased it. The Blum Defendants assert those allegations are not adequate as Koch did not allege he wanted

coverage for slip and fall accidents by an employee, but they cite no authority requiring an insured to identify a particular type of plaintiff. Whether such coverage should have been provided cannot be resolved at the pleading stage.

“A broker’s failure to obtain the type of insurance requested by an insured may constitute actionable negligence and the proximate cause of injury.” (*Desai v. Farmers Ins. Exchange* (1996) 47 Cal.App.4th 1110, 1120.)

As they did in their demurrer, the Blum Defendants rely on *Jones v. Grewe, supra*, 189 Cal.App.3d at page 956, in which the court noted, “The general duty of reasonable care which an insurance agent owes his client does not include the obligation to procure a policy affording the client complete liability protection.” The court also noted that an insurance policy “arises out of the insured’s desire to be protected in a particular manner against a specific kind of obligation,” not a generalized desire to be completely protected against any possible financial loss and that the insured was responsible for advising the agent about the insurance wanted, “including the limits of the policy to be issued.” (*Ibid.*) However, the allegations of a special relationship discussed in *Jones* are not relevant to this case as the issue in *Jones* was the amount of insurance, i.e., whether the policy was sufficient to protect the insured’s personal assets (*id.* at pp. 953, 956), whereas in the case at bar, the issue was whether Koch was provided with the specific type of insurance he requested.

In *Clement v. Smith* (1993) 16 Cal.App.4th 39, 45, the court concluded: “Absent some notice or warning, an insured should be able to rely on an agent’s representations of coverage without independently verifying the accuracy of those representations by examining the relevant policy provisions. This is particularly true in view of the understandable reluctance of an insured to commence a study of the policy terms where even the courts have recognized that few if any terms of an insurance policy can be clearly and completely understood by persons untrained in insurance law.” Whether the insured’s reliance is reasonable is a question of fact. (*Id.* at p. 46.)

Thus, Koch adequately alleged a cause of action for negligence against the Blum Defendants based on their failure to procure the specific insurance (i.e., protection against personal injury suits) he requested, and they assured him he had.

B. Signing the Application

The Blum Defendants noted that ““when a person with the capacity of reading and understanding an instrument signs it, he is, in the absence of fraud and imposition, bound by its contents, and is estopped from saying that its provisions are contrary to his intentions or understanding.”” (*Palmquist v. Mercer* (1954) 43 Cal.2d 92, 98.) The Blum Defendants reason that any concern Koch had about potential personal injury claims can only be viewed as a comment preceding the agreement to secure the insurance specified in the application signed by Koch. As discussed above, the law is to the contrary when an insured requested a particular type of insurance coverage. In their view, Koch got what he bargained for and paid for. Koch alleged he did not get the slip and fall coverage he requested. Furthermore, the Blum Defendants claim Koch breached his duty to read the policy and hence was bound by its terms. There is no allegation that Koch failed to read the policy, only that he did not read the application.

Cases cited by the Blum Defendants involved cases of fraud, not cases where an insured was misled by the negligence of an insurance agent. Some of those cases are distinguished in *Butcher v. Truck Ins. Exchange* (2000) 77 Cal.App.4th 1442, 1463, in which the court reasoned: “Respondents urge us to follow a line of cases standing for the proposition that an insured has a duty to read the policy. They argue that a simple comparison of Truck’s policy with West American’s would have disclosed the absence of personal injury coverage. [¶] None of the cases relied upon by respondents involve an

insured being misled by the negligence of an insurance agent.”³ The court further noted: “Respondents contend oral misrepresentations must not be allowed to override ‘the most clearly drafted [written] agreements,’ and holding otherwise will encourage insureds not to read their policies. While one might quarrel with whether insurance contracts in general are ‘clearly drafted agreements,’ this is not a case involving a dispute about the meaning of a policy provision. [¶] A principle that underlies the ‘failure to deliver the agreed-upon coverage’ cases is that a disparity in knowledge may impose an affirmative duty of disclosure on the insurer or its agent.” (*Id.* at p. 1464.)

Accordingly, the TAC properly alleges a cause of action for negligence against the Blum Defendants as Koch’s signing the application did not negate the possible negligence of the insurance agents in failing to procure complete slip and fall coverage for Koch.

III. Markel’s Demurrer

The TAC alleged that Markel denied coverage for a covered loss, improperly relying on certain exclusions. Markel demurred to the TAC on the grounds that there was no coverage for the Patrick lawsuit by virtue of worker’s compensation and employment-related exclusions⁴ as Koch applied for insurance to cover his entire garage business, the

³ The issue in *Butcher* was whether a new insurance policy provided the same coverage as the old policy. (*Butcher v. Truck Ins. Exchange, supra*, 77 Cal.App.4th at p. 1446.)

⁴ The relevant exclusions are: Worker’s compensation, which excluded: “Any obligation for which the ‘insured’ or the ‘insured’s’ insurer may be held liable under any worker’s compensation, disability benefits, or unemployment compensation law, or any similar law.” Employee indemnification and employer’s liability, which excluded: “‘Bodily injury’ to: [¶] a. An ‘employee’ of the ‘insured’ arising out of and in the course of: [¶] (1) Employment by the ‘insured;’ or [¶] (2) Performing the duties related to the conduct of the ‘insured’s’ business, or [¶] b. The spouse, child, parent, brother or sister of that ‘employee’ as a consequence of Paragraph a above.” This exclusion applied: “Whether the ‘insured’ may be liable as an employer or in any other capacity.”

Blum Defendants' knowledge of the structure of Koch's businesses had no relevance because Koch signed the application for the policy showing him as the named insured, and even if there was coverage, there could be no bad faith because there was a genuine dispute about coverage. The court sustained Markel's demurrer on the basis the TAC failed to allege sufficient facts to constitute a cause of action.

Koch contends that because the Corporation is not the insured, those exclusions do not apply by their plain terms and are inconsistent with the allegations of the TAC that Patrick was employed by the Corporation. Koch further contends his signing the insurance application did not automatically insulate Markel.

Markel contends the court properly sustained its demurrer because the exclusions in the policy eliminated any possibility of coverage as the insured was the repair business which employed Patrick, i.e., the entire garage operation was the insured. Markel reasons that identification of the named insured as the sole proprietorship did not affect the Corporation's status as the insured and that Koch is bound by the statements in his application, i.e., the alleged misidentification of the insured.

A. Negligence Cause of Action

“[I]f the agent fails to exercise reasonable care in procuring the type of insurance that the insured demanded and bargained for, the cases hold that the insurer may be liable under theories of ratification and ostensible authority. [¶] For example, where an insurance agent negligently failed to name the insured's lessor as an additional insured on the policy, so that the lessor was exposed to liability when someone was injured on the insured premises, a claim which survived demurrer was stated against the insurance carrier based on the negligence of its agent. The court observed that the insurance carrier -- as a 'quasi-public' entity -- may be held vicariously liable for failing to fulfill its basic obligation to provide the insurance required by the policy's intended beneficiary and demanded from the agent.” (Citation omitted.) (*Desai v. Farmers Ins. Exchange, supra*, 47 Cal.App.4th at p. 1120; see also *O'Riordan v. Federal Kemper Life Assurance Co.* (2005) 36 Cal.4th 281, 288 [“The fact that the knowledge acquired by the agent was not

actually communicated to the principal . . . does not prevent operation of the rule.”].) Thus, Markel is potentially liable for the failure of its agent (the Blum Defendants) to procure the insurance for personal injury suits, including as owner of the Garage Property, requested by Koch such that the TAC could be amended to add Markel to the negligence cause of action.

B. Breach of Contract/Breach of Covenant of Good Faith

1. Duty to Defend

“It has long been a fundamental rule of law that an insurer has a duty to defend an insured if it becomes aware of, or if the third party lawsuit pleads, facts giving rise to the potential for coverage under the insuring agreement. This duty, which applies even to claims that are ‘groundless, false, or fraudulent,’ is separate from and broader than the insurer’s duty to indemnify. However, “where there is no possibility of coverage, there is no duty to defend . . .” [Cases] have made it clear that the determination whether the insurer owes a duty to defend usually is made in the first instance by comparing the allegations of the complaint with the terms of the policy. Facts extrinsic to the complaint give rise to a duty to defend when they reveal a possibility that the claim may be covered by the policy. [¶] Conversely, where the extrinsic facts eliminate the potential for coverage, the insurer may decline to defend even when the bare allegations in the complaint suggest potential liability. This is because the duty to defend, although broad, is not unlimited; it is measured by the nature and kinds of risks covered by the policy.” (Citations omitted.) (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 19; see also *Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 299-300 [“Any doubt as to whether the facts establish the existence of the defense duty must be resolved in the insured’s favor.”].) “The issue of whether there is a potential for coverage under an insurance policy and a duty to defend is a question of law.” (*Peters v. Firemen’s Ins. Co.* (1998) 67 Cal.App.4th 808, 811.)

2. Insured

Koch's insurance application identified the named insured as "Blake Koch" dba "Gene & Jim's Auto Repair" located at 21414 Ingomar in Canoga Park. The Corporation is not identified as a named insured. The application identified the form of the business as "Individual" rather than "Corporation," "Partnership" or "Other." It identified the nature of the business by checking the box for "Repair Garage." In response to a question asking whether the applicant occupied the "entire premises," Koch answered yes. However, Koch's position was that the businesses were legally separate entities which operated out of the same physical location. On page one, under employees, the application listed zero as the number of mechanics. On page four, the application asked the applicant to list all active owners, mechanics, technicians and any others who worked on customer cars or drove on their job. The application identified Koch and four other full-time employees by name and position. The application contained a box to be marked if the applicant wanted the "Owner of Premises" to be added as an additional insured to the policy; that box was not checked even though Koch had specifically requested such coverage.

The named insured on the policy is "Blake Koch DBA Gene & Jim's Auto Repair." Koch argues the Markel policy insures only his sole proprietorship and not the Corporation, noting the application describes the sole proprietorship and not the Corporation. Markel argues Koch insured his entire garage operation (i.e., the sole proprietorship and the Corporation). By impliedly finding there were misstatements in the application, the court impliedly found the insurance policy covered the entire garage operation.⁵ However, "California has long followed the . . . rule that fraud or misrepresentation as to coverage under a policy or issuance of a policy different in coverage from that represented to the insured estops the insurer from reliance on the

⁵ In ruling on the demurrer to the second amended complaint, the court expressly stated the policy covered the entire garage operation.

coverage as stated in the issued policy.” (*Hartford Fire Ins. Co. v. Spartan Realty International, Inc.* (1987) 196 Cal.App.3d 1320, 1325.)

“[A]n insurance company may by its conduct or dealings apart from the policy itself be estopped from denying that coverage has been furnished for a risk which the insured has been led to believe is protected under the policy.” (*Middlesex Mutual Ins. Co. v. Ramirez* (1981) 116 Cal.App.3d 733, 739.) Kopstein assured Koch that Koch had coverage as owner of the premises for personal injury suits. (See *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 874 [reasonably based on the contract, the agent assured the insured that the policy provided the requested coverage; the court concluded the insurer was bound by its agent’s interpretation of the contract].)

Koch suggests that if the application showed he sought insurance for both businesses, then Markel would have issued two distinct policies; one for each business. After Patrick sued Koch, Kopstein told Koch it appeared he had purchased the wrong policy. From Koch’s perspective, he was sold the wrong policy.

We conclude one cannot determine from the policy and application which business or businesses were the intended insured. As both interpretations are arguably reasonable, the identity of the insured entity cannot be resolved at the pleading stage. (See *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225, 1240-1241.) We note that if Koch is correct that only the sole proprietorship was insured, he would not have had insurance coverage for a slip and fall accident in the general repair portion of the garage.

In *Byrd v. Mutual Ben. H. & A. Assn.* (1946) 73 Cal.App.2d 457, 462, the court stated: “We are constrained to hold that the proffered evidence of the facts and circumstances surrounding the execution of the application for insurance was admissible to establish an estoppel upon the part of the insurer by reason of the conduct of its agent. The insured was not responsible for the omission or negligence in connection with the answer given to question 11 [asking whether the insured had ever made a claim or

received indemnity on account of any injury or illness], unless he had actual knowledge of the fact that such answer had been improperly or incorrectly written by the agent of the insurer. There is no claim made that the insured had any actual knowledge of the contents of the application, or that he had been asked to read it, or do anything other than sign his name at the end thereof.” The insured had offered to prove that he had fully discussed with the agent the injuries he had received in World War I and the compensation he had received for them. (*Ibid.*) Koch alleged he signed the application without reading it and was not given a copy of the application.

The court concluded: “When the insured acts in good faith and without fault and by reason of the fraud, mistake or negligence of a soliciting agent the truthful answers of an insured given at the time he makes application for insurance have been omitted or incorrectly set forth in the form used for informing the company of the applicant’s previous injuries and treatment therefor, the insurer is estopped to set up the omissions in or falsity of such answers as a defense to an action on the policy.” (*Byrd v. Mutual Ben. H. & A. Assn., supra*, 73 Cal.App.2d at p. 462.) The court noted that insurance agents “not infrequently mislead” the insured by taking the preparation of an insurance application into their own hands and procuring the insured’s signature by an assurance the application was properly drawn and would meet the requirements of a policy such that the risk of a false or erroneous statement should be regarded as an act of the insurer and “to hold otherwise would outrage equity and justice and be a blot upon the law.” (*Id.* at p. 464.) Thus, even if the application incorrectly identified the insured, there remains the question of whether that identification was due to the negligence of the Blum Defendants such that the law of equitable estoppel might apply. (*Ibid.*)

3. Signing the Application

Citing *Telford v. New York Life Ins Co.* (1973) 9 Cal.2d 103, 107, the court also sustained Markel’s demurrer on the basis that because Koch had an opportunity to read the insurance application, the rule in California is that he cannot blame the insurance

company for his own misstatements or omissions. Markel proffers that as Koch was the one who caused the alleged error in the identification of the named insured, he cannot argue the Corporation was not the insured. In *Telford*, the misstatement on the insured's life insurance application was the insured's failure to disclose she had had her left breast removed which vitiated the policy. (*Id.* at p. 105.) In the case at bar, who was insured and whether there was a misstatement in the identification of the insured are questions of fact as was the question of whether Koch was entitled to rely on Kopstein's representations about coverage. (See *Clement v. Smith, supra*, 16 Cal.App.4th at pp. 44-47.)

4. Bad Faith

The bad faith cause of action included allegations that Markel's construction of the policy was unreasonable, Markel ignored information that might support coverage and focused on information that might defeat coverage, Markel refused to reconsider its denial despite multiple requests to do so, Markel made misrepresentations to Koch about the coverage in hope of dissuading him from pressing his claim, and Markel refused to defend Koch in the underlying action even though it realized there was potential coverage.

"[T]here can be no breach of the implied covenant of good faith and fair dealing if no benefits are due under the policy." (*Brehm v. 21st Century Ins. Co., supra*, 166 Cal.App.4th at p.1235.) However, the inquiry is whether the allegations pled, if ultimately proved, would be sufficient to show the insurer acted unreasonably. (*Id.*, at pp. 1238-1240.) In the instant case, whether Markel acted reasonably in denying coverage for the Patrick lawsuit cannot be resolved at the pleading stage as the answer, at

least in part, turns on a determination of whether Markel's interpretation of the "insured" was reasonable even it is ultimately found to be incorrect.⁶

DISPOSITION

The orders sustaining the demurrers without leave to amend and dismissing the action are reversed with directions to the superior court to enter an order overruling the demurrers and giving Koch leave to amend to add Markel as a defendant to the negligence cause of action. Appellant to recover costs on appeal.

WOODS, J.

We concur:

PERLUSS, P. J.

ZELON, J.

⁶ According to Markel, "Koch had failed to purchase separate liability insurance for risks arising out of his individual ownership of the commercial property" and its policy "insured Koch in his capacity as the owner and operator of a garage business" and therefore "Koch cannot claim that the Markel policy also insured him for liability arising out of his capacity as the owner of the property" as "Koch is not insured under the Markel policy for any and all of his personal business activities, but only for his activities as the owner and operator of that garage business." In its demurrer, Markel did not argue Koch was not insured as the premises owner. If Koch was not so insured that would be an even more egregious violation of the Blum Defendants' duty to procure the specific insurance requested by the insured. However, the policy includes an endorsement for "OWNERS OF GARAGE PREMISES."