UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ATAIN SPECIALTY INSURANCE COMPANY, Plaintiff, v. LAKE LINDERO HOMEOWNERS ASSOCIATION, et al., Defendants.	CV 19-9824 DSF (MRWx) Order GRANTING Plaintiff's Motion for Summary Judgment (dkt. 57) and DENYING Defendants' Motion for Partial Summary Judgment (dkt. 58)

Before the Court are cross-motions for summary judgment. Plaintiff Atain Specialty Insurance Company's motion is at docket 57 (Atain Mot.). The motion by Defendants Lake Lindero Homeowners Association (LLHOA) and Lordon Enterprises, Inc. (Lordon), insureds of Atain, is at docket 58-1 (LLHOA Mot.). The Court deems these matters appropriate for decision without oral argument. See Fed R. Civ. P. 78; Local Rule 7-15. Atain's motion is GRANTED. LLHOA's motion is DENIED.

I. UNDISPUTED FACTS

LLHOA is a homeowner's association in Agoura Hills, California. Dkt. 59-1 (LLHOA SUF) ¶ 1.[1] LLHOA had an agreement with Golf

[1] Citations to SUF refer to each party's statement of disputed facts, which incorporates both a party's proposed uncontroverted facts and the responses to those facts. To the extent certain facts are not mentioned in this Order, the Court has not relied on those facts in reaching its decision. To the extent the Court cites to a disputed fact, the Court has found the dispute was not

Projects Lindero, Inc. (GPL) under which GPL maintained and managed the common areas, parks, lake, country club, restaurant, tennis facilities, and other amenities within the association. Id. ¶ 19. The parties entered into the Lease and Management Agreement in 1994. Id. The FAC alleges that in 2013 the parties extended the contract through 2050. See Dkt. 60-1 (Atain SUF) ¶ 33. However, in July 2018, LLHOA notified GPL that unless GPL satisfactorily addressed the breach of contract issues, it was relieved of its duties. LLHOA SUF ¶ 32. GPL filed suit against LLHOA in August 2018 (the GPL Action). Id. ¶ 33. This dispute between LLHOA and its insurer Atain arises out of that action.

A. The Policy

On May 14, 2018, LLHOA submitted an application for insurance (the Application) to Atain. Atain SUF ¶ 1. The Application included the following two questions:

> Question 18: "Within the last 5 years, has any inquiry, complaint, notice of hearing, claim or suit been made (including but not limited to, Equal Employment Opportunity commission, State Human Rights Board, Municipal, State or Federal Regulatory Authorities), against the organization, or any person proposed for Insurance in the capacity of either Director, Officer, Trustee, Employee or Volunteer Organization[?]"
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> Question 19: "Is any person proposed for this insurance aware of any fact, circumstance or situation, which may result in a claim against the organization or any of its Directors . . . ?"

Id. ¶¶ 2, 7 (alteration in original). LLHOA answered "no" to both questions. Id. ¶¶ 3, 8. The Application was completed by Hal Siegel,

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valid or was irrelevant, unless otherwise indicated. The Court has independently considered the admissibility of the evidence and has not considered facts that are irrelevant or based on inadmissible evidence.

an LLHOA board member and the association's treasurer and secretary. LLHOA SUF ¶¶ 5-8. In order to complete the Application, Siegel reviewed the "loss run" provided to him by the association's insurance broker showing no claims against the association for a substantial period. Id. ¶ 6. Siegel declared that to his knowledge LLHOA had not had a claim against it in the preceding five years and he was not aware of any fact, circumstance, or situation that would result in a claim against LLHOA. Dkt. 58-3 (First Siegel Decl.) ¶ 9. Based on the Application, Atain issued a policy for the period June 6, 2018 through June 6, 2019 (the Policy). Atain SUF ¶¶ 21, 23.

B. Alleged Complaints Against LLHOA

In 2015, the Department of Alcoholic Beverage Control for the State of California (ABC) filed a complaint and decision regarding LLHOA's misuse of its liquor license. Id. ¶ 4. In 2017, the State of California Water Resources Control Board (Water Board) informed LLHOA that it was in violation of a license agreement regarding the use of Lake Lindero. As a result, LLHOA was required to pay $310,000 to repair a gate in the lake and for additional costs, which resulted in a $675 Emergency Assessment to each homeowner. Id. ¶¶ 5-6, 9.

C. The Underlying Action

The Emergency Assessment, along with others, led to a recall and election of a new board. Id. ¶ 10; dkt. 57-12 (Barone Decl.) ¶ 9. Christopher Barone was elected to the board and became board president. Atain SUF ¶¶ 11, 15. Barone had run on a "Get Rid of Golf Projects Lindero, Inc." platform and issued a flier promising that if elected, he would review contracts and agreements with GPL to ensure the contracts were terminated as soon as possible. Id. ¶¶ 11-12.

Between April 17, 2018 and May 8, 2018, the LLHOA Board sent a series of ten notices to GPL demanding it take action on numerous issues or face termination. Id. ¶ 16; LLHOA SUF ¶ 21. Additionally, Barone invited other property management companies to inspect the property so that they could bid for a new management contract. Atain SUF ¶ 17. On July 11, 2018, the Board terminated its contract with

GPL. Id. ¶ 19. GPL filed suit against LLHOA and Lordon on August 6, 2018 asserting causes of action for breach of written agreement, money had and received, interpleader, tortious interference with contractual relations, and interference with prospective economic advantage. Id. ¶¶ 30, 35. LLHOA and Lordon tendered defense of the GPL Action to Atain. Id. ¶¶ 36, 38. Atain accepted the defense, id. ¶¶ 37, 39, without a reservation of rights, id. ¶ 40. Atain continues to provide LLHOA and Lordon with a defense to the GPL Action. Id. ¶ 44.

II. LEGAL STANDARD

"A party may move for summary judgment, identifying each claim or defense – or the part of each claim or defense – on which summary judgment is sought. The court shall grant summary judgment if the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "This burden is not a light one." In re Oracle Corp. Sec. Litig., 627 F.3d 376, 387 (9th Cir. 2010). But the moving party need not disprove the opposing party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Rather, "the burden on the moving party may be discharged by 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." Id. at 325. If the moving party satisfies this burden, the party opposing the motion must set forth specific facts, through affidavits or admissible discovery materials, showing that there exists a genuine issue for trial. Id. at 323-24; Fed. R. Civ. P. 56(c)(1). A non-moving party who bears the burden of proof at trial as to an element essential to its case must make a showing sufficient to establish a genuine dispute of fact with respect to the existence of that element of the case or be subject to summary judgment. See Celotex Corp., 477 U.S. at 322.

The "mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). An issue of fact is a genuine issue if it reasonably can be

resolved in favor of either party. Id. at 248. "[A] district court is not entitled to weigh the evidence and resolve disputed underlying factual issues." Chevron Corp. v. Pennzoil Co., 974 F.2d 1156, 1161 (9th Cir. 1992). Summary judgment is improper "where divergent ultimate inferences may reasonably be drawn from the undisputed facts." Fresno Motors, LLC v. Mercedes Benz USA, LLC, 771 F.3d 1119, 1125 (9th Cir. 2014) (citing Miller v. Glenn Miller Prods., Inc., 454 F.3d 975, 988 (9th Cir. 2006)). Instead, "the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986) (punctuation omitted).

"[W]hen parties submit cross-motions for summary judgment, each motion must be considered on its own merits." Fair Hous. Council of Riverside Cty., Inc. v. Riverside Two, 249 F.3d 1132, 1136 (9th Cir. 2001) (internal quotation marks and brackets omitted). In doing so, the Court must consider the evidence submitted in support of both motions before ruling on each of them. Id.

III. DISCUSSION

Atain argues that, as a matter of law, it is entitled to rescind the Policy due to material misrepresentations and concealments made by LLHOA in the application or, alternatively, that it does not have – and never had – a duty to defend or indemnify LLHOA in the GPL Action. LLHOA seeks summary judgment on the same issues – that Atain had a duty to defend and has no basis to rescind the policy.

A. Evidentiary Objections

In support of its motion, Atain submits the declaration of its counsel GailAnn Stargardter. Dkt. 57-8 (Stargardter Decl.).[2] Stargardter was hired by Atain to determine its obligations to LLHOA

[2] Atain also submits a virtually identical Stargardter Declaration in support of its opposition to LLHOA and Lordon's motion, to which LLHOA and Lordon also object. Dkt. 59-8. Because the evidentiary objections to both Stargardter Declarations are the same, the Court considers them together.

and Lordon under the Policy. Id. ¶ 3. She reviewed the pleadings and other documents filed in the GPL Action as well as in another lawsuit filed against LLHOA. Id. ¶ 4. She attaches to her declaration copies of three declarations filed in the GPL Action: the declaration of David E. Smith, president and CEO of GPL; the declaration of Barone; and the declaration of Terry Miller, who served as president of the LLHOA Board of Directors from 1992 to 2018. Id. ¶¶ 5-10, 15-17.

LLHOA objects to the Stargardter Declarations and the three exhibits because (1) Stargardter does not testify to having personal knowledge of the factual contents of these exhibits as required by Federal Rule of Evidence 602, (2) Stargardter does not testify from personal knowledge about the authentication of documents as required by Federal Rule of Evidence 901, and (3) the statements in the declarations are hearsay prohibited by Federal Rule of Evidence 802. See generally dkts. 60-2, 64. "At the summary judgment stage, we do not focus on the admissibility of the evidence's form. We instead focus on the admissibility of its contents." Fraser v. Goodale, 342 F.3d 1032, 1036 (9th Cir. 2003). The Court overrules LLHOA's evidentiary objections as to these exhibits because the facts underlying all three would be admissible at trial.

1. Authentication

"[U]nauthenticated documents cannot be considered in a motion for summary judgment" because "[a]uthentication is a 'condition precedent to admissibility.'" Orr v. Bank of Am., NT & SA, 285 F.3d 764, 773 (9th Cir. 2002) (quoting Alexander Dawson, Inc. v. N.L.R.B., 586 F.3d 1300, 1302 (9th Cir. 1978)). The documents have been adequately authenticated because the Stargardter declaration presents evidence that the documents were "recorded or filed in a public office as authorized by law." Fed. R. Evid. 901(b)(7)(A). Even if they weren't properly authenticated, "[w]hether the authentication requirement should be applied to bar evidence when its authenticity is not actually disputed, is . . . questionable." Burch v. Regents of Univ. of Cal., 433 F. Supp. 2d 1110, 1120 (E.D. Cal. 2006); see also Classical Silk, Inc. v. Dolan Grp., Inc., No. CV 14-09224-AB (MRWx), 2016 WL 7638113, at

*1 n.2 (C.D. Cal. Feb. 2, 2016) (the Fraser rule is "particularly true for authentication objections where . . . Defendants have raised procedural objection rather than substantive challenges to the authenticity of documents). LLHOA does not actually challenge the documents' authenticity.

2. Personal Knowledge

Because each of the declarants has personal knowledge each could testify to at trial, Stargardter's personal knowledge of each exhibit is immaterial. See, e.g., Raines v. Seattle Sch. Dist. No. 1, No. C09-203 TSZ, 2013 WL 496059, at *5 n.3 (W.D. Wash. Feb. 7, 2013) ("The Court presumes that, if the authors of [documents attached to a declaration] were called as witnesses, they would testify consistently with their respective writings, which appear to be based on personal knowledge.").

3. Hearsay

Courts may consider hearsay on summary judgment if the contents of the hearsay would be admissible at trial. In Fraser, the Ninth Circuit held a diary could be considered on summary judgment because the contents of the diary – recitations of events within a party's personal knowledge – could be admitted into evidence at trial by direct testimony from Fraser with the diary used to refresh her recollection or as a recorded recollection. 342 F.3d at 1037; see also Williams v. Borough of W. Chester, Pa., 891 F.2d 458, 465 n.12 (3d Cir. 1989) ("[H]earsay evidence produced in an affidavit opposing summary judgment may be considered if the out-of-court declarant could later present that evidence through direct testimony, i.e. in a form that would be admissible at trial." (internal quotation marks omitted)). Because the declarants here could testify at trial to each of the statements, the Court can properly consider their declarations. Additionally, even as introduced by another, the statements of Barone and Miller are not hearsay under Federal Rule of Evidence 801(d)(2) because the statements are made by and offered against an opposing party.

B. Rescission

"The rule in insurance cases is that a material misrepresentation or concealment in an insurance application, whether intentional or unintentional, entitles the insurer to rescind the insurance policy *ab initio*." W. Coast Life Ins. Co. v. Ward, 132 Cal. App. 4th 181, 186-87 (2005); see Cal. Ins. Code § 331 ("Concealment, whether intentional or unintentional, entitles the injured party to rescind insurance."). To show that rescission is appropriate, Atain must show both that there was a misrepresentation or concealment and that it was material. However, "if the applicant for insurance had no present knowledge of the facts sought, or failed to appreciate the significance of information related to him, his incorrect or incomplete responses would not constitute grounds for rescission." Thompson v. Occidental Life Ins. Co., 9 Cal. 3d 904, 916 (1973).

Atain argues that it can rescind the Policy because LLHOA incorrectly answered "no" to Questions 18 and 19. Atain Mot. at 13. It asserts that LLHOA's "no" response to Question 18 – whether any inquiry, complaint, notice of hearing, claim or suit had been made against LLHOA, including by a government regulatory authority – was a misrepresentation because LLHOA (1) received a complaint and entered into a settlement with the ABC, and (2) received a complaint from the Water Board. Id. LLHOA contends that Atain "cannot dispute that Atain's objective application question 18 was correctly answered 'No' since there had been no claims against the HOA in the five years prior to the application date." Dkt. 60 (LLHOA Opp'n) at 9; see also LLHOA Mot. at 12. LLHOA also argues it was not aware of the ABC complaint until after it submitted the Application. LLHOA Opp'n at 7; LLHOA Mot. at 5.

To show there was a complaint by the ABC, Atain submits the Barone Declaration from the underlying action, which states that "[u]pon investigation, the new board also discovered that GPL had been ordering large quantities of alcohol under the Lake Lindero liquor license and reselling them off-premises, in violation of the law and of Lake Lindero's license, and which resulted in a 10-day suspension of

the license." Barone Decl. ¶ 14. Additionally, Atain submits the Smith Declaration, which attaches the ABC's 2015 correspondence on the issue. Dkt. 57-11 (Smith Decl.) ¶ 9.

To counter this, Defendants submit two declaration by Siegel, the LLHOA treasurer who completed the Application. First Siegel Decl.; dkt. 60-3 (Second Siegel Decl.). In order to complete the Application, Siegel reviewed a loss run to determine if there had been any claims made against LLHOA. LLHOA SUF ¶ 6. A loss run provides the history of claims made against an insurance policy. Siegel was therefore reviewing only a document of claims already submitted to Atain. Siegel testifies that "[a]t the time [he] completed the Atain renewal application, [he] answered question 18 correctly based on the information known to [him] that LLHOA had not had a claim against it in the preceding 5 years." First Siegel Decl. ¶ 9. He does not give any additional information about why he was unaware of the two claims.

Defendants argue Siegal had no knowledge of these prior events, and that anything within GPL's "knowledge . . . cannot be imputed to Defendants under a plain reading of Atain's own severability provision." LLHOA Opp'n at 14. The severability provision provides that "[e]xcept for material facts or circumstances known to the person or persons signing the APPLICATION, no statement in the APPLICATION or knowledge or information possessed by an INSURED shall be imputed to any other INSURED for the purpose of determining the availability of coverage." Atain SUF ¶ 25.

The Court has no reason to doubt that Siegel himself was unaware of the ABC claim. However, "[a]s against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other." Cal. Civ. Code § 2332. Therefore, it is not enough that Siegel was unaware of the ABC complaint if LLHOA was aware of it. Siegel declared that the LLHOA Board did not learn of the allegations until July 9, 2018, two months after the Application was signed. First Siegel Decl. ¶ 24. While Atain submits evidence that Smith had knowledge of the claim, Smith's

knowledge cannot be imputed to LLHOA because of the severability provision. There is, therefore, a dispute of material fact as to whether failing to include the ABC claim in the answer to Question 18 was a concealment or misrepresentation.

Atain further argues LLHOA's answer to Question 18 was a misrepresentation because there was an inquiry or complaint from the Water Board that resulted in LLHOA paying $310,000. In its opposition, LLHOA presents *no* argument specific to the Water Board complaint. It also is not specifically addressed in the Siegal Declaration, which states, as noted above, only that Siegel "answered question 18 correctly based on the information known to [him] that LLHOA had not had a claim against it in the preceding 5 years." First Siegel Decl. ¶ 9. However, Siegel goes on to acknowledge that "[i]n 2017, the Water Board . . . advised both GPL and the LLHOA that the lake water was not being diverted as required by the Water Board permit." Id. ¶ 16.[3] In other words, LLHOA admits there was a complaint against it by the Water Board and Siegel and the Board were

[3] It is possible that by stating the Water Board "advised" LLHOA of the issue, Siegel Decl. ¶ 16, LLHOA and Lordon are trying to argue this incident was simply a notice or advisement and does not fall into the categories listed in Question 18 for which it was required to give notice. However, LLHOA and Lordon make no such argument in the briefs for their motion or Atain's. Courts need not "manufacture arguments" for a party. Birdsong v. Apple, Inc., 590 F.3d 955, 959 (9th Cir. 2009); see also Indep. Towers of Wash. v. Washington, 350 F.3d 925, 929-30 (9th Cir. 2003) ("However much we may importune lawyers to be brief and to get to the point, we have never suggested that they skip the substance of their argument in order to do so. . . . We require contentions to be accompanied by reasons."); Mahaffey v. Ramos, 588 F.3d 1142, 1146 (7th Cir. 2009) ("Perfunctory, undeveloped arguments without discussion or citation to pertinent legal authority are waived."). Additionally, Atain submits evidence that this was a complaint. The Smith Declaration attaches the letter LLHOA sent to its homeowners regarding the issue and the need for an emergency assessment. Smith Decl. ¶ 5, Ex. A. The letter refers to the notice from the Water Board as a "complaint." Id.

aware of the complaint. The Court finds that LLHOA's answer to Question 18 was therefore a misrepresentation or concealment because it did not include the Water Board complaint.

Whether that misrepresentation or concealment warrants rescission depends on its materiality. "Materiality is determined solely by the probable and reasonable effect which truthful answers would have had upon the insurer." LA Sound USA, Inc. v. St. Paul Fire & Marine Ins. Co., 156 Cal. App. 4th 1259, 1268 (2007) (quoting Thompson, 9 Cal. 3d at 916); see also Cal. Ins. Code § 334. "The fact that the insurer has demanded answers to specific questions in an application for insurance is in itself usually sufficient to establish materiality as a matter of law." LA Sound USA, 156 Cal. App. 4th at 1268 (quoting Thompson, 9 Cal. 3d at 916)). Because a misrepresentation must be material, "[a]n incorrect answer on an insurance application does not give rise to the defense of fraud where the true facts, if known, would not have made the contract less desirable to the insurer." Thompson, 9 Cal. 3d at 916. And the Court "is not required to believe the 'post mortem' testimony of an insurer's agents that insurance would have been refused had the true facts been disclosed." Imperial Cas. & Indemn. Co. v. Sogomonian, 198 Cal. App. 3d 169, 181 (1988).

In support of its motion, Atain attaches the declaration of Jessalynn Suda, corporate associate vice president for Atain responsible for Atain's Underwriting Department. Dkt. 57-2 (Suda Decl.) ¶ 1. Suda declares: "Had LLHOA disclosed this information in response to Question 18, Atain would not have issued" the Policy. Id. ¶ 42. This statement is unopposed; in none of its papers does LLHOA argue that its failure to disclose the Water Board complaint was not material beyond a generic statement that it "neither misrepresented nor concealed any material facts." See LLHOA Opp'n at 17. Further, LLHOA only disputes Atain's proposed undisputed fact that the information sought by Atain in Question 18 was material "to the extent Atain is asserting LLHOA's responses to questions 18 and 19 were materially false." Atain SUF ¶ 20. While materiality is not established by self-serving statements, courts give weight to the fact that such

statements are undisputed. See Taylor v. Sentry Life Ins. Co., 729 F.2d 652, 655 (9th Cir. 1984) ("Sentry submitted *uncontradicted affidavits* to the effect that it would not have issued life insurance to Barbara Taylor had it known her actual medical condition." (emphasis added)); Nieto v. Blue Shield of Cal. Life & Health Ins. Co., 181 Cal. App. 4th 60, 77-78 (2010) (finding misrepresentations were material because declarations attesting to materiality "constituted the only evidence on the point; appellant offered no evidence to raise a triable issue of fact as to materiality").

C. Waiver or Estoppel

LLHOA argues "Atain has waived or is estopped from asserting any non-coverage defenses because it entirely failed to reserve any such defenses before it sued its insured." LLHOA Mot. at 18. "[W]aiver is the intentional relinquishment of a known right after knowledge of the facts." Waller v. Truck Ins. Exch., Inc., 11 Cal. 4th 1, 31 (1995). "An essential element of both estoppel and of waiver is knowledge of the true facts. There can be no waiver of a right to charge fraud or misrepresentation, except when there is an intention to relinquish a known right." Anaheim Builders Supply, Inc. v. Lincoln Nat'l Life Ins. Co., 233 Cal. App. 2d 400, 410 (1965) (citation omitted). The party claiming waiver of a right bears the burden of proving waiver by clear and convincing evidence; "doubtful cases will be decided against a waiver." Waller, 11 Cal. 4th at 31. Waiver depends solely on the intent of the waiving party and is not established merely by evidence the insurer failed to specify the exclusion in a letter reserving rights. Velasquez v. Truck Ins. Exch., 1 Cal. App. 4th 712, 722 (1991).

For LLHOA to demonstrate adequately that Atain waived its right to rescind, it would have to show Atain was aware of LLHOA's misrepresentation and intended to relinquish its right to rescind. LLHOA submits no such evidence or argument. It is not enough to show that Atain provided a defense for a number of months or that it did not expressly reserve the right to rescind.

LLHOA's estoppel argument is similarly unavailing. LLHOA notes that in Miller v. Elite Ins. Co., 100 Cal. App. 3d 739 (1980), the case upon which it primarily relies in making its argument, the court recited the elements of estoppel as including "that the person to be estopped had knowledge of the true facts" and "that the one asserting the estoppel was ignorant of the true facts." LLHOA Mot. at 20. Neither of these elements is met here. LLHOA is therefore not entitled to estoppel.

IV. CONCLUSION

The Court finds that LLHOA concealed or misrepresented a material fact and, consequently, Atain is entitled to rescind the Policy. It GRANTS summary judgment to Atain on the rescission issue. The Court declines to reach the duty to defend issue because Atain makes that argument in the alternative. The Court DENIES LLHOA's motion for partial summary judgment.

IT IS SO ORDERED.

Date: November 25, 2020

Dale S. Fischer
United States District Judge