Filed 3/1/12 Workmen's Auto Ins. v. Guy Carpenter & Co. CA2/2
Opinion following rehearing

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

WORKMEN'S AUTO INSURANCE COMPANY, Plaintiff and Appellant, v. GUY CARPENTER & COMPANY, INC., Defendant and Respondent.	B211660 (c/w B213853) (Los Angeles County Super. Ct. No. BC329991) **OPINION ON REHEARING**

APPEAL from a judgment of the Superior Court of Los Angeles County. Mark V. Mooney, Judge. Affirmed.

Archer Norris, Kronick Moskovitz Tiedmann & Girard ,Thomas S. Clifton; Greines, Martin, Stein & Richland, Robin Meadow and Cynthia E. Tobisman, for Plaintiff and Appellant.

Bingham McCutchen, Robert A. Lewis, Frank Kennamer and Geoffrey T. Holtz, for Defendant and Respondent.

Workmen's Auto Insurance Company (company) sued Guy Carpenter & Company, Inc. (Carpenter) for negligence, breach of fiduciary duty and breach of contract. After the trial court eliminated the fiduciary duty claim during pretrial proceedings, a jury decided in favor of Carpenter. The company appeals. It contends that the trial court erred when it granted summary adjudication regarding the allegation that Carpenter did not obtain the best terms for reinsurance, when it sustained a demurrer without leave to amend the fiduciary duty cause of action, and when it denied the company permission to conduct discovery on and add allegations for price fixing. We find no error and affirm.

FACTS

In its first amended complaint, the company sued Carpenter for negligence, breach of fiduciary duty and breach of contract. The company alleged that Carpenter is a reinsurance intermediary who negotiated with PMA Capital Insurance Company of Philadelphia, Pennsylvania (PMA) to provide the company with reinsurance through a finite quota share reinsurance agreement (PMA Agreement). Among other breaches of duty, Carpenter allegedly failed to secure the best terms of coverage available in the reinsurance marketplace. As to that one particular allegation, Carpenter moved for summary adjudication. The trial court granted the motion. Despite that ruling, certain fiduciary duty allegations remained in the case. In its third amended complaint, the company once again sued Carpenter for negligence, breach of fiduciary duty and breach of contract. Carpenter filed a demurrer to the fiduciary duty cause of action. The trial court sustained the demurrer without leave to amend.

The company filed a fourth amended complaint. Subsequently, it filed a fifth amended complaint alleging causes of action for negligence and breach of contract. Carpenter filed an answer. The company served discovery intended to determine whether Carpenter had placed the company in a price-fixed reinsurance scheme. When Carpenter refused to comply, the company filed a motion to compel but did not prevail. On April 8, 2008, which was about a week before the trial date, the company moved for leave to file a sixth amended complaint in order to add price fixing allegations. The motion was

denied because it was untimely, Carpenter would be prejudiced and the proposed pleading was defective.

The case proceeded to trial on the company's causes of action for negligence and breach of contract. The jury found in favor of Carpenter. Judgment was entered in favor of Carpenter with an award of costs.

This timely appeal followed.[1]

DISCUSSION

I. The motion for summary adjudication regarding the claim that Carpenter did not secure the best available terms.

The company argues that "[t]he trial court erred by summarily adjudicating the 'best available terms' claim because there was a triable issue of fact regarding whether the deal actually transferred risk to the reinsurer."

We disagree.

A. Standard of review.

"Summary judgment is subject to independent review. [Citation.] To assess the record for error, we utilize a three-step analysis: 'First, we identify the issues framed by the pleadings. Next, we determine whether the moving party has established facts justifying judgment in its favor. Finally, if the moving party has carried its initial burden, we decide whether the opposing party has demonstrated the existence of a triable, material fact issue. [Citation.]' [Citation.]" (*Supervalu, Inc. v. Wexford Underwriting Managers, Inc.* (2009) 175 Cal.App.4th 64, 71.)

---

[1] The company filed two appeals, B211660 and B213853. On March 12, 2009, we entered an order consolidating the two appeals for all purposes, including briefing, oral argument and decision. Our opinion affirming the trial court in all respects was issued on May 4, 2011. Subsequently, we granted the company's petition for rehearing and, in addition, allowed supplemental letter briefing by the parties and accepted amicus letters from Consumer Attorneys of California, The Pacific Association of Domestic Insurance Companies and attorney Steven W. Murray.

B. Analysis.

In the first amended complaint, the company alleged that Carpenter breached its fiduciary duty by failing to obtain the best available terms of coverage in the reinsurance marketplace. The breach of fiduciary duty elements are a fiduciary relationship, breach of fiduciary duty, and damages. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820.)

In its motion, Carpenter focused on duty. It relied in part on a factually devoid response to a special interrogatory. The special interrogatory stated: "STATE ALL FACTS RELATING TO YOUR allegation in Paragraph 29 of YOUR First Amended Complaint that [Carpenter] 'did not secure the best available terms of coverage . . . available in the reinsurance marketplace." The company replied: "[The company] believes and is informed but has no direct knowledge of specific facts as of this date, including documents, relating to this allegation." This evidence shifted the burden of proof. (*Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 590 [a factually devoid interrogatory response demonstrated that a plaintiff could not establish an element of its cause of action].)

When opposing the motion, the company cryptically argued that there was a triable issue of fact because Carpenter *might not* have obtained a product that sufficiently transferred risk to qualify as reinsurance.[2] But the allegation that Carpenter failed to

---

[2] The company argued as follows: "As set forth in [an opposing declaration] and in the September 2005 [Carpenter] article from its website . . . , deposit accounting results if [an agreement] does not meet the test for sufficient 'risk transfer' to the reinsurer. In his June 2004 PowerPoint presentation to the senior management and Board members of [the company], [a Carpenter employee] represented that [the PMA Agreement] passed the risk transfer test. [Citation.] [The company] has only recently discovered that in the eyes of [PMA], [the PMA Agreement] apparently did not. The potential consequences to [the company are set forth [in an opposing declaration]. [Citation.] If it does not pass the risk transfer test, [Carpenter] did not secure the best possible terms in the reinsurance market. [It] failed to acquire the very product [it] claim[s] in [its] moving papers to have acquired for [the company]. There is no clearer case of a triable issue of fact." The company offered no additional argument; and it never affirmatively argued that the PMA Agreement was not reinsurance. Thus, the opposition merely argued a possibility. Even

obtain the best available terms of reinsurance is entirely different from the claim that it *might not* have obtained reinsurance at all. Thus, this issue was not framed by the first amended complaint and was therefore not properly asserted. It is a tried and true maxim of California law that "'[t]he burden of a defendant moving for summary judgment only requires that he or she negate plaintiff's theories of liability *as alleged in the complaint*. A "moving party need not ' . . . refute liability on some theoretical possibility not included in the pleadings.' [Citation.]'" (*County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 332.) "A plaintiff wishing 'to rely upon unpleaded theories to defeat summary judgment' must move to amend the complaint before the hearing. [Citations.]" (*Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 90.) But this rule is not absolute. If a new theory is argued in an opposition and the moving party does not object, the trial court has the discretion to either reject the new theory or consider it on the merits. (*Ibid*.) Thus, whether we need to examine the company's new theory on appeal depends upon whether Carpenter objected to it, or whether the trial court refused to consider it as a matter of discretion.

In its reply, Carpenter addressed the merits of the new theory. But at the August 2006, summary adjudication hearing, the trial court stated: ". . . I don't think that there really is a claim here on the failure to obtain the best deal available." The parties then proceeded to discuss whether Carpenter obtained reinsurance at all. After the parties argued, the trial court stated: "[T]his particular motion . . . is on whether or not [there is a] triable issue as to whether [Carpenter] used [its] best efforts to get the best available terms for [the company][.] The [trial court] is going to grant the motion. There doesn't seem to be really anything brought in response to that . . . particular claim."

---

if the company took the stance that the PMA Agreement was not reinsurance, our analysis would remain. The opposition contained a new argument that, as we discuss, the trial court declined to consider. And, regardless, the company's argument was cryptic and insufficient on that basis.

In its written order granting summary adjudication, the trial court stated: "Assuming that the subject contract at issue . . . was a reinsurance contract, the [trial court] finds no evidence to suggest that better terms were available in the reinsurance market in 1999 for this type of contract." Based on this written ruling, and the context of the summary adjudication hearing, we easily conclude that the trial court did not rule on the company's new theory.

We reach this conclusion by following the law set forth in *Concerned Citizens Coalition of Stockton v. City of Stockton* (2005) 128 Cal.App.4th 70, 77. "'The true measure of an order . . . is not an isolated phrase appearing therein, but its effect when considered as a whole. [Citations.] In construing orders they must always be considered in their entirety, and the same rules of interpretation will apply in ascertaining the meaning of a court's order as in ascertaining the meaning of any other writing. If the language of the order be in any degree uncertain, then reference may be had to the circumstances surrounding, and the court's intention in the making of the same.' [Citation.]" (*Ibid*.)

The use of the word "assuming" establishes that the trial court never ruled on the argument that the PMA Agreement *might not* be reinsurance. Context bears out our conclusion. At the hearing, the trial court focused its comments on the best available terms issue. This was with good reason. The company suggested a mere possibility that the PMA agreement was a loan instead of reinsurance. But "an issue of fact is not raised by 'cryptic, broadly phrased, and conclusory assertions' [citation], or mere possibilities [citation]." (*Sinai Memorial Chapel v. Dudler* (1991) 231 Cal.App.3d 190, 196.) In other words, if the trial court had found that the PMA Agreement *might not* be reinsurance, the finding would have been moot and Carpenter would still have been entitled to summary adjudication. Therefore, the trial court had little reason to consider the company's new theory. As a consequence, we pass on deciding the company's new

theory on appeal, which means that we must affirm the order granting summary adjudication.[3]

Despite the foregoing, the company argues that the trial court erred by ruling that the PMA Agreement qualified as reinsurance. After acknowledging that the written order did not address the new theory, the company states that the trial court "later clarified that in granting Carpenter's motion, it had expressly found that the PMA product was, in fact, reinsurance." What the company refers to is a hearing in October 2007 that involved a motion to strike allegations from the fourth amended complaint. At that hearing, the parties debated whether the trial court had ruled as to whether the PMA product was reinsurance, with the company taking the position that the trial court had not. Thomas S. Clifton, attorney for the company, specifically argued: "[F]or the record, I don't think you made a determination that the subject agreement was reinsurance rather than a loan. You made a determination that as a reinsurance agreement, there were no better terms out there. . . . [¶] The loan versus reinsurance allegation, I believe is clear-cut and still in the case because[] your honor[] explicitly you didn't consider it . . . because there wasn't any evidence in front of you on that issue." In response, the trial court said it considered the issue and interpreted the PMA product as reinsurance. The trial court then granted a motion to strike regarding the allegation in the fourth amended complaint that Carpenter failed to secure clear-cut reinsurance coverage.

To the degree that the trial court purported to interpret its prior order, we are not bound by that interpretation. The question presented is one of law subject to de novo review. (*Mendly v. County of Los Angeles* (1994) 23 Cal.App.4th 1193, 1205.) The company does not argue otherwise. Indeed, the company offered no legal argument on whether it properly presented its new theory or the meaning of the trial court's summary adjudication order. The company's attorney had it right when he argued to the trial court that the issue was never decided. And it is apparent that the company believed the transfer of risk issue was still extant. We note that in the second amended complaint, the

---

[3] The same holds even if we interpret the opposition as arguing that the PMA Agreement *might be* a loan instead of reinsurance.

company alleged that Carpenter breached "its duty of reasonable care" when it "placed an agreement subject to challenge as a loan rather than a reinsurance agreement." The identical allegation was repeated in the third amended complaint and fourth amended complaint. Moreover, the fourth amended complaint alleged that Carpenter breached the PMA Agreement when it failed to "secure clear-cut reinsurance coverage."

The risk transfer issue was eliminated from the case due to the motion to strike, not the motion for summary adjudication. Notably, the company has not challenged the ruling on the motion to strike.

Moving on, the company attacks the summary adjudication order from a different angle. It points to evidence presented at trial that Carpenter knew that the PMA Agreement was risk challenged, and that the company would have been better off if it had known that the PMA Agreement did not transfer risk. According to the company, the evidence presented at trial establishes that there was a triable issue. But the company ignores the standard of review. We cannot consider trial evidence when reviewing the propriety of summary adjudication.

II. The demurrer to the third amended complaint.

A. Standard of review.

Case law requires us to independently review the success of a demurrer. (*Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1500–1501 (*Lazar*).) In doing so, "'[w]e treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.]" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 (*Blank*).)

The company advocates a different standard of review, one which has no support in the law and which we therefore decline to adopt. It contends that "[t]he situation is akin to where a trial court grants a nonsuit or refuses to instruct the jury on a plaintiff's theory of liability. Because the trial court has denied the appellant an opportunity to have a jury weigh its theory of liability, the standard of review 'is the opposite of the traditional substantial evidence test'—the reviewing court 'must assume the jury might have believed appellant's evidence and, if properly instructed, might have decided in appellant's favor.'"

For authority, the company cites to Eisenberg et al., California Practice Guide: Civil Appeals and Writs (The Rutter Group 2010) (Eisenberg), paragraph 8:75, page 8-35. In relevant part, paragraph 8:75 states: "On certain appeals—such as appeals . . . from orders of dismissal following sustaining of demurrers . . . —appellate courts must view the evidence in the light most favorable to appellant; the substantial evidence rule is essentially reversed because . . . [the] appellant was deprived of the benefit of a trial on the merits. [Citations.]" (Eisenberg at ¶ 8:75, p. 8-35.) This statement is erroneous because it does not comport with case law. In other words, there is no case law requiring a court to consider trial evidence when determining whether to overrule or sustain a demurrer.[4]

In the alternative, the company refers us to *GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc.* (2000) 83 Cal.App.4th 409, 423 (*GAB*), *Meyer v. Blackman* (1963) 59 Cal.2d 668, 671 (*Meyer*), and *Whiteley v. Philip Morris, Inc.* (2004) 117 Cal.App.4th 635, 655 (*Whiteley*).

GAB discussed the rule that instructional error requires reversal only if it is reasonably probable that the error prejudicially affected the judgment. To make this determination, a reviewing court must consider whether the evidence was sufficient for a properly instructed jury to find in the appellant's favor. (*GAB, supra*, 83 Cal.App.4th at

---

[4] After we issued our original opinion and discussed paragraph 8:75, the author of Eisenberg wrote to inform us that paragraph 8:75 would be revised in future publications to comport with case law such as *Blank*.

p. 423.) Because it did not involve a demurrer, *GAB* does not support the company's position. Neither does *Meyer* or *Whiteley*. *Meyer* explained that "'while in most appeals it is the duty of the reviewing court to indulge every reasonable intendment in favor of sustaining the trial court, substantially the reverse is true when the appeal is from an order of nonsuit. In the latter case the appellate court must view the evidence as though judgment had gone in favor of the appellant, and order a reversal if such a judgment can be sustained.' [Citations.]" (*Meyer*, *supra*, 59 Cal.2d at pp. 671–672.) *Whiteley*, like *GAB*, merely cited law regarding instructional error, stating: "'With respect to our review of issues relating to [the failure to give requested jury instructions], as well as the question of their prejudicial impact, we do not view the evidence in the light most favorable to the successful [party] and draw all inferences in favor of the judgment. Rather, we must assume that the jury, had it been given proper instructions, might have drawn different inferences more favorable to the losing [party] and rendered a verdict in [that party's] favor on those issues as to which it was misdirected. [Citations.]' [Citation.]" (*Whiteley*, *supra*, at p. 655.)[5]

Simply put, the company failed to persuade us to deviate from the rule set forth in *Blank*. Indeed, that is not an option. We are bound by *Blank* (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455) and do not have the authority to remake the well established standard of review for demurrers.

---

[5] In a footnote in its opening brief, the company states: "We recognize that the authorities above do not directly address our procedural setting, but the logic of the favorable review cases compels the same standard here. Review of the sustaining of a demurrer requires favorable review *of the complaint's allegations*, and usually there is no occasion to consider trial evidence. But the situation in the present case is functionally identical to what would have happened if the trial court had refused instructions on [the company's] breach of fiduciary duty claim on the same basis (i.e., on the basis that there could be no fiduciary duty as a matter of law). The favorable standard of review would undoubtedly apply."

B. Analysis.

The court in *Hydro-Mill Co., Inc. v. Hayward, Tilton & Rolapp Ins. Associates, Inc.* (2004) 115 Cal.App.4th 1145 (*Hydro-Mill*) noted that "it is unclear whether a fiduciary relationship exists between an insurance broker and an insured." (*Id*. at p. 1156.) *Hydro-Mill* cited a treatise that questioned "'in what respect the "fiduciary duty" owed by an independent insurance agent differs from the duty of due (reasonable) care'" and opined that when "'used in [reference] to an independent agent, "fiduciary duty" may refer merely to avoidance of conflict of interest, self-dealing, excessive compensation, etc.' [Citation.]" (*Id*. at p. 158) Recently, a federal court held: "This [c]ourt will not expand the doctrine of fiduciary duty to include insurance brokers, given that it has not been recognized by California courts." (*Miniace v. Pacific Maritime Association* (N.D. Cal. 2005) 2005 U.S. Dist. LEXIS 40708, *34.)[6]

Case law suggests that when negligence and fiduciary duty claims overlap regarding a breach of the duty of care, the nature of the claim is negligence. For example, in *Hydro-Mill*, a broker was held liable for professional negligence, breach of contract, negligent misrepresentation and breach of fiduciary duty. The court reversed based on a two-year statute of limitations. In declining to apply a four-year statute of limitations to the breach of fiduciary duty cause of action, the court stated: "[T]he applicable statute of limitations is determined by—as variously phrased—the nature of the right sued upon, the primary interest affected by the defendant's wrongful conduct, or the gravamen of the action. [Citations.] Here, the complaint shows that the allegations of professional negligence subsume all of the allegations for breach of fiduciary duty. The statement of decision indicates that liability on both of those causes of action is based on

---

[6] In *Westrec Marina Management, Inc. v. Jardine Ins. Brokers Orange County, Inc*. (2000) 85 Cal.App.4th 1042 (*Westrec*), the court reversed an order granting a new trial motion and affirmed a judgment against a broker for negligence, breach of contract and breach of fiduciary duty. The court was not asked to decide whether a broker can be sued for breach of fiduciary duty, so *Westrec* does not provide guidance. (*Palmer v. GTE California, Inc.* (2003) 30 Cal.4th 1265, 1278 ['"'"an opinion is not authority for a proposition not therein considered"'"].)

the same findings: [The broker] failed to obtain the requested insurance coverage and did not disclose that failure. In short, [the client's] causes of action, regardless of appellation, amount to a claim of professional negligence. Because a two-year statute of limitations governs that type of claim [citation], [the client] cannot prolong the limitations period by invoking a fiduciary theory of liability." (*Hydro-Mill*, *supra*, 115 Cal.App.4th at pp. 1158–1159.)

Older cases reached the same result. In *Wilson v. All Services Ins. Corp.* (1979) 91 Cal.App.3d 793, a broker was sued on five theories, including negligence and breach of fiduciary duty, for placing insurance without looking beyond the insurer's certificate of authority to conduct business and investigating its financial condition. The court held that the urged investigation was not required by the duty of care. It then held: "Each of the four remaining counts incorporates all of the allegations of the [negligence count] and, no matter how denominated (breach of express and implied agreements, breach of fiduciary duty, breach of warranty), depends for its validity upon the existence of an alleged duty on defendant's part. . . . Since no such duty exists, defendant is not liable to plaintiffs under any of the theories pleaded." (*Id*. at p. 799.) In *Jones v. Grewe* (1987) 189 Cal.App.3d 950 (*Jones*), brokers were sued for negligence and breach of fiduciary duty for failing to obtain sufficient liability insurance to protect client assets. The brokers demurred, arguing that they did not have a duty to provide the clients with liability insurance to cover every conceivable eventuality and therefore the complaint failed to state a claim for negligence. The demurrer was sustained without leave to amend and the action was dismissed. The *Jones* court affirmed, stating that the appellant "failed to state a cause of action for negligence." (*Id.* at p. 957.) The opinion focused on the brokers' duty of reasonable care and was conspicuously silent with respect to the fiduciary duty claim.

The bottom line is that while these authorities do not close the door on fiduciary duty claims against insurance brokers, they cast doubt on the nature and extent of those claims. In our view, however, a fiduciary duty cause of action against an insurance

broker very well might pass muster in an appropriate case. With this thought in mind, we turn to the company's arguments.

The company contends that there is substantial trial evidence from which the jury could have found that Carpenter and the company formed an agency relationship. The company refers us to the following trial evidence: the parties' agreements; Carpenter's testimony; the parties' communications and conduct; and Carpenter's reputation and expertise; and the past relationship of the parties giving rise to trust and confidence. Following *Lazar* and *Blank*, the foregoing trial evidence does not have a role in our analysis of the pleading. We therefore decline to consider whether the trial evidence established that Carpenter was an agent.[7]

Next, the company argues that the elimination of the fiduciary duty claim was prejudicial because the stringent fiduciary obligations of disclosure and loyalty were absent from trial. Moreover, in the absence of a fiduciary duty claim, the jury applied the wrong burden of proof; the company could not pursue Carpenter's commissions as damages; there was no evidence that Carpenter had an obligation to tell the company's board of directors that PMA disagreed with the company's accounting; the jury was not properly instructed; evidence of Carpenter's self-interest was irrelevant; and Carpenter was not obligated to carry the burden of proving that it made all proper disclosures. These arguments fail to establish that the trial court committed error when ruling on Carpenter's demurrer.

---

[7] The company provided voluminous briefing. Only in its reply brief, in less than two pages, did the company cite its allegations and suggest without analysis that they were sufficient. Obvious reasons of fairness militate against our consideration of arguments an appellant raises for the first time in its reply brief. (*Varjabedian v. Madera* (1977) 20 Cal.3d 285, 295, fn. 11.)

III. The price fixing allegations.

A. Standard of review.

A trial court's ruling on a motion to compel discovery is reviewed for an abuse of discretion. (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 732.) A trial court "'has wide discretion in allowing the amendment of any pleading [citations], [and] as a matter of policy the ruling of the trial court in such matters will be upheld unless a manifest or gross abuse of discretion is shown. [Citations.]'" (*Record v. Reason* (1999) 73 Cal.App.4th 472, 486.)

B. Analysis.

The company informs us that the attorney general of Connecticut filed suit against Carpenter for price-fixing and other antitrust violations, and that the Connecticut case "implicated Carpenter in a price-fixing conspiracy with the same reinsurers with whom Carpenter had placed [the company's] excess loss insurance program." As a result, the company argues that it should have been allowed to conduct discovery and allege price fixing claims.

Citing Code of Civil Procedures section 2017.010, the company informs us that a party has the right to obtain discovery of any matter relevant to the subject matter of a lawsuit if it is reasonably calculated to lead to admissible evidence. Next, the company notes that an amendment should be permitted so long as it relates to the same general set of facts previously alleged and the opposing party is not prejudiced. (*Berman v. Bromberg* (1997) 56 Cal.App.4th 936, 945.) Based on this law, the company states that the "absence of the fiduciary duty claim prejudicially affected the trial court's consideration of [the company's] request to conduct discovery . . . and to amend its complaint to allege that[] Carpenter placed [the company's] excess loss reinsurance business in a price-fixed reinsurance program." It also states that "because of the absence of the fiduciary duty claim, the trial court's exercise of discretion 'start[ed] from a mistaken premise'—that is, that Carpenter was not [the company's] fiduciary. If, in fact, this was a fiduciary duty case, then [the company's] price-fixing allegations would have gone to the heart of whether Carpenter was discharging its obligations to [the company],

or instead placing its own interest ahead of [the company] in order to obtain illegal kickbacks or compensation. Because the trial court acted under a false premise, it cannot be said to have exercised its discretion at all. [Citation.] [¶] . . . In a trial of the fiduciary duty claim, [the company] should be permitted to pursue claims that Carpenter placed it in a price-fixed reinsurance scheme."

The company's arguments lack merit for a variety of reason. First, there is no showing that the trial court improperly excluded the fiduciary duty claim. Second, the company made no attempt to demonstrate that the requested discovery was reasonably calculated to lead to admissible evidence. Third, it did not argue that the proposed amendment was related to the same general facts alleged in the fifth amended complaint. Fourth, it did not argue that the motion was improperly denied due to delay, prejudice to Carpenter or factual insufficiency. Regarding each of these points, "[i]t is not our responsibility to develop an appellant's argument." (*Alvarez v. Jacmar Pacific Pizza Corp*. (2002) 100 Cal.App.4th 1190, 1206, fn. 11.)

DISPOSITION

The judgment is affirmed.

Carpenter is entitled to its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
CHAVEZ