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**THE SUIT GALLERY FIVE STAR MEN'S WEAR, INC., Plaintiff and Appellant,
v. GRANITE STATE INSURANCE COMPANY, INC., Defendant and Respondent.**

G042622

**COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT,
DIVISION THREE**

2011 Cal. App. Unpub. LEXIS 1699

March 9, 2011, Filed

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PRIOR HISTORY: [*1]

Appeal from a judgment of the Superior Court of Orange County. Super. Ct. No. 07CC06029. Geoffrey T. Glass, Judge.

DISPOSITION: Affirmed.

COUNSEL: Wu & Cheung and Mark H. Cheung for Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith, Ernest Slome, Lisa Wilhelm Cooney and Celia Moutes-Lee for Defendant and Respondent.

JUDGES: MOORE, J.; BEDSWORTH, ACTING P. J., IKOLA, J. concurred.

OPINION BY: MOORE

OPINION

Granite State Insurance Company (Granite State) insured Sam's Suit Gallery, Inc. (Sam's), a men's wear store. Following a burglary at the store, The Suit Gallery Five Star Men's Wear, Inc. (Five Star) made a \$327,432.31 claim against the policy. Granite State rescinded the policy due to the insured's failure to disclose, in its insurance application, two prior burglaries at the store. Five Star filed suit against Granite State. The court sustained without leave to amend Granite State's demurrer with respect to the cause of action for breach of contract as asserted by Five Star in its capacity as a third party beneficiary of the policy. It also granted Granite State's motion for summary judgment, due to the material misrepresentation in the insurance application. Five Star appeals.

Five Star argues that the court erred in sustaining [*2] the demurrer and that Five Star should have been able to enforce the policy provisions and sue for breach of contract as a third party beneficiary of the policy. Five Star also contends that the court erred in granting summary judgment based on Granite State's right to rescind the policy. It asserts there was a triable issue of material fact as to whether the insurance application was completed by agents of Granite State, such that their failure to obtain a full loss history and disclose the prior burglaries should have been imputed to the insurer. In

addition, Five Star maintains that Granite State's failure to comply with the policy provision requiring the insurer to act upon a claim within 30 days of receipt of a sworn statement of loss precludes it from rescinding the policy. Finally, Five Star maintains that public policy favors the denial of summary judgment.

Five Star failed to raise a triable issue of material fact precluding summary judgment. Given that the court properly granted summary judgment on the basis of Granite State's right to rescind the policy, we need not address Five Star's arguments with respect to the third party beneficiary issues and the demurrer. We affirm.

I

FACTS

Sam [*3] Abujoudeh, also known as Sam Joudeh or Sam Abu,¹ incorporated Five Star in 2000 and is the president and sole shareholder. His men's wear store in Placentia was burglarized in January 2002 and again in February 2002. His insurer at the time, Zurich, cancelled the insurance policy for the business. Abujoudeh then began shopping for new insurance. He disclosed the prior burglaries to State Farm, because the State Farm agent asked about prior losses. Having learned about the loss history, State Farm was unwilling to issue insurance for the Placentia men's wear store without the payment of a top dollar premium. So, Abujoudeh met with Jay Lee of EG Insurance Agency about obtaining insurance. According to Abujoudeh, Lee did not ask him for much information or enquire about prior losses. Abujoudeh decided to go with Lee's suggested insurer, AIG, purportedly the parent company of Granite State.

1 Five Star filed the declaration of Sam Joudeh. He declared that he has been known by several variations of his name. He indicated that his original name was Sam Abujoudeh, but that he dropped the "Abu" portion of the name when he became a naturalized United States citizen. Nonetheless, people have come [*4] to know him by the last names Abujoudeh, Abu, or Joudeh. The record reflects that he continues to use each of those names in legal documents. Because various portions of the record refer to him by any one of those three last names, we will use the most inclusive version--Abujoudeh.

Granite State issued to Sam's an insurance policy

providing property and general liability coverage. The policy period was August 15, 2002 to August 15, 2003. However, at the time the policy was applied for and issued, Sam's was not actually registered either as a corporation or as a fictitious business name for Five Star.

On October 31, 2002, the men's wear store was burglarized again. Sam's filed a claim under the Granite State policy. By letter of May 31, 2003, Granite State rescinded the policy, due to the insured's failure to disclose the prior loss history when applying for the policy. Also in 2003, Granite State returned premiums to Sam's.

Sam's and Abujoudeh filed a lawsuit against Granite State, in April 2004 (*Sam's Suit Gallery, Inc. v. Granite State Insurance Company* (Super. Ct. Orange County, 2007, No. 04CC05436)) (Sam's Lawsuit). Five Star represents that Sam's Lawsuit was dismissed without prejudice [*5] on December 14, 2007.

Five Star did not file a fictitious business name statement for Sam's until May 14, 2007. Three days later, Five Star filed the within lawsuit. In its second amended complaint against Granite State, Five Star asserted three causes of action: (1) breach of contract; (2) breach of contract--third party beneficiary; and (3) reformation. Five Star alleged that Granite State provided insurance to it for the policy period of August 15, 2002 to August 15, 2003. It further alleged that it suffered two losses--\$249,247.41 in stolen inventory and \$78,184.90 in business interruptions, for a total of \$327,432.31. Five Star asserted that it timely filed a claim, but that Granite State untimely denied the claim on or about May 21, 2003.

Five Star admitted that the policy did not name it as an insured. Therefore, it sought to enforce the insurance policy as a third party beneficiary and to reform the policy to correctly identify it as the insured.

Granite State filed a demurrer. The court sustained the demurrer without leave to amend only as to the second cause of action for breach of contract--third party beneficiary.

Granite State then filed a motion for summary judgment, or in the [*6] alternative, summary adjudication. The court granted Granite State's motion for summary adjudication as to the first cause of action for breach of contract. It found that Granite State had

properly rescinded the insurance policy. It held that since no causes of action survived the rescission of the policy, Granite State was entitled to judgment. Summary judgment was entered accordingly. Five Star appeals.

II

DISCUSSION

A. Standard of Review:

"Under summary judgment law, any party to an action, whether plaintiff or defendant, 'may move' the court 'for summary judgment' in his [or her] favor on a cause of action . . . or defense (*Code Civ. Proc.*, § 437c, *subd. (a)*) -- a plaintiff 'contend[ing] . . . that there is no defense to the action,' a defendant 'contend[ing] that the action has no merit' (*ibid.*). The court must 'grant[]' the 'motion' 'if all the papers submitted show' that 'there is no triable issue as to any material fact' (*id.*, § 437c, *subd. (c)*) -- that is, there is no issue requiring a trial as to any fact that is necessary under the pleadings and, ultimately, the law [citations] ? and that the 'moving party is entitled to a judgment as a matter of law' (*Code Civ. Proc.*, § 437c, *subd. (c)*)." [*7] (*Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 843.*)

"[I]n moving for summary judgment, a 'defendant . . . has met' his [or her] 'burden of showing that a cause of action has no merit if' he [or she] 'has shown that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. . . .' (*Code Civ. Proc.*, § 437c, *subd. (o)(2)*)."² (*Aguilar v. Atlantic Richfield Co., supra, 25 Cal.4th at p. 849.*)

² See now *Code of Civil Procedure section 437c, subdivision (p)(2)*.

On review of a summary judgment, we "examine the record de novo and independently determine whether [the] decision is correct. [Citation.]" (*Colarossi v. Coty US Inc. (2002) 97 Cal.App.4th 1142, 1149.*)

B. Summary Judgment:

(1) Motion, opposition and ruling

In its motion for summary judgment, Granite State

argued: (1) Five Star could not prevail on the cause of action for breach of contract because it was not an insured under the policy and had no standing [*8] to sue; (2) Granite State was entitled to rescind the policy due to material misrepresentations in the insurance application; (3) the cause of action for reformation was barred by the statute of limitations; and (4) the cause of action for reformation failed because Five Star could not establish mutual mistake.

Five Star opposed the motion on several grounds: (1) Granite State failed to comply with the policy provision requiring the response to a statement of loss to be made within 30 days; (2) the conduct of the agent who procured the policy should have been imputed to Granite State; (3) there were triable issues bearing upon whether the policy should be reformed to identify Five Star as the insured, including issues of forfeiture and estoppel; and (4) there were triable issues as to the purported materiality of the alleged misrepresentations regarding the loss history at the insured premises.

The court granted Granite State's motion for summary adjudication as to the first cause of action for breach of contract. In addition, it held that even if the policy were reformed, there would be no coverage because rescission was proper. It further held that since no causes of action survived [*9] the rescission of the policy, Granite State was entitled to judgment.

In its minute order, the court explained: "Granite State rescinded the policy because the insured company had a previous loss that Plaintiff did not disclose on the application. The Suit Gallery Five Star Men's Wear, Inc., operated a store in Placentia in 2002, and suffered two burglar[y] losses before the present one. The Application of Insurance specifically asks for any losses at the Placentia location, and the Plaintiff answered 'no.' That sort of representation is material and Defendant has shown that it was a misrepresentation. Therefore, Defendant has met its burden of showing that it properly rescinded the policy. The burden then shifts to the Plaintiff to show a triable issue of fact. Plaintiff has raised several issues as issues to be tried."

The minute order continued: "One argument is that the agent who assisted the Plaintiff in filling out the Application of Insurance was also an agent for the carrier and therefore the carrier is [e]stopped from rescinding the policy based upon misrepresentations in the application. Defendant has shown that the agent was not an actual

agent of Granite State. Plaintiff [*10] has not identified any issues of fact related to the actual agency. [¶] Plaintiff has argued that the agent was the ostensible agent. *Civil Code* § 2317 requires, in order to show ostensible authority, that the principal, intentionally or by want of ordinary care, caused the Plaintiff to believe that the insurance agent had authority from the carrier. In this case, Plaintiff has not shown any acts or omission by Granite State that caused Plaintiff to believe that the insurance agent was its agent. The agent was the agent of the Plaintiff only, according to the evidence. It is not reasonable to infer that the agent was an actual or ostensible agent of Granite State. Therefore, Plaintiff has not created an issue of fact as to whether Granite State is bound by the actions of the agent."

(2) *Agent or Broker?*

An ""insurance agent" means a person authorized, by or on behalf of an insurer, to transact insurance' [citation], while "insurance broker" means a person who, for compensation and on behalf of another person, transacts insurance . . . *with, but not on behalf of, an insurer.*' [Citation.] . . . An independent insurance broker is not an agent of the insurer, but rather is an agent of [*11] the insured. [Citations.]" (*Marsh & McLennan of Cal., Inc. v. City of Los Angeles* (1976) 62 Cal.App.3d 108, 117.)

In opposing the summary judgment motion, Five Star asserted that Lee did not ask any details about whether the business had suffered prior losses and did not provide the owner with an application to complete. Rather, he simply asked Abujoudeh to sign the signature page of an application for AIG, the parent company of Granite State. According to Five Star, Lee did not provide multiple offers from different insurers, but rather presented only one proposal, from AIG, indicating that no better terms were available from other insurers. In sum, Five Star asserted that it was a triable issue of material fact whether EG Insurance Agency was an agent of AIG and Granite State and whether Lee's actions should be imputed to Granite State.

On appeal, Five Star continues to maintain that "EG Insurance Agency (and *broker* Jay Lee) acted as insurer [Granite State's] agent so that the agent's failure to obtain full information from the insured regarding any loss history and/or past claims based on burglaries should be imputed to the insurer Granite [State]." (Italics added.) Five Star also [*12] continues to assert that Granite State

should be estopped from complaining about the nondisclosure of the loss history. It states that, at the very least, it was a triable issue of material fact whether EG Insurance Agency and Lee were the agents of Granite State and that, given this, the trial court erred in granting summary judgment. We disagree, for reasons we shall show.

In support of its motion for summary judgment, Granite State provided, inter alia, the declaration of Lee. Lee declared that he was the president of EG Insurance Agency, Inc., an independent insurance broker. Lee further declared: "2. EG Insurance Agency represented Sam Abujoudeh and his business, Sam's Suit Gallery, Inc., in obtaining insurance for the retail store located at 148 E. Yorba Linda Boulevard, Placentia, California 92870. [¶] . . . [¶] 5. I prepared a Business Insurance Proposal for Sam's Suit Gallery, Inc., for the retail store located at 148 E. Yorba Linda Boulevard, Placentia, California. . . . [¶] . . . [¶] 7. Based upon Mr. Abujoudeh's representations, I filled out the application for insurance under the 'AIG Business Owners Insurance Program' for the Named Insured Sam's Suit Gallery, Inc."

A copy [*13] of the business insurance proposal, signed by Abujoudeh, was attached to Lee's declaration. The proposal identified the insurance company as AIG. The proposal described the property and liability coverages, noted the amount of the annual premium, and stated: "***Above quotation includes \$ 200 company fee and \$200 broker's[.]" Language at the bottom of the page provided that the proposal was neither an insurance policy nor an offer to insure.

Granite State also provided a copy of the complaint filed in Sam's Lawsuit. In that complaint, Sam's and Abujoudeh alleged that they had entered into an oral agreement with EG Insurance Agency, Lee and Daniel Byun "for the purpose of acquiring insurance coverage for Plaintiffs' business." They further alleged that they agreed that EG Insurance Agency, Lee and Byun "would procure insurance on behalf of Plaintiffs" and "would assist Plaintiffs in the preparation and submission of any and all applications necessary to procure the insurance on Plaintiffs' behalf."

In addition, in its reply to Five Star's opposition to the summary judgment motion, Granite State drew attention to the copy of the policy attached as exhibit 1 to Five Star's second amended [*14] complaint. "Broker's Fee" was stamped on the first page of the policy--the

common policy declarations page. This, Granite State asserted, showed that a broker's fee was paid to EG Insurance Agency.

In sum, the declaration of Lee, the business proposal, the complaint filed in Sam's Lawsuit, and the insurance policy all show that EG Insurance Agency was a broker engaged in the procurement of insurance. Five Star offered no admissible evidence demonstrating to the contrary.

Five Star filed the declaration of Abujoudeh in opposition to the motion for summary judgment. Abujoudeh declared that he obtained a quote from EG Insurance Agency after he had "received a mailer or 'cold contact' correspondence" from the company. He declared that he believed that Lee and EG Insurance Agency were agents of AIG or Granite State because: (1) Lee did not provide multiple proposals from different insurers, but rather only one proposal--from AIG; Lee's explanation for this "was that no other insurer had better terms"; (2) the page Abujoudeh signed was for an AIG insurance application; (3) Lee said that if Abujoudeh signed the application and made a down payment, Lee could bind the policy immediately; (4) the [*15] remaining payments for the balance of the premium were sent directly to EG Insurance Agency; and (5) EG Insurance Agency sent him the Granite State policy.

Abujoudeh's statements to the effect that Lee did not provide multiple offers, but only provided one because "no other insurer had better terms" is an indication that Lee was a broker seeking to find the best available deal for the business, having looked at insurers other than just Granite State. The facts that payments were made to EG Insurance Agency and that EG Insurance Agency transmitted the policy to Abujoudeh do not show that EG Insurance Agency was an agent of Granite State. As *Insurance Code section 1732* provides, "A person acting as an insurance broker may, on behalf of an insurance company, collect and transmit premium or return premium and deliver policies and other documents evidencing insurance. Performance of those functions shall not be construed for any purpose to mean that the person is an insurance agent."

The only statement contained in Abujoudeh's declaration that would be indicative of agency status rather than broker status is the statement that Lee indicated he could bind the policy. "The most definitive characteristic [*16] of an insurance agent is his authority

to bind his principal, the insurer; an insurance broker has no such authority." (*Marsh & McLennan of Cal., Inc. v. City of Los Angeles, supra, 62 Cal.App.3d at p. 117.*)

However, Granite State filed objections to Abujoudeh's declaration. Among other things, Granite State objected to two sentences wherein Abujoudeh declared that Lee had indicated he could bind the policy. Its objection was made on the basis of the *Evidence Code section 1200* hearsay rule and other authorities. Granite State represents that the court did not rule on the objections, but reminds us that, pursuant to *Reid v. Google, Inc. (2010) 50 Cal.4th 512 at pages 531 through 532*, the objections are preserved on appeal. We agree with Granite State that the hearsay rule bars consideration of the two statements for the truth thereof. That is, we will not consider whether it was true that Lee had the power to bind a Granite State insurance policy.

All the admissible evidence showed that Lee and EG Insurance Agency were brokers, not the agents of Granite State. Inasmuch as Five Star did not present any admissible evidence to show that Lee and EG Insurance Agency were agents, it did not [*17] raise a triable issue of material fact on the point. Five Star cites no authority for the proposition that the actions of brokers in completing an insurance application and transmitting it to the insurance agency should be imputed to that insurance agency. Rather, "[a]s a matter of law, 'if [an insurance] application was prepared by an insurance *broker* (the agent of the insured), the application's contents are the *insured's* responsibility" [*Citations.*]" (*LA Sound USA, Inc. v. St. Paul Fire & Marine Ins. Co. (2007) 156 Cal.App.4th 1259, 1268.*) The trial court did not err in concluding there was no triable issue of material fact with regard to whether the actions of Lee and EG Insurance Agency should be imputed to Granite State.

Five Star insists that agency status is a question of fact that precludes summary judgment, citing *Arocho v. California Fair Plan Ins. Co. (2005) 134 Cal.App.4th 461*, *Preis v. American Indemnity Co. (1990) 220 Cal.App.3d 752*, and *Thompson v. Occidental Life Ins. Co. (1969) 276 Cal.App.2d 559*. These authorities do not control the matter before us. "We acknowledge that the existence or extent of an agency relationship is a question of fact [citation], and [*18] summary judgment is improper where triable issues of fact exist as to whether there is an agency. [Citation.] Nonetheless, summary judgment is appropriate where, as here, the evidence is

undisputed and susceptible of but a single inference. [Citation.]" (*Universal Bank v. Lawyers Title Ins. Corp.* (1997) 62 Cal.App.4th 1062, 1066.)

(3) 30-Day Response Clause

Five Star contends on appeal, as it did in opposition to the motion for summary judgment, that Granite State's failure to comply with the policy provision requiring the insurer to act upon a claim within 30 days of receipt of the sworn statement of loss precludes it from terminating the policy. We disagree.

Section III of the property coverage form portion of the policy contains the language at issue. Section III.A.3.a specifies the insured's responsibilities in the event of loss. It provides, inter alia, that the insured is required to provide to the insurer a prompt notice of the loss. Section III.A.3.a(7) requires that the insured: "Send us a signed, sworn proof of loss containing the information we request to investigate the claim. You must do this within 60 days after our request. We will supply you with the necessary forms."

Section [*19] III.A.5 identifies the insurer's rights and obligations with respect to loss payment. Section III.A.5.a provides that in the event of a covered loss, the insurer has four options, including paying for the damaged property, paying the cost to repair or replace the damaged property, taking any part of the damaged property at a specified value, or repairing, rebuilding, or replacing the damaged property. Section III.A.5.b, cited by Five Star, provides: "We will give notice of our intentions within 30 days after we receive the sworn statement of loss."

Abujoudeh provided a handwritten statement dated December 10, 2002, disclosing the fact that a burglary took place on October 31, 2002 and providing certain background information concerning the procurement of the policy and prior losses. According to Five Star, the statement was actually written out by Granite State's adjuster based on information obtained from Abujoudeh in a meeting. Five Star claims that because the statement was taken down by the adjuster, it must be deemed to be the sworn statement of loss required by section III.A.3.a(7) of the policy and must be construed to have triggered the requirement that Granite State respond [*20] within 30 days. It further asserts that Granite State did not respond until it sent its notice of rescission dated May 21, 2003. This, Five Star insists, constituted a

breach of the 30-day response provision.

Taking its position a step further, Five Star says that, due to the breach of the response clause, Granite State should be barred from asserting any claims of fraud or misrepresentation and should be deemed to have waived its defenses to the second amended complaint. In other words, it argues that the court erred in summarily adjudicating the issue of whether Granite State had validly rescinded the policy.

In response, Granite State argues that the December 10, 2002 statement did not constitute a sworn statement of loss within the meaning of policy section III.A.3.a(7) and that, it does not matter in any event because the policy was validly rescinded. On its face, the December 10, 2002 statement is a handwritten narrative, not a completed form as referenced in section III.A.3.a(7). Furthermore, it does not itemize the stolen merchandise or place a value on it. It is hardly conceivable that this could suffice as a "sworn statement of loss," even though the statement was taken during [*21] a post-burglary investigation by Granite State's adjuster. This is a matter we need not resolve, however, for we agree with Granite State that once the policy was rescinded, the claims handling provisions were null and void.

As Granite State points out, section U of the policy's common policy provisions provides: "By accepting this policy, you agree that: [¶] . . . [¶] d. Any and all coverage provisions under this policy may be voided by 'us' in any case of fraud, intentional concealment, or misrepresentation of a material fact by 'you.'" Furthermore, "Section 331 of the Insurance Code reads: 'Concealment, whether intentional or unintentional, entitles the injured party to rescind insurance.'" (*Thompson v. Occidental Life Ins. Co.*, *supra*, 276 Cal.App.2d at pp. 564-565.)

"When a policyholder conceals or misrepresents a material fact on an insurance application, the insurer is entitled to rescind the policy. 'Each party to a contract of insurance shall communicate to the other, in good faith, all facts within his knowledge which are or which he believes to be material to the contract' [Citation.] Concealment, which is the '[n]eglect to communicate that which a party knows, and [*22] ought to communicate' [citation], 'entitles the injured party to rescind insurance' [citation]. Similarly, '[i]f a representation is false in a material point . . . the injured party is entitled to rescind the contract from the time the representation becomes

false.' [Citation.] '[A] rescission effectively renders the policy totally unenforceable from the outset so that there was never any coverage and no benefits are payable.' [Citation.]" (*LA Sound USA, Inc. v. St. Paul Fire & Marine Ins. Co.*, *supra*, 156 Cal.App.4th at pp. 1266-1267, fn. omitted.) "When a policy is void *ab initio*, it is 'as though it had never existed.' [Citation.] A policy void *ab initio* thus cannot be breached." (*Id.* at p. 1266.)

Five Star does not dispute that the insurance application submitted to Granite State did not disclose the prior burglaries on the property. It simply seeks to lay the blame for the nondisclosure on Lee and EG Insurance Agency, and then say that Granite State is stuck with it. However, as we have already addressed, the actions of Lee and EG Insurance Agency are not imputed to Granite State. Moreover, as the above-referenced authorities make clear, Granite State was entitled to rescind the [*23] policy due to concealment, whether intentional or otherwise. Once it rescinded the policy, it was as though the policy never existed. The 30-day response provision is irrelevant as a matter of law. The court did not err in granting the motion for summary judgment on the basis of rescission of the policy.

Five Star protests. It contends that this court should apply, by analogy, the law applicable to statutory incontestability clauses contained in life insurance and disability policies. (See, e.g., *Galanty v. Paul Revere Life Ins. Co.* (2000) 23 Cal.4th 368; *United Fidelity Life Ins. Co. v. Emert* (1996) 49 Cal.App.4th 941.) We decline to do so. Such statutory incontestability clauses are not at issue here.

(4) Policy considerations

Finally, Five Star reminds us that "[f]orfeitures, particularly in insurance contracts, are not favored. [Citation.] And if reasonably possible in light of the circumstances, the courts will determine that a forfeiture has not occurred or that a waiver or estoppel exists. [Citations.]" (*Crump v. Northwestern Nat. Life Ins. Co.* (1965) 236 Cal.App.2d 149, 151-152.) Given this general policy, Granite State's purported failure to comply with the 30-day response [*24] clause, and the fact that Lee and EG Insurance Agency were the ones who completed the insurance application, Five Star contends that both the facts and the equities require a trial. Even though, as a

general matter, forfeitures are disfavored, that does not mean either that rescission, as specifically permitted by *Insurance Code section 331*, is never permitted or that a triable issue of material fact precluding summary judgment has been raised in this case.

C. Demurrer:

In its demurrer, Granite State argued that Five Star did not have standing to sue for breach of contract because the policy was issued to Sam's, not Five Star. It also argued that nowhere in the second amended complaint did Five Star allege that the policy provided coverage to it as an additional insured or an express third party beneficiary, so the breach of contract--third party beneficiary cause of action failed. The court sustained the demurrer without leave to amend as to the second cause of action for breach of contract--third party beneficiary.

Five Star contends that the court erred in sustaining the demurrer to that cause of action. It claims that, as a third party beneficiary of the policy issued to Sam's, it should [*25] have been able to enforce the terms of the policy, to recover benefits thereunder, and to sue for breach of contract.

This is a matter we need not resolve. Even if Five Star were determined to be a third party beneficiary of the policy, it would matter not. Because the policy was properly rescinded, there were no policy provisions to be enforced and no benefits to be had. (*LA Sound USA, Inc. v. St. Paul Fire & Marine Ins. Co.*, *supra*, 156 Cal.App.4th at pp. 1266-1267.)

III

DISPOSITION

The judgment is affirmed. Granite State shall recover its costs on appeal.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

IKOLA, J.