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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

CHI KIN HUI,

Plaintiff and Appellant,

v.

FIRE INSURANCE EXCHANGE,

Defendant and Respondent.

A133238

(City & County of San Francisco
Super. Ct. No. CGC-10-503260)

Plaintiff Chi Kin Hui appeals from a summary judgment entered against him on his complaint seeking insurance coverage for the defense of a claim for intentionally destroying vegetable crops by “tearing out power blocks that operated the water supply to the crops.” The applicable insurance policy provides liability coverage for property damage caused by an “occurrence,” defined as an “accident.” We agree with the trial court that the insured’s alleged act was not an accident and that there is no potential for coverage under the policy triggering a duty to defend, so that summary judgment was properly granted to the insurer.

FACTS

Hui owns a four-unit residential building in San Francisco that is insured by defendant Fire Insurance Exchange. He also owns, as a tenant in common, 20 acres of agricultural land in Gilroy. One of the Gilroy cotenants, Quan Zhong Zhang, has farmed the land since 2001 and paid rent to Hui for the right to do so. In 2009, a dispute arose between the Gilroy cotenants which ripened into litigation.

In August 2009, Hui sued Zhang for breach of the co-tenancy agreement, seeking to eject Zhang from the Gilroy property. Hui also sought to foreclose on a deed of trust securing a purchase-money loan Hui extended to Zhang when Zhang bought his cotenancy interest from Hui. Zhang countered by filing a cross-complaint against Hui alleging a “course of defamation, libel and abuse of process” designed to drive Zhang from the property. Zhang stated multiple causes of action, including malicious damage to growing crops. Zhang alleged that Hui “destroyed more than \$30,000 in vegetable crops” being cultivated on the Gilroy property “by tearing out power blocks that operated the water supply to the crops and power to the residences.”

Hui tendered the defense of the Zhang cross-complaint to Fire Insurance Exchange, the insurer of Hui’s San Francisco property. Hui concedes that most of the claims in the cross-complaint are not covered by the Fire Insurance Exchange policy but contends that the property damage claim for crop destruction is covered. The Fire Insurance Exchange policy is a “dwelling” policy that covers physical loss to the San Francisco property and personal liability. Hui sought to invoke coverage under a provision covering “those damages which an insured becomes legally obligated to pay because of bodily injury or property damage resulting from an occurrence” “Occurrence” is defined as “an accident . . . neither expected nor intended by a reasonable person in the position of any insured, which results in bodily injury or property damage.” The policy excludes coverage for property damage arising from the insured’s business pursuits or resulting from “an existing condition on an uninsured location.”

Fire Insurance Exchange notified Hui that there was no coverage for the cross-complaint because the alleged property damage did not result from an accident and arose from Hui’s business pursuits and from existing conditions on an uninsured location. In September 2010, Hui brought this action for a declaration that Fire Insurance Exchange is obligated to defend the Zhang cross-complaint and for damages for breach of the insurance contract and bad faith insurance practices in denying a defense.

Fire Insurance Exchange filed a motion for summary judgment arguing that the Zhang claim “is not an ‘accident’ within the meaning of the policy and California law. It also arises out of both a business pursuit and an uninsured location, and is consequently excluded from coverage under the terms of the policy.” The trial court granted the motion upon concluding that “[t]he underlying acts referred to in the Zhang cross-complaint[] do not constitute an ‘occurrence,’ defined in the policy to mean an ‘accident.’ ” Judgment in favor of Fire Insurance Exchange was thereupon entered and Hui filed a timely notice of appeal.

DISCUSSION

The parties have briefed the issue that the trial court found dispositive: whether the alleged property damage to Zhang’s crops arose from an accident. The parties have also briefed the applicability of the two policy exclusions asserted by the insurer but which the trial court’s order does not address. Like the trial court, we conclude that the alleged property damage did not arise from an accident within the policy’s coverage provision and therefore have no occasion to consider application of policy exclusions.

“[W]ell-established precepts of insurance coverage guide us in our determination of whether a particular policy requires a liability insurer to defend a lawsuit filed by a third party against the insured. 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. [Citations.] 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. [Citation.] However, “where there is no possibility of coverage, there is no duty to defend” (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 19.) “[T]he duty to defend, although broad, is not unlimited; it is measured by the nature and kinds of risks covered by the policy.” (*Ibid.*)

As indicated above, the policy here provides that the insurer will “pay those damages which an insured becomes legally obligated to pay” because of “property

damage resulting from an occurrence” and will defend an insured against any covered claim. “Occurrence” is defined to mean “an accident, including continuous or repeated exposure to the condition, neither expected nor intended by a reasonable person in the position of any insured, which results in bodily injury or property damage.”

“In the context of liability insurance, an accident is ‘ “an unexpected, unforeseen, or undesigned happening or consequence from either a known or an unknown cause.” ’ ” (*Delgado v. Interinsurance Exchange of Automobile Club of Southern California* (2009) 47 Cal.4th 302, 308 (*Delgado*)). “ ‘This common law construction of the term “accident” becomes part of the policy and precludes any assertion that the term is ambiguous.’ ” (*Ibid.*)

Here, there is no possibility of coverage and, thus, no duty to defend because the alleged crop damage did not result from an accident. Zhang alleged that Hui maliciously “destroyed more than \$30,000 in vegetable crops” being cultivated on the Gilroy property “by tearing out power blocks that operated the water supply to the crops and power to the residences” and did so as part of a concerted effort to destroy Zhang and to eject him from the property. Hui concedes that a nonaccidental, intentional tort is alleged but argues that crop destruction can happen accidentally so that he may ultimately be found liable for accidental damage that would be covered by the policy. Hui relies upon *Gray v. Zurich Ins. Co.* (1966) 65 Cal.2d 263, 266-277 (*Gray*), which held that an insurer must defend its insured against an assault claim despite a policy exclusion for intentional injury. *Gray* held that “the duty to defend should be fixed by the facts which the insurer learns from the complaint, the insured, or other sources” and not “the precise language” and theory of recovery stated in the complaint. (*Id.* at p. 276.) While the complaint in *Gray* alleged a willful assault, the facts stated in the complaint presented the possibility that the insured acted in self-defense and thus did not commit willful injury. (*Id.* at pp. 267-268 & fn. 1, 277.) Self-defense was potentially covered under the policy in *Gray*, which excluded coverage for willful acts but did not limit coverage to accidents. (*Delgado, supra*, 47 Cal.4th at pp. 312-314.) Thus, in *Gray*, there was a duty to defend because the third party’s “complaint clearly presented the possibility that he might obtain

damages that were covered by the indemnity provisions of the policy.” (*Gray, supra*, at p. 277.)

Gray does not aid Hui. *Gray* simply “makes it clear that the bare allegations of the claimant’s complaint do not control. If the broad charge made, which claims an intentional or wilful tortious act, contains within it the potentiality of a judgment based upon nonintentional conduct, the indemnitor becomes liable to defend.” (*Davidson v. Welch* (1969) 270 Cal.App.2d 220, 234; accord *Allstate Ins. Co. v. Overton* (1984) 160 Cal.App.3d 843, 851.) The teaching of *Gray* is that the duty to defend does not turn upon the characterization of the conduct pleaded by the third party but upon whether the alleged facts could support a claim that is within the coverage of the policy. “[C]overage turns not on ‘the technical legal cause of action pleaded by the third party’ but on the ‘facts alleged in the underlying complaint’ or otherwise known to the insurer.” (*Swain v. California Casualty Ins. Co.* (2002) 99 Cal.App.4th 1, 8, quoting *Barnett v. Fireman’s Fund Ins. Co.* (2001) 90 Cal.App.4th 500, 510.)

While a third party’s claim is broadly construed when evaluating potential insurance coverage, the claim must assert some facts or legal theory that bring the claim within the terms of the policy. “There must be something in the existing complaint or other facts known to the insurer indicating a potential for coverage.” (Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2011) ¶ 7:577, p. 7B-27.) “An insured may not trigger the duty to defend by speculating about extraneous ‘facts’ regarding potential liability or ways in which the third party claimant might amend its complaint at some future date. This approach misconstrues the principle of ‘potential liability’ under an insurance policy.” (*Gunderson v. Fire Ins. Exchange* (1995) 37 Cal.App.4th 1106, 1114.) Potential liability is not judged by speculation about what facts or theories could have been alleged by the third party but by an examination of the facts and theories actually alleged by the third party and a determination of “whether these known facts created a potential for coverage under the terms of the [p]olicy.” (*Ibid.*) “[T]he test is whether the *underlying action for which defense and indemnity is sought*

potentially seeks relief within the coverage of the policy.” (*La Jolla Beach & Tennis Club, Inc. v. Industrial Indemnity Co.* (1994) 9 Cal.4th 27, 44.)

Here, the Zhang cross-complaint does not contain any facts showing the possibility of a judgment based upon an accident. “[A]n injury-producing event is not an ‘accident’ within the policy’s coverage language when all the acts, the manner in which they were done, and the objective accomplished occurred as intended by the actor.” (*Delgado, supra*, 47 Cal.4th at pp. 311-312.) As noted above, Zhang alleged that Hui maliciously “destroyed more than \$30,000 in vegetable crops by tearing out power blocks that operated the water supply to the crops and power to the residences” and did so as part of a concerted effort to destroy Zhang and to eject him from the property. Disregarding the allegations concerning Hui’s state of mind, the alleged act of tearing out the power blocks could not have been an accident. An accident “ ‘is never present when the insured performs a deliberate act unless some additional, unexpected, independent, and unforeseen happening occurs’ ” after the act of the insured that produces the damage. (*Id.* at p. 315.) Nothing in Hui’s complaint, the underlying cross-complaint, or the facts presented in opposition to the summary judgment motion suggest that the crop damage here was unexpected. The facts presented in support of the summary judgment motion indicate without contradiction that the damage was the direct and foreseeable result of Hui’s alleged act of cutting electricity to the crops’ water supply. This was not an accident. Thus there is no potential for coverage under the policy to trigger the duty to defend.

The trial court properly granted summary judgment to Fire Insurance Exchange. The insurer does not have a duty to defend the Zhang cross-complaint and, absent a duty to defend, Hui’s causes of action for breach of the insurance contract and bad faith insurance practices in denying a defense cannot be maintained.

DISPOSITION

The judgment is affirmed.

Pollak, Acting P.J.

We concur:

Siggins, J.

Jenkins, J.