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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

MONIER, INC.,

Plaintiff and Appellant,

v.

AMERICAN HOME ASSURANCE
COMPANY,

Defendant and Appellant;

TRAVELERS INDEMNITY COMPANY,

Defendant and Respondent.

A138976

(City & County of San Francisco
Super. Ct. No. CGC-493895)

Monier, Inc. (Monier) appeals from a judgment rejecting its claim that its insurers had the duty to provide it with a defense of a consumer class action. Monier, a roof tile manufacturer, was sued for allegedly “failing to disclose” to consumers “that the color and exterior surface of [its] slurry-coated roofing tiles would not remain on those tiles for the expressly warranted life of the product.” Monier sought coverage under general commercial liability policies for property damage resulting from an “occurrence,” which the policies state “means an accident.” The insurers denied coverage, asserting they had no duty to defend or to indemnify. Following a bifurcated bench trial, the court held that all property damage claimed in the class action necessarily resulted from misrepresentations, which are not accidental occurrences. We shall affirm the resulting judgment denying coverage.

FACTS AND PROCEDURAL HISTORY

The *McAdams* lawsuit

Monier manufactures roof tiles. In November 2003, a putative class action (*McAdams v. Monier, Inc.*, hereafter *McAdams*) was filed against Monier and related companies in Placer County Superior Court. The operative second amended complaint, filed in April 2005, alleges that defendants engaged in “unfair, deceptive, and misleading practices in falsely representing” their product to California homeowners. The complaint states causes of action for violations of the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.) and Consumer Legal Remedies Act (Civ. Code, § 1750 et seq.).¹

The complaint alleges that all claims arise out of defendants’ “failure to disclose” that Monier slurry-coated roof tiles are “inherently defective such that their material composition causes the exterior surface of the product (including the glaze and slurry-coated color exterior) to deteriorate, degrade, and disperse from the tiles well in advance of their warranted 50-year useful life. As a result, within the warranted life of the tiles, the tiles lose the body of their color; i.e., the exterior surface of the tiles becomes friable, and the color coating together with its concrete body divests from the extruded tile such that plaintiffs and class members are left with plain concrete (non-colored) cement tiles.” (Italics deleted and capitalization altered.)

The superior court initially denied class certification but the Third District Court of Appeal reversed the denial. (*McAdams v. Monier, Inc.* (2010) 182 Cal.App.4th 174.) The class was certified in August 2010. A jury trial was held from November 2012 through January 2013. The *McAdams* jury returned a verdict for plaintiffs, awarding compensatory damages of \$7.4 million. The trial court later held that expert testimony supporting class claims was wrongly admitted and granted Monier’s motions for nonsuit and judgment notwithstanding the verdict. An appeal is pending.

¹ A breach of express warranty claim was included in the complaint but plaintiffs did not seek class certification of that cause of action.

The insurance coverage lawsuit

Monier and its related companies have commercial general liability policies with multiple insurers, including American Home Assurance Company (American Home) and Travelers Indemnity Company (Travelers). A single American Home policy covers the period from 1999 to 2009 and four consecutive Travelers' policies cover 1983 to 1986. The key provisions in the policies are substantially the same. All policies provide coverage for sums the insured becomes obligated to pay for "property damage" caused by an "occurrence." The full policy definitions of an "occurrence" are set out below but, in short, the term means an "accident."

Monier asked its liability insurers to defend it against the *McAdams* lawsuit. It tendered defense to American Home in January 2005 and Travelers in October 2005. All insurers disputed coverage and denied a duty to defend. Monier filed suit against numerous insurers in October 2009. The operative first amended complaint, filed the following month, seeks a declaration that the insurers are obligated to provide a defense and indemnity in the *McAdams* suit.

The trial court bifurcated issues for trial. In a phase one bench trial, the court addressed coverage issues concerning five insurers, including issues that would be dispositive as to American Home and Travelers. Trial was held over the course of four days between September and December 2011. The court issued a tentative statement of decision in June 2012. The tentative statement of decision had not been finalized when, in January 2013, the jury in *McAdams* reached a verdict. The court received additional briefing concerning the import of jury instructions and the form of verdict submitted in *McAdams*. The court issued its statement of decision in May 2013.

The court found (1) Monier is an insured under all of defendants' policies except three of Travelers' policies, which insure a separate holding company; (2) all insurers received actual or constructive notice of *McAdams*; (3) there is no duty to defend under any "policies because, while *McAdams* does present the possibility of 'property damage' loss under the policies, it does not present the possibility that such loss was caused by an 'occurrence' as provided therein;" and (4) American Home's claim that the self-insured

retention was not satisfied is moot. The court entered judgment for American Home and Travelers in June 2013 and stayed the action against the other insurers on all remaining issues. Monier timely filed a notice of appeal and American Home cross-appealed.

DISCUSSION

The parties raise numerous issues on appeal. Monier contests the court's findings that the company is not an insured under several Travelers policies and that the insurers have no duty to defend the *McAdams* case because it does not present the possibility of an "occurrence." The insurers support those findings but dispute the court's finding of potential property damage within the scope of coverage. Travelers argues that the absence of property damage provides an alternate basis for affirming the judgment. American Home filed a cross-appeal seeking review of the trial court's property damage findings and modification of the judgment to correct claimed errors.

As a preliminary matter, we note that American Home's cross-appeal is improper. Only those parties "aggrieved" by a judgment may appeal. (Code Civ. Proc., § 902.) "[I]f the judgment or order is in favor of a party he is not aggrieved and cannot appeal." (*Nevada County Office of Education v. Riles* (1983) 149 Cal.App.3d 767, 779.) No appeal lies from a favorable judgment even if, as here, it contains unfavorable subsidiary findings. A prevailing party cannot "appeal from a judgment in his favor solely to attack findings of the court, which if he is successful would result in new findings being made or ordered which would themselves support the judgment, if the original findings should be held by the court on appeal to be insufficient to support it." (*Albers v. Los Angeles County* (1965) 62 Cal.2d 250, 273.) The principal contention American Home seeks to assert in its cross-appeal is no more than an alternate ground on which the judgment arguably should be affirmed. The contention can be made in response to the direct appeal and does not require a cross appeal. Therefore, the cross-appeal will be dismissed and we shall treat American Home's briefing on the subject, as we do Travelers' argument on appeal, as an asserted alternative basis for affirming the judgment.

However, there is no need to reach the alternative ground asserted in support of the judgment—that, contrary to the trial court's finding, the damages alleged in the

underlying action do not constitute property damage within the meaning of the policies -- because we conclude that the judgment is supported by another finding that the court also made. As we shall discuss, we conclude that the trial court correctly determined that the *McAdams* suit does not allege facts that could potentially constitute an “occurrence” within the meaning of the policies so as to trigger a duty to defend. This conclusion also renders it unnecessary to consider Monier’s contention that the court erred in concluding that Monier is not covered by several of the Travelers’ policies, or other issues raised by the parties.

The duty to defend

An insurer “must defend a suit which *potentially* seeks damages within the coverage of the policy.” (*Gray v. Zurich Ins. Co.* (1966) 65 Cal.2d 263, 275.) “[I]n an action seeking declaratory relief on the issue of the duty to defend . . . the insured must prove the existence of a potential for coverage, while the insurer must establish the absence of any such potential. In other words, the insured need only show that the underlying claim may fall within policy coverage; the insurer must prove it cannot.” (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 300 (*Montrose*), italics omitted.) But “the obligation to defend is not without limits.” (*La Jolla Beach & Tennis Club Inc. v. Industrial Indemnity Co.* (1994) 9 Cal.4th 27, 39.) “[S]uch a duty is limited by ‘the nature and kind of risk covered by the policy.’ ” (*Ibid.*, italics omitted.) “‘[T]he insurer need not defend if the third party complaint can by no conceivable theory raise a single issue which could bring it within the policy coverage.’ ” (*Ibid.*)

The policies limit coverage to liability for property damage resulting from an “occurrence,” which requires an “accident.” The American Home policy states: “‘Occurrence’ means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” The Travelers policies are similar: “‘Occurrence’ means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.” (Italics omitted.)

“An intentional act is not an ‘accident’ within the plain meaning of the word.” (*Royal Globe Ins. Co. v. Whitaker* (1986) 181 Cal.App.3d 532, 537.) “Under the interpretation of the case law, ‘occurrence’ as defined in a CGL [comprehensive general liability] policy means ‘accidental.’ In its plain, ordinary sense, ‘accidental’ means ‘“arising from extrinsic causes[;] occurring unexpectedly or by chance[; or] happening without intent or through carelessness.” ’ [Citations.] Since insurance is designed to protect against contingent or unknown risks of harm, rather than harm that is certain or expected [citation], it is well settled that intentional or fraudulent acts are deemed purposeful rather than accidental and, therefore, are not covered under a CGL policy.” (*Chatton v. National Union Fire Ins. Co.* (1992) 10 Cal.App.4th 846, 860-861.)

Misrepresentation, whether intentional or negligent, is not an accident under a CGL policy. (*Miller v. Western General Agency, Inc.* (1996) 41 Cal.App.4th 1144, 1150.) Whether a representation of fact is made with knowledge of its falsity (intentional misrepresentation) or with no reasonable grounds to believe it true (negligent misrepresentation), in each instance the representation is made with the *intention* that it be relied upon. (See CACI Nos. 1900, 1903.) Such intentional acts are not accidents and thus both intentional and negligent misrepresentation are excluded from policy coverage. (*Chatton v. National Union Fire Ins. Co., supra*, 10 Cal.App.4th at p. 861.)

“The duty to defend is determined by reference to the policy, the complaint, and *all* facts known to the insurer from any source” at the time of the tender of defense. (*Montrose, supra*, 6 Cal.4th at p. 300.) Initially, we note that both the insurers and Monier support their respective contentions concerning the potential for coverage by referring to developments in the *McAdams* litigation well beyond the point in time that is relevant. As noted above, Monier tendered the defense to American Home in January 2005 and Travelers in October 2005. Thus, we may not properly consider certain facts urged by the insurers, such as the 2010 appellate court opinion approving class certification or the content of the notice that was subsequently sent to class members. Nor may we consider the jury instructions and verdict forms, as urged by Monier.

There is no “justification ‘by hindsight’ ” when an insurer denies a duty to defend. (Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2014) ¶ 7:589, p. 7B-34.) “The crucial question is whether [the insurer] was in possession of factual information which gave rise to potential liability under its policy when the company denied [the insured] a defense in [the underlying] action.” (*Mullen v. Glen Falls Ins. Co.* (1977) 73 Cal.App.3d 163, 170.)

“The determination whether the insurer owes a duty to defend usually is made in the first instance by comparing the allegations of the complaint with the terms of the policy.” (*Horace Mann Ins. Co. v. Barbara B.* (1993) 4 Cal.4th 1076, 1081.) The damage asserted in the *McAdams* complaint arises from Monier’s alleged intentional misrepresentations of deficiencies in its roof tiles, which are purposeful, non-accidental acts outside the scope of potential coverage. The complaint alleges: “This is a consumer class and private attorney general action arising out of defendants’ unfair, deceptive, and misleading practices in failing to disclose to plaintiffs and all class members that the color and exterior surface of defendants’ slurry-coated roofing tiles would not remain on those tiles for the expressly warranted life of the product;” “[a]ll of the claims asserted . . . arise out of defendants’ failure to disclose to the Class that the Tiles are inherently defective”; “defendants have fraudulently concealed the defective nature of the Tiles, and the false nature of their representations concerning the tiles, from plaintiffs and the class;” Monier and a related company “have agreed and conspired to conceal and omit the true facts concerning the properties of the tiles from the general public and the Class”; defendants “knew that the glaze was not permanent and knew that the glaze would not last as long as the warranty or for as long as defendants represented it would last”; defendants “failed to disclose that defendants’ Tiles are inherently defective;” defendants “falsely represented that their slurry-coated color roof tiles are of a particular standard, quality or grade”; defendants’ “deceptive practices were specifically designed to, and did, induce plaintiffs and the other class members to purchase the defective tiles”; and defendants “have engaged and continue to engage in unfair competition by concealing the

defective nature of the tiles and by continuing to knowingly misrepresent to the class that the tiles possess qualities and characteristics that they do not have.”

Despite the fact that the complaint unequivocally alleges intentional misrepresentation, Monier argues that there was a *possibility* that it would be held liable for accidental conduct because the complaint alleges a cause of action under the Consumer Legal Remedies Act (CLRA) (Civ. Code, § 1750 et seq.), and liability under the CLRA may be premised on unintentional, as well as intentional, acts. On this premise, Monier argues that the complaint “presented a clear path through which Monier could be held liable for an ‘accident’ ” within policy terms. However, even if Monier’s interpretation of the CLRA is correct, the fact remains that the CLRA cause of action is based entirely upon misrepresentations, intentional acts whether made knowingly or negligently. As the trial court correctly observed: the *McAdams* complaint “does not allege that [Monier] violated the CLRA by any acts other than its alleged intentional failure to disclose the defects in its roof tiles.” Even if those allegations encompass the possibility that Monier’s representations were not knowingly false but were made without reasonable grounds for believing them to be true, such negligent misrepresentation would nevertheless be intentional, non-accidental conduct because the representations were made with the intent to induce reliance. (*Dykstra v. Foremost Ins. Co.* (1993) 14 Cal.App.4th 361, 366.)

Monier observes that the factual allegations of the complaint, not the legal theory of relief, determine whether the complaint triggers a duty to defend (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 841) and argues that misrepresentation is simply the *McAdams* plaintiffs’ legal theory of relief and that any damages ultimately arise from an unintended product defect. Monier points to references in the complaint to “poor manufacturing and design” and “defective” tiles, asserting that “[w]ithout defective tiles, the *McAdams* class members had no claims.” But the factual allegations of the complaint are that the class members were damaged by their reliance on Monier’s misrepresentations concerning the qualities of its tiles, not because of any property damage caused by defects in the manufacturing or design of the product. The *McAdams*

plaintiffs did not claim damages from an unintended manufacturing defect and Monier points to nothing in the record to suggest it ever defended their claims on that basis. Indeed, Monier opposed class certification with the assertion: “This is not a products defect case; it is a misrepresentations case.” Monier’s argument that plaintiffs *could* have claimed a manufacturing defect does not trigger a present duty to defend. “An insured may not trigger the duty to defend by speculating about . . . ways in which the third party claimant might amend its complaint at some future date.” (*Gunderson v. Fire Ins. Exchange* (1995) 37 Cal.App.4th 1106, 1114.) Monier’s reliance upon cases imposing a duty to defend product defect claims is therefore to no avail.

An instructive case is *Miller v. Western General Agency, Inc.*, *supra*, 41 Cal.App.4th at pages 1147-1148, in which homeowners sold their house allegedly without disclosing defective plumbing. The sellers’ insurer denied a duty to defend the buyers’ lawsuit, contending that the sellers’ potential liability was “was not based upon the *existence* of defective plumbing, but upon the [sellers’] fraudulent and deceptive misrepresentation and concealment of the defects.” (*Id.* at p. 1149.) The Court of Appeal affirmed summary judgment for the insurers with this explanation: “The [sellers] are being sued not because their home had defective plumbing, but because they allegedly fraudulently misrepresented and concealed such fact from the [buyers]. [¶] Whether the [sellers’] misrepresentations were intentional or simply negligent, they did not constitute an ‘accident.’ ” (*Id.* at pp. 1149-1150.)

It is true that the determination of an insurer’s duty to defend is not based solely on the allegations of the complaint. “[F]acts known to the insurer and extrinsic to the third party complaint can generate a duty to defend, even though the face of the complaint does not reflect a potential for liability under the policy.” (*Montrose, supra*, 6 Cal.4th at p. 296.) Extrinsic facts can also defeat the duty to defend. (*Id.* at pp. 296-299.) Here, the record reveals no facts that the insurers knew or should have known when evaluating the request for a defense that suggested a potential basis for recovery based on an accidental occurrence. To the contrary, in May 2005, the *McAdams* plaintiffs submitted interrogatory responses that confirmed that their complaint was based on a

claim of fraud, not product defect. Plaintiffs were asked if they contended the roof tiles were “inherently defective” and responded: “Yes, however, plaintiffs are not asserting tort claims, and therefore, do not need to prove ‘defect’ in the traditional sense of negligence or strict liability, only that the tiles are prone to fail.” Plaintiffs clarified that they did not assert any defect in “the manufacturing of the particular batch(es) of tiles from which plaintiffs’ were taken” but that “the tiles are not fit for the purpose for which they were sold, and violate . . . customers’ aesthetic expectations.”

The *McAdams* plaintiffs’ October 2005 motion for class certification also confirms that Monier was being sued for intentional conduct, not an accident within policy coverage. The motion begins with a summation of the facts, asserting: “Monier knew that its slurry coated tiles would erode down to bare concrete but did not disclose this fact to consumers.” (Capitalization altered.) The motion further asserted that “Monier knew all along, and even had studies to show, that its colored ‘slurry coating’ would erode away well within the supposed 50-year life of the Tiles.” As pointed out above, Monier itself opposed class certification with the argument that the action was “not a products defect case; it is a misrepresentations case.” The insurers had no duty to defend a misrepresentations case.

DISPOSITION

The judgment is affirmed. The cross-appeal is dismissed. American Home Assurance Company and Travelers Indemnity Company are the prevailing parties and, as such, shall recover costs incurred on appeal and cross-appeal upon timely application in the trial court.

Pollak, J.

We concur:

McGuinness, P. J.

Jenkins, J.