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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

GERALD TOSTE et al.,

Plaintiffs and Appellants,

v.

FIRST AMERICAN TITLE INSURANCE COMPANY,

Defendant and Respondent.

C067520

(Super. Ct. No. PC20070292)

This is the fifth appeal involving an easement on land owned by plaintiffs Gerald and Robin Toste (the Tostes) for the benefit of their neighbors, the Smedbergs. In the first, we affirmed an award of compensatory and punitive damages against Gerald Toste for willfully interfering with the easement.

(*Smedberg v. Toste* (Dec. 10, 2008, C056578) [nonpub. opn.].) In the second, we sanctioned the Tostes and their attorney, Charles Kinney, for filing a frivolous appeal that "recycl[ed] the same arguments" from the first appeal. (*Smedberg v. Toste* (Sept. 28,

2009, C058031) [nonpub. opn.].) In the third, we affirmed the dismissal of the El Dorado Superior Court as a party in the Tostes' action for inverse condemnation. (*Toste v. Superior Court* (Oct. 27, 2009, C058938) [nonpub. opn.].) In the fourth appeal, we affirmed an order denying Gerald Toste's challenge of the denial of his claim of exemption to the Smedberg's wage garnishment. (*Smedberg v. Toste* (Mar. 6, 2012, C068218) [nonpub. opn.].)

This fifth appeal fares no better for the Tostes. Here, the Tostes claim the trial court erred in granting summary judgment in favor of defendant First American Title Company (First American) in a lawsuit the Tostes filed against First American. The preliminary title report First American issued on the Tostes' property missed the easement encumbering the Tostes' property. The lawsuit alleged breach of contract against First American. The trial court granted summary judgment in favor of First American. The Tostes appeal from the resulting judgment. They contend the court erred in granting summary judgment because triable issues of material fact existed. As best we can discern, the Tostes develop seven issues.¹ Finding no merit in them, we affirm the judgment.

¹ The argument section of the Tostes' opening brief has a heading stating "triable issues of material fact existed" and then enumerates nine "triable issues" in one page without any factual or legal analysis or citations to the record. In the pages that follow, the brief explains in a little more detail some (but not all) of those triable issues. Then, in the conclusion section, the brief enumerates three "triable issues."

FACTUAL AND PROCEDURAL BACKGROUND

In June 1999, the Tostes purchased property in Pollock Pines consisting of a home on about one acre. First American issued a title insurance policy on the property. The policy failed to note the property was encumbered by an easement held by the Smedbergs.²

In May 2006, the Tostes made a claim under the policy after the Smedbergs notified the Tostes they were going to construct a driveway on the easement. That same month, the Tostes (among other things) piled obstructions on the easement, scared off the Smedbergs' contractors with growling dogs, and removed erosion control devices on the easement.

On June 1, 2006, First American wrote the Tostes a letter acknowledging the easement. The letter explained that First American would pay for the actual loss the Tostes incurred because of the easement, which was to be determined by an independent appraiser based on the difference in value of the property with the easement and without it.

On June 6, 2006, the Smedbergs wrote a letter to First American informing the insurance company that the Tostes had physically blocked access to the easement and threatened litigation.

The lack of clarity of what exactly are the triable issues and the lack of development of the triable issues make it difficult to understand the Tostes' arguments on appeal.

² This appeal deals with only one easement, although there are actually two.

On June 15, 2006, First American wrote a letter to the Tostes reiterating its decision to pay for the actual loss caused by easement on their property, thus eliminating any duty to defend the Tostes if they were sued. However, the letter also stated, "If the Smedbergs bring a legal action against you, please send [First American] copies of the summons and complaint promptly so that we can evaluate the allegations for any potential obligation to defend you."

On July 3, 2006, the Smedbergs filed a lawsuit against the Tostes to quiet title and to allege trespass and nuisance causes of action based on the Tostes' interference with the use of the easement.

After the Smedbergs filed their lawsuit, the Tostes hired attorney Kinney to defend them in that lawsuit.

On July 8, 2006, Kinney wrote First American a letter stating he had been retained by the Tostes to defend them in the Smedbergs' lawsuit and included the complaint and other documents relating to the lawsuit. It was the Tostes' and Kinney's position that the Tostes had adversely possessed the easement. Kinney also stated that he had already filed a declaration and opposition to the Smedbergs' motion for preliminary injunction.

On July 13, 2006, the El Dorado Superior Court granted the preliminary injunction enjoining the Tostes from interfering with the Smedbergs' use of the easement.

Later that month, Kinney filed an answer and cross-complaint on behalf of the Tostes.

In August 2006, First American wrote Kinney a letter stating that it had reconsidered its decision to pay the Tostes for their loss from the easement and would instead defend them in the Smedbergs' action. It warned, however, that it would not pay to prosecute the cross-complaint. First American retained attorney William Barnes to defend the Tostes against the Smedbergs' lawsuit. The title insurance policy stated, "We have the right to choose the attorney when [w]e bring or defend a legal action on [y]our behalf." "We are required to repay [y]ou only those . . . attorneys' fees . . . that [w]e approve in advance."

In April 2007, the El Dorado County Superior Court found Gerald Toste guilty of 12 counts of contempt for violating the preliminary injunction. Thereafter, the court ordered Gerald Toste to serve 60 days in jail for violating the preliminary injunction and awarded costs to the Smedbergs in response to their memorandum of costs.

In May 2007, Kinney filed a lawsuit on behalf of the Tostes against El Dorado County alleging the county had created a dangerous condition by approving construction of the Smedbergs' driveway on the easement and later amended the complaint to add a cause of action for inverse condemnation against the El Dorado County Superior Court.

The Smedbergs' lawsuit and Tostes' cross-complaint went to trial in June 2007. Both attorneys Barnes and Kinney were at the trial and the Tostes elected to have Kinney handle the examination of witnesses and argument to the jury. A jury

rejected the Tostes' claim of adverse possession and found Gerald Toste liable for nuisance and trespass and awarded the Smedbergs \$65,000 in compensatory damages and \$40,000 in punitive damages.

Kinney filed a notice of appeal on behalf of the Tostes. First American did not authorize the appeal, instead choosing to pay the Tostes the loss they incurred based on the difference in value of the property with and without the easement. The policy of title insurance stated, "We can appeal any decision to the highest level," but provided for other options also. Those options included "[p]lay the claim." When this option is exercised, First American's obligations for the claim ends, including its obligation to defend any legal action. Two days after the jury's verdict, First American sent the Tostes a check for \$54,000, which represented the loss caused by the easement as determined by an independent appraiser. The Tostes' first appeal was unsuccessful.

In January 2008, Kinney filed a second notice of appeal on behalf of the Tostes challenging the award of costs. First American did not authorize the second appeal or approve Kinney's attorney fees. We deemed this second appeal frivolous because "[u]nder the guise of challenging the cost order, the Tostes raise[d] two issues considered and disposed of in [their] previous appeal." We sanctioned the Tostes and Kinney \$9,875 payable to the Smedbergs for their attorney fees and \$2,500 payable to the clerk of this court for the cost of processing the appeal.

In March 2008, the trial court entered judgment in favor of El Dorado Superior Court after sustaining without leave to amend the El Dorado Superior Court's demurrer in the inverse condemnation lawsuit.

In May 2008, Kinney filed a third notice of appeal on behalf of the Tostes challenging the dismissal of the superior court from the lawsuit. First American did not authorize the third appeal or approve Kinney's attorney fees. On appeal, we affirmed the judgment dismissing the Tostes' action against the El Dorado Superior Court.

While the appeals and other litigation were ongoing, the Tostes sued First American in August 2007. The lawsuit alleged breach of contract against First American. The Tostes' theory was that First American "refused to pay for legal services for a full and complete defense as provided by [Kinney], and for a cross-complaint . . . and for other litigation filed by the same attorney" They sought a "determination of the rights and obligations regarding . . . the title insurance policy, which contain[ed] an option to go to arbitration, but for which [First American] waived that right by [its] refusal to defend [the Tostes] when the litigation noted was filed." They requested declaratory relief "as to the rights and duties under the preliminary title report and title insurance policy." And they requested injunctive relief "as to the payment for legal services regarding the defense and cross-complaint and appeal thereof, and the damages awarded, in the litigation by the Smedbergs, and the new litigation regarding the Easement."

The trial court granted summary judgment in favor of First American. The court "f[ound] that [First American]'s performance under the title insurance policy contract by covering the claim of [the Tostes], providing and paying for defense counsel for the Smedbergs' action, paying for the actual loss to [the Tostes'] property incident to the Smedbergs' easement and paying for covered costs awarded the Smedbergs as the prevailing party [wa]s supported by the moving party's evidence and constitute[d] a full and complete defense to [the Tostes'] breach of contract action." The Tostes' "opposition [to the summary judgment motion] fail[ed] to provide evidence of any breach of the title insurance contract by [First American] while, at the same time, offer[ed] argument that [First American] had [a] myriad [of] duties to [the Tostes] which were not met giving rise to 'waiver' by [First American] and liability for all of [the Tostes'] litigation losses, including punitive damages. [The Tostes] offer[ed] no evidence in support of their position and their position d[id] not conform to their complaint for breach of contract. Thus, no triable issue of material fact remain[ed]"

The Tostes filed a timely notice of appeal from the ensuing judgment.

DISCUSSION

I

*There Was No Triable Issue As To Whether
First American Fully Investigated Title Issues*

The Tostes contend there was a triable issue as to whether First American "fully investigate[d] the title issues presented by the missed easement" before the Smedbergs filed their lawsuit in July 2006. They argue a "full title search" by First American might have shown that the Smedbergs violated the Subdivision Map Act,³ illegally combined two "dissimilar easements into one," and illegally excluded the Tostes "from their only access to their land and house."

This theory was not alleged in the complaint. The complaint did not mention that First American had any obligation to investigate these issues before the Smedbergs filed the lawsuit against the Tostes, and it did not allege the title policy was breached in this respect. "A party cannot successfully resist summary judgment on a theory not pleaded." (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 541.)

II

*There Was No Triable Issue As To Whether
First American Timely Defended*

The Tostes contend there was a triable issue as to whether First American "timely defend[ed]" the Smedbergs' preliminary

³ Government Code section 66410.

injunction motion or "whether there was a belated tender by [the] Toste[s]." The Tostes explain as follows: First American's "failure to fully investigate the title issues made it almost impossible to fully defend against the preliminary injunction because no one really knew what the Smedberg's rights in title were compared to [Tostes'] rights in title." In the complaint, however, the only reference to the timeliness of First American's defense was that First American "waived" the right to go to arbitration by their refusal to defend the Tostes when the Smedbergs sued the Tostes. This is not the claim the Tostes are making now on appeal and they are limited to those issues framed in their complaint. (*Roth v. Rhodes, supra*, 25 Cal.App.4th at p. 541.)

III

There Was No Triable Issue As To Whether First American Improperly Failed To Pay For Kinney's Legal Services

The Tostes contend there was a triable issue as to whether First American improperly failed to pay for legal services provided by Kinney in various phases of the litigation. The complaint alleged that First American breached the title insurance policy by refusing to pay for Kinney to "fully defend the lawsuit by the Smedbergs, and to prosecute the cross-complaint, the appeal, and other litigation." The problem with the Tostes' argument, as the trial court recognized, was the lack of evidence to support it and the undisputed evidence offered by First American to defeat it.

A

Defending The Smedbergs' Action

The undisputed evidence offered by First American was that it did not authorize Kinney to defend the Smedbergs' action and the policy did not require it to pay for Kinney to so defend. The title insurance policy stated, "We have the right to choose the attorney when [w]e bring or defend a legal action on [y]our behalf." "We are required to repay [y]ou only for those . . . attorneys' fees . . . that [w]e approve in advance." Some of Kinney's services were rendered before Kinney wrote to First American informing it he had been retained by the Tostes to defend the Smedbergs' action. "Such clauses bar reimbursement for pre-tender expenses based on the reasoning that until the defense is tendered to the insured, there is no duty to defend." (*Tradewinds Escrow v. Truck Ins. Exchange* (2002) 97 Cal.App.4th 704, 710.) And the services Kinney rendered after First American began defending the Tostes in the Smedbergs' action (examining witnesses during trial and arguing to the jury) were by the Tostes' election and not because attorney Barnes (who First American had hired to defend the Smedbergs' action and was present for the trial) would not do so.

B

Prosecuting The Cross-Complaint Against The Smedbergs

The undisputed evidence offered by First American was that it was not obligated to pay for the Tostes' prosecution of the cross-complaint against the Smedbergs, which alleged the Tostes had extinguished the easement by adverse possession. First

American wrote to Kinney in August 2006 that it "d[id] not have an obligation to prosecute any action or cross-action on behalf of an insured under the terms of the policy" and therefore "any cross-actions must continue to be handled by you." Consistent with this letter, the title insurance policy stated that First American had a "choice[]" of whether to "[b]ring . . . a legal action related to the claim." "Insurance policies are contracts" and "nothing in the policy . . . contractually obligate[d]" First American "to fund and prosecute an insured's affirmative relief . . . cross-complaints." (*James 3 Corp. v. Truck Ins. Exchange* (2001) 91 Cal.App.4th 1093, 1104.)

C

Appealing The Smedbergs' Judgment

The Tostes contend First American was required to pay for "all of the appeal." They argue First American "refused to appeal the adverse decisions against [the Tostes] arising from Smedberg's lawsuit" and "[t]hat refusal by itself violated the insurer's duty to fully defend." In this section of their opening brief, the Tostes cite no evidence showing there is a triable issue of fact as to this claim.

The undisputed evidence offered by First American was that it did not authorize the appeal, instead choosing another route, and therefore it did not have to pay to appeal the Smedbergs' judgment. The title insurance policy stated, "We can appeal any decision to the highest level," (italics added) but provided for other options. Those options included "[p]lay the claim." When this option is exercised, First American's obligations toward

the claim ends, including its obligation to defend any legal action. First American chose this option. Upon doing so, First American had no duty to appeal the adverse judgment against the Tostes. It likewise was not obligated to pay for the appeal that Kinney prosecuted because First American did not approve those fees in advance. As we have already noted, the title insurance policy stated, "We are required to repay [y]ou only those . . . attorneys' fees . . . that [w]e approve in advance."

IV

There Was No Triable Issue As To Whether First American Waived Management Control

The Tostes contend there is a triable issue as to whether First American "waived management control of the Smedbergs' case by its 2 months of inaction." In both places where the Tostes claim this triable issue, they fail to identify what they mean by "2 months of inaction."

In any event, the undisputed facts do not support a theory of waiver through inaction. On June 1, 2006, First American wrote the Tostes a letter acknowledging the easement and explaining it would pay for their losses incurred because of the easement. This letter was sent one month before the Smedbergs filed their July 3, 2006, lawsuit to enforce the easement. After the Smedbergs filed their lawsuit, the Tostes hired Kinney to defend that lawsuit, failing to inform First American of the Smedbergs' lawsuit until Kinney wrote a letter to First American on July 8, 2006. It was in that letter Kinney stated he had already filed the opposition to the motion for preliminary

injunction. One month later, on August 10, 2006, First American wrote Kinney a letter that it had reconsidered its decision to pay the Tostes for their loss from the easement and would instead defend them in the Smedbergs' action.

V

*There Was No Triable Issue As To Whether First American's
June 2006 Letters Were Unreasonable Refusals To Act*

The Tostes contend there is a triable issue as to whether First American's letters dated June 1, 2006, and June 15, 2006, were "unreasonable refusal[s] to act on [the Tostes'] behalf." This contention, like the two months' of inaction contention discussed above, is also not explained when raised in the Tostes' brief.

In any event, there is no triable issue because the letters contain no refusals to act. To the contrary, the first letter dated June 1, 2006, explained, "your policy *does* cover your actual loss caused by the easement in question." (Italics added.) The second letter dated June 15, 2006, explained while First American would "most likely not provide further representation to you should the Smedbergs bring a legal action against you," it also explained "[i]f the Smedbergs bring a legal action against you, please send [First American] copies of the summons and complaint promptly so that we can evaluate the allegations for any potential obligation to defend you."

VI

*There Was No Triable Issue As To Whether
First American Must Indemnify The Tostes For The
Compensatory And Punitive Damages Awarded The Smedbergs*

The Tostes contend there is a triable issue as to whether First American must indemnify them for the compensatory and punitive damages awarded the Smedbergs for trespass and nuisance. They base their contention on the notion that First American's "inactions and refusals noted herein . . . visited upon [the Tostes]" "the resulting adverse consequences."

There is no triable issue for at least three reasons. One, since there are no triable issues as to First American's alleged "inactions and refusals" (as we have already explained in parts IV and V of the Discussion), the premise on which this indemnity argument is made fails. Two, liability for tortious conduct is not a covered risk, either under the language of the title insurance policy here or by operation of law. (*Rosen v. Nations Title Ins. Co.* (1997) 56 Cal.App.4th 1489, 1501.) And three, title insurance does not insure against events that occur after the policy date. (*Id.* at pp. 1501-1502.)

VII

*There Was No Triable Issue As To Whether
The \$54,000 Fully Compensated The Tostes*

The Tostes contend there is a triable issue of fact as to whether First American's payment of \$54,000 compensated them for "all loss in property value" caused by the easement. This issue is outside the complaint and therefore cannot be raised. (*Roth*

v. Rhodes, supra, 25 Cal.App.4th at p. 541.) The complaint was specific in that First American breached the title insurance policy by failing to pay Kinney's legal services and refusing to pay the damages awarded the Smedbergs. The damages the Tostes sought from First American corresponded with these unpaid amounts, as did their request for injunctive relief. The complaint did not state that the issue of whether First American's payment of \$54,000 compensated them for "all loss in property value" needed to be addressed to defend against the lawsuit. While the issue was arguably raised by the Tostes in their opposition to the motion for summary judgment by declarations of Gerald and Robin Toste that their property was worth "\$0" and "\$15,000" respectively, the Tostes did not seek to amend their complaint to raise this issue. First American argued this issue was outside the pleadings at the hearing on the summary judgment motion and accordingly, the trial court properly refused to consider it.

DISPOSITION

The judgment is affirmed. First American is awarded its costs on appeal. (Cal. Rules of Court, rule 8.278(a).)

We concur: ROBIE, J.

RAYE, P. J.

MAURO, J.