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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MICHAEL SULLIVAN, as Trustee of the Sullivan Family Trust and the James M. and Marguerite O. Sullivan Trust of 1987, Plaintiff and Appellant, v. FIREMAN'S FUND INSURANCE COMPANY, Defendant and Respondent.	B281479 (Los Angeles County Super. Ct. No. BC616165)

APPEAL from a judgment and order of the Superior Court of the County of Los Angeles, Gail Ruderman Feuer, Judge. Affirmed.

Nunziato Buckley Weber, Tom A. Nunziato and Illece Buckley Weber, for Plaintiff and Appellant.

Crowell & Moring, Mark D. Plevin and Brendan V. Mullan, for Defendant and Respondent.

The trial court granted summary judgment for defendant Fireman's Fund Insurance Company, concluding the insurer owed no duty to defend plaintiff Michael Sullivan, as trustee of two family trusts, in an action for soil and groundwater contamination to real property adjacent to property owned by the trusts. We agree there was no potential for coverage on behalf of plaintiff under the commercial general liability policy (CGL policy) and accordingly affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff accepts the facts as set forth in the trial court's ruling on defendant's summary judgment motion. We summarize them as follows:

The CGL Policy

The critical time period is March 20, 1983 through March 20, 1986, the years defendant's CGL policy no. MXX 67502355 was in effect.[1] Throughout that policy period, Charles S. Sullivan and James M. Sullivan, with their respective spouses as joint tenants, each owned an undivided one-half interest in commercial real property located in Gardena. They leased the property to California Gasket Corporation (Cal Gasket). Cal Gasket was the named insured on the defendant's CGL policy covering the business's leased premises and operations. The policy provided coverage for "the actual, alleged or threatened discharge, dispersal, release or escape of pollutants."

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[1] CGL policies provide general liability coverage for businesses and typically provide coverage for accidental occurrences. (*Energy Ins. Mutual Limited v. Ace American Ins. Co.* (2017) 14 Cal.App.5th 281, 292.)

The Sullivans, as owners of the property, were additional named insureds. The CGL policy's basic insuring agreement, general policy condition number 3, entitled "assignment," provided: "3. Assignment. Assignment of interest under this policy shall not bind the Company until its consent is endorsed hereon; if, however, the Named Insured shall die, such Insurance as is afforded by this policy shall apply (1) to the Named Insured's legal representative, as the Named Insured . . . ."

The Trusts

On July 1, 1986, after the CGL policy lapsed, Charles and Nathalie Sullivan created a revocable inter vivos trust and deeded their undivided one-half interest in the property to the trust. Charles Sullivan died in 1990, Nathalie Sullivan in 1998; they did not exercise their right to revoke the trust during their lifetimes.

On May 26, 1987, a year after the CGL policy lapsed, James and Marguerite Sullivan also created a revocable inter vivos trust and deeded their undivided one-half interest in the property to the trust. Marguerite Sullivan died in 2000, James in 2004; they as well never exercised their right to revoke the trust during their lifetimes.

At some point before 2011, plaintiff was named as trustee for both trusts.

Underlying Action

On December 12, 2011, plaintiff, solely in his capacity as trustee, sued Cal Gasket and its subtenant, Alliance Hose and Extrusions, Inc., for nuisance (*Sullivan Trust v. California Gasket and Rubber Corporation and Alliance Hose and*

Extrusions, Inc., Super. Ct. L.A. County, 2011, No. BC475004). Plaintiff sought damages and equitable relief for soil and groundwater contamination on the property. Cal Gasket tendered its defense of the action to defendant; defendant accepted the tender subject to a reservation of rights.

Cal Gasket and Alliance cross-complained against Halldale Partners, LLC (Halldale), the owner of the adjoining property. On or about January 8, 2015, Halldale substituted plaintiff and the estates of Charles Sullivan and James Sullivan for roe cross-defendants in its second amended cross-complaint[2] for damages and indemnity. Halldale alleged operations on the property owned by the Sullivans and then the trusts caused and contributed to soil and groundwater contamination on Halldale property.

The estates and plaintiff tendered their defenses of the Halldale cross-complaint to defendant. Defendant accepted the estates' tender of defense.[3] Defendant also initially accepted plaintiff's defense, but then withdrew its agreement to defend.

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[2] Halldale's second amended cross-complaint is not in the record.

[3] Where, as here, a decedent's estate, but not the estate's personal representative, is sued, any recovery "is enforceable only from the insurance coverage and not against property in the estate." (Prob. Code, § 554, subd. (a).)

Halldale voluntarily dismissed the estates as cross-defendants in the underlying action after the estates filed a motion for summary judgment.

Current Action

Plaintiff, again solely in his capacity as trustee, initiated this lawsuit against defendant in April 2016 for breach of the insuring agreement, tortious breach of the covenant of good faith and fair dealing, and declaratory relief. According to the complaint, the duty to defend under the CGL policy arose "under the *de facto* merger doctrine, a long recognized exception to the rule requiring consent to assignment of insurance policies, when the assignment is merely a continuation of the business operations for which the insurance carriers had issued coverage and . . . the potential for coverage for the losses alleged that triggered the duty to defend."

In August 2016, defendant filed its motion for summary judgment. Based on the undisputed facts that the trusts were formed and the property deeded into them after the CGL policy expired, defendant argued there was no potential for coverage for plaintiff under the policy and, consequently, no duty to defend him in his capacity as trustee.

Plaintiff opposed. He all but ignored the pleaded de facto merger doctrine, simply noting that in *Westoil Terminals Co. v. Harbor Ins. Co.* (1999) 73 Cal.App.4th 634, the Court of Appeal found the insurer had a duty to defend an insured that changed the form of ownership of the insured company from a corporation to a limited partnership. Instead, plaintiff argued Halldale's alleged loss occurred during the CGL policy period, so the deed granting title to the property from the Sullivans individually into their respective trusts *after* the policy expired should be viewed as an effective, or implied, assignment of the policy benefits from the Sullivans individually to the trusts. Relying on Insurance Code section 520 and *Fluor Corp. v. Superior Court* (2015) 61

Cal.4th 1175 (*Fluor*), plaintiff asserted defendant was not required to consent to the "effective" assignment. The argument was not supported by any evidence other than the undisputed fact that the Sullivans individually deeded the property to their respective revocable inter vivos trusts. Plaintiff also argued that the CGL policy was ambiguous because its definition of "insured" did "not deal with, nor [did] it expressly exclude from potential coverage, successors-in-interest in the nature of a family trust[]."

The trial court entertained argument on defendant's motion. There, plaintiff also asserted Civil Code section 1084[4] supported his position that the Sullivans assigned the right to a defense to the trusts. The trial court took the matter under submission; and on November 18, 2016, it issued minutes and a detailed ruling granting the motion. Counsel agreed notice of the trial court's decision would be deemed to have been given January 4, 2017.

On January 13, 2017, plaintiff filed a motion for reconsideration. (Civ. Proc. Code, § 1008.) Plaintiff supported the motion with facts and law not presented in opposition to defendant's motion for summary judgment. The trial court issued a tentative ruling denying plaintiff's motion for reconsideration. The matter was not heard in open court; trial counsel conferred off the record, and the trial court adopted its tentative ruling. The trial court found the facts and law plaintiff relied on were not new and denied the motion for reconsideration. (Code Civ. Proc., § 1008.)

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[4] Civil Code section 1084 provides: "The transfer of a thing transfers also all its incidents, unless expressly excepted; but the transfer of an incident to a thing does not transfer the thing itself."

DISCUSSION

Standard of Review

We review de novo the trial court's ruling that defendant owed no duty to defend plaintiff against the Halldale cross-complaint. (*Lomes v. Hartford Financial Services Group, Inc.* (2001) 88 Cal.App.4th 127, 131.) In a duty to defend case, an insurer moving for summary judgment must establish there is no potential for coverage under any "'*conceivable theory*.'" (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 300.) We begin our analysis by "comparing the allegations of the complaint with the terms of the policy." (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 19.) We are not concerned with "the labels given to the causes of action in the third party complaint; instead [we focus] on whether the *alleged facts* or *known extrinsic facts* reveal a possibility that the claim may be covered by the policy." (*Cunningham v. Universal Underwriters* (2002) 98 Cal.App.4th 1141, 1148.) Unless the words in an insurance policy are used in a ""technical sense,"" we give them their ordinary, everyday meaning. (*Palmer v. Truck Ins. Exchange* (1999) 21 Cal.4th 1109, 1115.)

The pleadings play a key role in a summary judgment motion. They limit "the scope of the issues . . . and . . . frame the outer measure of materiality . . . . Accordingly, the 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;* that is, a moving party need not refute liability on some theoretical possibility not included in the pleadings." (*Hutton v. Fidelity National Title Co.* (2013) 213 Cal.App.4th 486, 493 (*Hutton*), internal quotation marks omitted.)

As this court has previously held, "'A defendant moving for summary judgment may rely on the allegations contained in the plaintiff's complaint, which constitute judicial admissions. As such they are conclusive concessions of the truth of a matter and have the effect of removing it from the issues.'" (*Castillo v. Barrera* (2007) 146 Cal.App.4th 1317, 1324.) Plaintiff, however, as the party opposing summary judgment cannot rely on allegations in "his own pleadings, even if verified, to make or supplement the evidentiary showing required in the summary judgment context." (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 720, fn. 7.) Finally, a plaintiff faced with a motion for summary judgment who "wishes to introduce issues not encompassed in the original pleadings . . . must seek leave to amend the complaint at or prior to the hearing on the motion for summary judgment." (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1257 (*Laabs*).)

Analysis

Plaintiff argues the following errors require reversal: (1) Defendant failed to meet its prima facia burden to show the Sullivans did not impliedly assign to their trusts, in 1986 and 1987, the right to be defended almost 30 years later by defendant and, in any event, the trial court failed to consider evidence of an implied assignment of the right to a defense under the CGL policy; (2) the trial court refused to consider evidence of certain testamentary transfers to the trusts of the right to a defense of the Halldale cross-complaint; (3) the trial court erroneously took judicial notice of defendant's having provided a defense of the Sullivan estates in the Halldale cross-complaint; and (4) the motion for reconsideration was improperly denied.

1. Implied Assignment of the Right to a Defense

a. Burden of Proof on Assignment Issue

Plaintiff maintains the existence, or not, of an implied assignment by the Sullivans to their trusts of the right to be defended (what plaintiff now refers to as a "chose in action") was a triable issue of material fact that precluded summary judgment. Plaintiff argues defendant did not even address this issue in its moving papers, so the burden never shifted to him to produce evidence of an implied assignment.

As mentioned above, the defendant moving for summary judgment need only negate the theories of liability that the plaintiff has "*alleged in the complaint;* that is, a moving party need not refute liability on some theoretical possibility not included in the pleadings." (*Hutton, supra,* 213 Cal.App.4th at p. 493.) An implied assignment, not having been alleged in the complaint, was not material to defendant's motion. Nor did plaintiff seek leave, either before or during the hearing on the summary judgment motion, to amend his complaint to add this theory. (*Laabs, supra,* 163 Cal.App.4th at p. 1257.)

Defendant was not required, as part of its initial burden on the motion, to show the "nonexistence" of facts to support an unpleaded theory of liability. And nothing in the record concerning the parties' pretrial discovery suggested this was a potential issue.

Once defendant made a prima facia factual showing based on the pleaded theories of liability, the burden shifted to plaintiff to show the existence of a triable issue, i.e., evidence demonstrating the trusts became named insureds under the policy by virtue of an implied assignment to them of the rights to a defense. Given the record on the motion, the trial court did not

err by concluding that plaintiff, not defendant, had the burden of demonstrating a factual dispute concerning the assignment issue.

b. Failure to Produce Evidence of an Implied Assignment

To the extent plaintiff was required to provide proof that the rights to a defense were assigned to the trusts when the property grant deeds were signed, he relied Insurance Code section 520,[5] *Fluor, supra,* 61 Cal.4th 1177 and Civil Code section 1084.

Plaintiff's implied-in-fact assignment theory fails on the merits.[6] "'Generally, interests may be assigned orally [citations], and assignments need not be supported by any consideration.'" (*Fink v. Shemtov* (2012) 210 Cal.App.4th 599, 610.) But the issue on summary judgment was not whether Charles and James Sullivan were authorized under the CGL policy to assign their respective defense rights; rather, it was whether there was sufficient evidence to show they in fact manifested an intent to

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[5] Insurance Code section 520 provides: "An agreement not to transfer the claim of the insured against the insurer after a loss has happened, is void if made before the loss . . . ."

[6] An assignment of contract rights may be either express or implied. (Civ. Code, § 1619.) The terms of the former are expressed in words. (Civ. Code, § 1620); the terms of the latter are "manifested by conduct" (Civ. Code, §1621). "'The true implied contract, then, consists of obligations arising from a mutual agreement and intent to promise where the agreement and promise have not been expressed in words.'" (*Varni Bros. v. Wine World Inc.* (1995) 35 Cal.App.4th 880, 888, citing 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 11, p. 46.)

assign those rights by their words or conduct. Although the trial court was receptive to the theory of an inter vivos assignment, plaintiff failed to present any evidence that raised a triable issue of material fact as to whether James and Charles Sullivan ever intended to do so, either by words or conduct.

Plaintiff has not explained how Insurance Code section 520 applies to the issue of whether evidence of an intent to assign was shown, and we consider that argument waived. *Fluor, supra,* 61 Cal.4th 1177 deals with whether an insurer must consent to an assignment; here, as noted, the issue is whether an assignment occurred at all. Nor is Civil Code section 1084 helpful. Under that section, when the "thing" transferred is the title to real property, the "incidents" to such a transfer are fixtures, appurtenances and easements. (*Drake v. Martin* (1994) 30 Cal.App.4th 984, 994.) Not so the right to be defended by an insurer.

2. Testamentary Transfer

Plaintiff next contends the trial court erred by concluding the right to a defense under the CGL policy could only have been transferred to the trusts by an inter vivos assignment. According to plaintiff, because the right to a defense under the CGL policy arose during the policy period, the right became personal property, or a chose in action, owned by the Sullivans during their lifetimes and passed through their wills' pourover provisions to the trusts. Plaintiff, however, failed to raise the issue of a testamentary transfer during the summary judgment proceedings.

Plaintiff cites no authority that permits him to assert this theory for the first time on appeal. (See *City of San Diego v.*

Rider (1996) 47 Cal.App.4th 1473, 1493 ["A party waives a new theory on appeal when he fails to include the underlying facts in his separate statement of facts in opposing summary judgment. [Citation.] A new theory on appeal is also waived when the new theory involves a controverted factual situation not put in issue below"].)

3. Judicial Notice

At the defense request in support of the motion for summary judgment, the trial court took judicial notice of the fact that the Sullivan estates moved for summary judgment and Halldale voluntarily dismissed them before the hearing; no court ever ruled on the estates' summary judgment motion. Plaintiff offered no objection and appeared to join in the request.

On appeal, however, plaintiff argues this information was not relevant and the taking of judicial notice was error. Plaintiff's failure to object in the trial court forfeits the issue on appeal. In any event, plaintiff has not demonstrated that the judicial notice, other than perhaps serving as an interesting factoid in the litigation between these parties, had any bearing on the trial court's decision concerning whether defendant had a duty to defend the trustee.

In addition, as discussed below, the trial court did not abuse its discretion by rejecting plaintiff's request for reconsideration on the grounds that the estates' summary judgment motion and their dismissal from the Halldale cross-complaint were irrelevant to the issues raised on defendant's summary judgment motion. As the trial court expressly noted in the ruling on the reconsideration motion, although its tentative ruling on defendant's motion mentioned the estates' motion for

summary judgment in the underlying action, the trial court did not rely on it or the subsequent dismissal in granting defendant's summary judgment motion.

4. Motion for Reconsideration

Code of Civil Procedure section 1008, subdivision (a) requires a party seeking reconsideration of a trial court ruling to timely present new or different facts, circumstances or law. "A party seeking reconsideration also must provide a satisfactory explanation for the failure to produce the evidence at an earlier time." (*New York Times Co. v. Superior Court* (2005) 135 Cal.App.4th 206, 212.) We review the ruling on a motion for reconsideration under an abuse of discretion standard. (*Ibid.*)

In seeking reconsideration, plaintiff argued he was "sandbagged" at the summary judgment hearing because defendant raised the implied assignment issue for the first time in its reply and the trial court took judicial notice that defendant provided a defense to the estates and Halldale voluntarily dismissed them without prejudice. The record demonstrates otherwise.

Plaintiff's primary focus in opposition to the motion for summary judgment was that the Sullivans impliedly assigned their right to a defense by defendant when they deeded the property into their trusts. This issue was outside plaintiff's pleadings and not raised in defendant's moving papers. Defendant discussed the issue in reply only because plaintiff argued in opposition to the summary judgment motion that an implied-in-fact assignment took place when the property was deeded to the trusts. Because the implied assignment issue was raised and relied upon by plaintiff in opposing the motion, it was

not the type of new matter that could support the request for reconsideration.

Similarly, the issue concerning dismissal of the estates was not raised at the hearing on the motion for summary judgment. Defendant requested, *as part of the summary judgment motion*, that the trial court take judicial notice of certain facts concerning the estates. Plaintiff did not object either before or during the summary judgment hearing. Facts concerning the estates were not new, and the judicial notice argument could not provide a basis for reconsideration under Code of Civil Procedure section 1008.

Plaintiff raised the testamentary transfer issue for the first time in his motion for reconsideration. But this ground for reconsideration failed because it was not based on new facts, circumstances, or law. Defendant included a copy of James Sullivan's will in support of the motion for summary judgment. The wills of all four Sullivans were presumably available to plaintiff, and he provided no explanation to the trial court as to why he failed to produce the wills earlier.

Conclusion

Plaintiff's complaint bore hallmarks of a memorandum of points and authorities—it cited opinions and statutes, for example, and made a number of conclusory statements. The fact allegations were few and straightforward. The Sullivans, as individuals, owned the real property where lessee Cal Gasket and the lessee's subtenant conducted their business operations. The occurrence-based CGL policy covered the Sullivans, individually, for the simple reason they were the property owners. After the policy expired, the Sullivans divested themselves, via grant deed,

of all property ownership. A party's right to a defense provided by an insurer exists only where there is a potential that party may be covered under the policy. There was no potential for coverage here, and summary judgment was properly granted in defendant's favor.

DISPOSITION

The judgment and the order denying reconsideration are affirmed. Defendant is awarded costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

DUNNING, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

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* Judge of the Orange Superior Court appointed by the Chief Justice pursuant to article VI, section 6, of the California Constitution.