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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

IMPERIAL TILE & STONE, Plaintiff and Appellant, v. STATE FARM GENERAL INSURANCE COMPANY, Defendant and Respondent.	B230937 (Los Angeles County Super. Ct. No. BC426710)

APPEAL from a judgment of the Superior Court of Los Angeles County, Yvette M. Palazuelos, Judge. Affirmed.

Law Offices of John Belcher and John A. Belcher for Plaintiff and Appellant.

Sedgwick, Maria Louise Cousineau, and Douglas J. Collodel, for Defendant and Respondent.

Imperial Tile & Stone appeals from the grant of summary judgment for respondent, State Farm General Insurance Company (State Farm) in a lawsuit arising from an insurance coverage dispute.[1] It contends that under the terms of a commercial general liability policy State Farm had a duty to defend it in an employment discrimination lawsuit. We conclude the underlying complaint does not fall within the terms of the policy and affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

State Farm issued a general liability policy to Imperial Tile & Stone and its owners, Nir and Guy Bachar (collectively ITS). On February 4, 2009, Carole Benhamou filed a complaint against ITS.[2] In the underlying action, Benhamou asserted that while serving as a sales manager for ITS, she became pregnant and suffered pregnancy-related illnesses. She alleged that she was harassed, treated differently, demoted, and ultimately terminated because of her pregnancy. She also claimed ITS did not pay her wages and commission, and that those remained unpaid at the time she filed her lawsuit. The complaint asserts the following causes of action: discrimination and harassment based on pregnancy, disability, and gender under the Fair Employment and Housing Act (FEHA; Gov. Code § 12940 et seq.); failure to accommodate a disability under FEHA (Gov. Code, § 12940, subds. (a), (m), & (n)); failure to pay wages (Lab. Code, §§ 200-300, 1194 et seq.); and intentional infliction of emotional distress.

ITS tendered defense of the *Benhamou* action to State Farm. State Farm declined to defend ITS on the grounds that the complaint did not allege "bodily injury" caused by an "occurrence," as required for coverage under the policy, and that the allegations in the complaint were excluded from coverage under both the "intentional acts" and "business practices" exclusions.

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[1] Respondent was erroneously sued as State Farm Fire and Casualty Company.

[2] *Benhamou v. Imperial Tile and Stone* (Super.Ct. L.A.County, 2009, No. 407054) (*Benhamou*).

ITS filed the instant lawsuit against State Farm for breach of contract and breach of the covenant of good faith and fair dealing, and sought declaratory relief, general damages, and punitive damages. State Farm answered, denying the allegations and raising affirmative defenses, including the absence of coverage. ITS subsequently settled the underlying lawsuit with Benhamou.

State Farm filed a motion for summary judgment or alternatively for summary adjudication of the issues. State Farm claimed it was entitled to summary judgment because: (1) the allegations of the *Benhamou* complaint do not allege bodily injury caused by an "occurrence" in order for the claims to be covered under the policy; (2) the allegations are excluded by the intentional acts exclusion in the policy; and (3) the allegations are employment-related torts, which are excluded by the policy's employment practices exclusion.

The trial court concluded ITS created a triable issue of material fact as to whether the conduct in the underlying complaint was accidental or intentional since it alleged it did not discriminate against Benhamou, that she voluntarily left her position, and she was paid all of her commissions. But it found the allegations in the complaint were excluded by the policy's employment practices exclusion which applies to injuries caused by employment-related torts. It granted summary judgment and entered judgment in State Farm's favor. This timely appeal followed.

DISCUSSION

On appeal from summary judgment, we examine the facts presented to the trial court and independently determine their effect as a matter of law. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037.) The judgment must be affirmed if it is correct under any theory of law applicable to the case. We are not bound by the trial court's stated reasons, if any, supporting its ruling since we review the ruling, not the rationale. (*Shugart v. Regents of University of Cal.* (2011) 199 Cal.App.4th 499, 504-505.)

I

The primary issue raised by this appeal is whether State Farm had a duty to defend ITS in the *Benhamou* action. ITS contends it did, arguing only that the policy's employment practices exclusion does not apply since Benhamou was an independent contractor, not an employee. Before we consider whether any policy exclusions apply, we examine the coverage provisions to determine whether a claim falls within the policy terms. (*Hallmark Ins. Co. v. Superior Court* (1988) 201 Cal.App.3d 1014, 1017.) State Farm argues Benhamou's claims did not allege an "occurrence" to trigger its duty to defend under the policy.[3]

"An insurer must defend its insured against claims that create a *potential* for indemnity under the policy." (*Scottsdale Ins. Co. v. MV Transportation* (2005) 36 Cal.4th 643, 654 (*Scottsdale*).) Thus, the duty to defend is broader than the duty to indemnify. But it is not unlimited; it "extends beyond claims that are actually covered" to those that are potentially covered, but no further. (*Aerojet–General Corp. v. Transport Indemnity Co.* (1997) 17 Cal.4th 38, 59.)

"Determination of the duty to defend depends, in the first instance, on a comparison between the allegations of the complaint and the terms of the policy. [Citation.] But the duty also exists where extrinsic facts known to the insurer suggest that the claim may be covered." (*Scottsdale, supra*, 36 Cal.4th at p. 654.) "[I]f, as a matter of law, neither the complaint nor the known extrinsic facts indicate any basis for potential coverage, the duty to defend does not arise in the first instance." (*Scottsdale*, at p. 655.) Conversely, an insurer has a duty to defend its insured "if it becomes aware of, or if the third party lawsuit pleads, facts giving rise to the potential for coverage" under the insurance policy. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 19.)

Insurance policies are contracts subject to ordinary rules of contract interpretation. (*Palmer v. Truck Ins. Exchange* (1999) 21 Cal.4th 1109, 1115.) In construing the terms

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[3] ITS did not file a reply brief.

of the policy, "'doubts, uncertainties and ambiguities arising out of policy language ordinarily should be resolved in favor of the insured in order to protect [its] reasonable expectation of coverage.' [Citation.] But that principle comes into application only where the policy provision is truly ambiguous, i.e., susceptible to two or more constructions, all of which are reasonable. [Citation.]" (*Loyola Marymount University v. Hartford Accident & Indemnity Co.* (1990) 219 Cal.App.3d 1217, 1222, italics omitted (*Loyola*).)

Typically, third party liability policies, like the one here, provide coverage for bodily injuries arising out of accidental events. The policy issued by State Farm contained the following relevant provisions: "This insurance applies only . . . [¶] . . . to bodily injury or property damage caused by an occurrence which takes place in the coverage territory during the policy period . . . ." The policy defines bodily injury as "bodily injury, sickness or disease sustained by a person" and "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions which result in bodily injury . . . ."[4] "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."' [Citations.] 'This common law construction of the term "accident" becomes part of the policy and precludes any assertion that the term is ambiguous.'" (*Delgado v. Interinsurance Exchange of Automobile Club of Southern California* (2009) 47 Cal.4th 302, 308.)

Both parties agree the complaint contains allegations of bodily injury. Bodily injury will only be covered under the policy if it is the result of an occurrence, which is an accident. The question is whether there is a triable issue of material fact showing the acts of ITS alleged by Benhamou potentially constitute an accident under the terms of the policy. (See *Scottsdale*, *supra*, 36 Cal.4th at p. 654.)

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[4] We do not discuss provisions of the policy addressing personal, property, or advertising injury since ITS does not challenge the trial court's finding that the *Benhamou* complaint did not allege these injuries, and we consider issues not raised to be forfeited. (*Christoff v. Union Pacific Railroad Co.* (2005) 134 Cal.App.4th 118, 125.)

As the moving party, it is State Farm's burden to show the absence of coverage. (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 300–301 (*Montrose*).) As we have discussed, we examine the terms of the policy, the underlying complaint, and extrinsic facts known to the insurer. (*Scottsdale, supra,* 36 Cal.4th at p. 654; *Montrose, supra,* 6 Cal.4th at p. 300.)

An intentional act is not an "'accident.'" (*Dyer v. Northbrook Property & Casualty Ins. Co.* (1989) 210 Cal.App.3d 1540, 1547.) A substantial line of authority exists, which holds that, as a matter of law, the acts of ITS alleged by Benhamou are not accidents. Alleged acts of discrimination do not constitute accidental conduct. (See, e.g., *American Motorists Ins. Co. v. Allied-Sysco Food Services, Inc.* (1993) 19 Cal.App.4th 1342, 1354 [alleged gender discrimination not covered], disapproved of on other grounds by *Buss v. Superior Court* (1997) 16 Cal.4th 35; *Loyola, supra*, 219 Cal.App.3d at p. 1224 [insured's claim at summary judgment that its "allegedly discriminatory conduct . . . qualifies, at least potentially, as an 'occurrence,' . . . dispositively lacks merit"]; see also *American Guarantee & Liability Ins. Co. v. Vista Medical Supply* (N.D. Cal. 1988) 699 F.Supp. 787, 791-792 [under California law, alleged FEHA violation not covered]; cf. *Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co.* (1993) 14 Cal.App.4th 1595 [claims for sexual harassment and associated employment-related torts are excluded from coverage by Ins. Code, § 533, since they are willful acts].) Neither do wrongful discharge claims involve accidental conduct. (*B & E Convalescent Center v. State Compensation Ins. Fund* (1992) 8 Cal.App.4th 78, 98 ["no coverage for injuries arising from wrongful termination under policies expressly limiting coverage to 'accidents'"].)

Further, the intentional application of an employment policy is not an accident, even if such application has an unintended effect. (*Loyola, supra*, 219 Cal.App.3d at p. 1225.) In other words, even if ITS did not mean to harm Benhamou, the fact that it intended to take certain actions against her means that there was no accident triggering State Farm's duty to defend.

Benhamou's complaint alleges that ITS intentionally took adverse action against her due to her pregnancy in violation of FEHA. She claims ITS harassed her upon

learning of her pregnancy, refused to pay her sales commissions, complained about her need to miss work for doctor's appointments, demoted her, failed to accommodate her pregnancy and related complications, and terminated her. As a matter of law, these alleged acts are intentional, and show no potential for coverage under the policy.

Since the allegations in the complaint show no coverage as a matter of law, we look next to the extrinsic facts known by State Farm. (*Montrose, supra*, 6 Cal.4th at p. 295.) The records submitted by State Farm show that it knew only that ITS disputed the truth of Benhamou's claims. ITS and its attorney advised State Farm that ITS denied all wrongdoing and disputed all of Benhamou's allegations. ITS contended Benhamou had not been terminated but had voluntarily abandoned her job and was not due unpaid commission.[5]

That ITS disputed Benhamou's claims and denied her allegations does not raise a possibility that the alleged acts were accidental rather than intentional; it only raises a possibility that ITS did not act as alleged. We thus find State Farm has carried its burden and shown there was no basis for potential coverage. (See *Buss v. Superior Court, supra*, 16 Cal.4th at p. 46.)

In opposition to State Farm's motion for summary judgment, ITS reiterated its denial of Benhamou's contentions. As we have discussed, this does not raise a triable issue of material fact as to the potential for coverage under the policy. ITS further argued that the failure to pay Benhamou's wages could have been accidental if it resulted from a miscalculation or computer malfunction. This claim is entirely speculative because there is no supporting evidence that this might have happened. "An insured may not trigger the duty to defend by speculating about extraneous 'facts' regarding potential liability . . . ."

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[5] ITS argued at summary judgment that State Farm would have known of additional extrinsic facts had it requested ITS to turn over discovery documents from the *Benhamou* action. ITS's claim that it possessed pertinent discovery that would show coverage is unsupported by the record. If ITS had pertinent documents, it was its burden to produce these. (See *Montrose, supra*, 6 Cal.4th at p. 301 ["an insured cannot manufacture a dispute on summary judgment, ipse dixit, by refusing to concede the truth of a fact without adducing some evidentiary support for its position"].)

(*Gunderson v. Fire Ins. Exchange* (1995) 37 Cal.App.4th 1106, 1114.) We thus conclude summary judgment was proper. Since there is no potential for coverage, we do not reach the applicability of the exclusions in the policy.

II

"It is clear that if there is no potential for coverage and, hence, no duty to defend under the terms of the policy, there can be no action for breach of the implied covenant of good faith and fair dealing because the covenant is based on the contractual relationship between the insured and the insurer." (*Waller v. Truck Ins. Exchange, Ins., supra*, 11 Cal.4th at p. 36, italics omitted.) Since we find no potential for coverage, we affirm the summary judgment for State Farm on ITS's claim for breach of the implied covenant of good faith and fair dealing.

DISPOSITION

The judgment is affirmed. Respondent to have its costs on appeal.

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EPSTEIN, P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.