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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

1500 VIEWSITE TERRACE, LLC, Plaintiff and Appellant, v. PICKFORD ESCROW, INC., et al., Defendants and Respondents.	B256246, B257166 (Los Angeles County Super. Ct. No. BC467238)

APPEAL from judgment and order of the Superior Court of Los Angeles County, Barbara A. Meiers, Judge. Affirmed.

Younesi & Yoss, John D. Younesi, Jan A. Yoss; Buchalter Nemer, John L. Hosack and Jason E. Goldstein for Plaintiff and Appellant.

Gaglione, Dolan & Kaplan, Robert T. Dolan and Kaiulani S. Lie for Defendant and Respondent, Pickford Escrow, Inc.

Early Sullivan Wright Gizer & McRae, Eric P. Early, William A. Wright and Kevin S. Sinclair for Defendant and Respondent, First American Title Insurance Company.

Green & Hall; Howard D. Hall and Markus D. Self for Defendant and Respondent, California Title Company.

INTRODUCTION

Plaintiff 1500 Viewsite Terrace LLC appeals from the judgment dismissing its lawsuit entered after the trial court granted three separate summary judgment motions brought by defendants First American Title Insurance Company (First American), California Title Company (CTC), and Pickford Escrow, Inc. (Pickford).[1] Plaintiff also separately appeals from the order awarding attorney's fees and costs to Pickford (Civ. Code, § 1717). We consolidated the appeals. We hold that defendants' motions demonstrated their entitlement to summary judgment as a matter of law and in opposition, plaintiff failed to dispute a material fact. We also hold that the attorney's fee provision in the escrow instructions was not adhesive. Accordingly, we affirm the judgment and the attorney's fee order.

FACTUAL AND PROCEDURAL BACKGROUND

This case involves plaintiff's purchase as an investment of a single-family residence. The purchase was made complicated by a trail of debts accumulated by the seller Richard Byrd that created liens and encumbrances on the property before escrow closed. The transaction's complexity was exacerbated by

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[1] Pickford should not be confused with another defendant, Pickford Real Estate, who is not a party to this appeal.

plaintiff's principals' hasty decisions and failure to read pertinent documents or to heed advice. Aware of the numerous liens and encumbrances on the property, plaintiff's principals nonetheless opted to complete the transaction and sue the escrow company (Pickford), the underwritten title company (CTC), and the title insurance company (First American), to force these defendants to bear the cost of clearing the inevitable cloud on plaintiff's title.

1. *The transaction*

In late 2008, Scott Unger discovered a residence located at 1500 Viewsite Terrace in Los Angeles that appeared to be under stalled renovation (the property). Unger contacted Walter Schild about joining him in purchasing the property as an investment. The two formed plaintiff and agreed with the owner/seller Richard Byrd on a purchase price of $2.28 million.

The transaction was eventually structured as a purchase option. Plaintiff's principals (hereinafter referred to as plaintiff, unless otherwise indicated) agreed to an irrevocable, three-year option to buy, which option plaintiff could exercise by paying off the existing mortgages on the property (the option contract). Plaintiff acknowledged, because it intended to acquire and develop the property as an investment, that an option was "prudent" and "a good financial decision since it avoided a large initial outlay of capital." The option contract enabled plaintiff to renovate the property, place it on the market, and enter into listing agreements before actually exercising the option.

Plaintiff and Byrd prepared the option contract and plaintiff had attorney Laura Davidov review some of its provisions. Recorded on February 4, 2009, the option contract was flawed because it identified the optioner as "Byrd Development, Inc." (BDI), not Richard Byrd the record owner, and obfuscated the flaw by giving BDI the nickname of "Byrd." Apparently, plaintiff did not notice the flaw until the purchase transaction closed just over two years later.

The option contract contained the escrow instructions. Therein, paragraph 6 provided that defendant Pickford, as escrow agent, would hold a quitclaim deed from "Byrd," and "release[ ]" the deed to plaintiff concurrently with closing of the purchase escrow. Richard Byrd submitted to escrow a deed granting the property to plaintiff from himself individually, rather than from BDI, the seller identified in the option contract (the Byrd deed).

2. *Escrow and the binder for a policy of title insurance*

The parties opened escrow with Pickford. Patricia Newton-Addy, Pickford's escrow officer, contacted defendant CTC about providing title services. CTC is an underwritten title company that *writes* policies on behalf of title insurance companies such as First American. Bill Thomas, CTC's Operations Manager, Senior Title Officer, and Vice President, explained to Pickford's Addy that CTC could not, by definition, issue plaintiff a policy insuring title because plaintiff would not be taking title under the option. Instead, CTC was willing to issue an interim binder of title insurance, with a one-year extension – because binders typically last two years – until plaintiff exercised its three-year option. Thomas told Addy, "Let me know if they [Schild and Unger] are ok with that."

Plaintiff paid $4,197 to purchase a binder from CTC to be issued by First American, effective February 4, 2009 (the binder). Plaintiff never gave CTC instructions about the binder and never told CTC that it disapproved of the binder or of its terms, or that plaintiff wanted to purchase any other insurance product, such as an abstract of title, title commitment, or an extended American Land Title Association (ALTA) policy.[2] CTC never received instructions from plaintiff. CTC took instructions from, and dealt solely with, Pickford.

As soon as the option contract was recorded on February 4, 2009, CTC issued the binder effective that same date, and plaintiff took possession of the property and began construction.

3. *Liens and encumbrances recorded on the property between February 4, 2009, when the binder was issued, and March 31, 2011, when the purchase escrow closed*

Byrd ran into personal financial trouble and several creditors attached his assets, including the property, during the escrow period. Three such categories of liens and encumbrances are of relevance here.

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[2] "Although it provides some coverage for risks not readily apparent, the standard form [California Land Title Association] CLTA policy of title insurance is intended primarily to insure against defects in the public records that are discoverable through an examination of the public records. The [American Land Title Association] ALTA policy forms include extended coverage for matters not apparent from the public records, such as those matters that could be revealed by a physical inspection of the property or a survey, and matters that would be discovered by inquiry of persons in possession of the property. The standard CLTA policy does not include such coverage, and the issuance of the extended coverage, whether in the form of an ALTA policy or by endorsement of the standard policy, generally requires a survey and inspection as well as payment of a large premium." (3 Miller & Starr, Cal. Real Estate (4th ed. 2017) § 7:5, p. 7-29, fns. omitted.)

a. *The Putnam attachment*

Putnam Leasing Company, LLC (Putnam) brought a lawsuit against Byrd for non-payment of a lease for a Bentley automobile (case No. BC409655) and recorded a $94,358.70 writ of attachment against the property on April 1, 2010 (the Putnam attachment). Putnam obtained a $136,282.04 judgment against Byrd in that lawsuit and recorded an abstract of its judgment against the property on December 27, 2010 (the Putnam leasing judgment).

However, apparently aware of Putnam's lawsuit, Byrd had transferred the property in March 2010 just before Putnam recorded its attachment, without consideration to Viewsite, LLC, an entity he owned and controlled (Byrd's LLC) -- not to BDI, the seller identified in the option contract.

Plaintiff knew that Putnam had some interest in the property that could have an impact on title. Plaintiff also knew that Byrd's aim in transferring the property to his LLC was to evade creditors. To ensure that Putnam would not interfere with plaintiff's interests, plaintiff and Byrd amended the option contract to authorize Byrd's transfer to his LLC (the option amendment). Signed by Byrd on March 31, 2010, the option amendment explicitly stated that Byrd "desire[d] to minimize liability exposure by transfer of the Property to a wholly owned Limited Liability Company . . . ." Plaintiff agreed to keep the option amendment "strictly confidential" without "disclos[ing] this [option] Amendment or divulg[ing] any of its terms except to their attorneys, tax preparers, or in response to lawful subpoena . . . ." In early April 2010, Unger "confirm[ed]" with Byrd's attorney that "[t]he property has been deeded to an LLC."

b. *The Putnam lis pendens and quiet title judgment*

Discovering that Byrd had transferred away his title to the property before the recording of its leasing judgment, Putnam filed a second lawsuit in October 2010 (case No. BC447686) to set aside this transfer as a fraudulent conveyance, and to quiet title back in the name of Byrd individually (the Putnam quiet title suit).

In connection with its quiet title suit, Putnam recorded a lis pendens on the property on November 2, 2010. The lis pendens stated that Putnam had filed a lawsuit that "concerns and *affects title to*, and possession of" the property, and that "the *object of said action is to* obtain *an adjudication that a certain purported deed of property is void or voidable and to require the purported deed to be* delivered up and *canceled*." (Italics added.)

c. *The four minor liens*

In 2010, four entities recorded liens on the property: Indiana Plumbing Supply Co., Inc. (for $8,083.93), Compex Legal Services (for $46,789.21), Wells Fargo Bank, N.A. (for $28,967.53), and the State Board of Equalization (for $7,016.55). These four liens (the minor liens) were released between September and November 2011.

4. *Plaintiff opts to purchase the property*

In February 2011, Schild informed escrow officer Addy that plaintiff elected to exercise its option. At the latest, on February 1, 2011, plaintiff had a copy of CTC's preliminary title report dated December 15, 2010. That preliminary title report's "Schedule A" insuring agreement identified Byrd's LLC as the owner of record and its "Schedule 'B' " listed as exceptions from coverage, among other things, the Putnam attachment and the lis pendens. Whether or not he grasped the precise legal ramifications, Schild nonetheless recognized in early February 2011 that the Putnam quiet title suit represented an effort "perhaps to get on title . . . ."[3] Also by this time, plaintiff had sunk more than $1.65 million into renovations on the property.

On March 11, 2011, the trial court in the Putnam quiet title suit filed a default judgment against Byrd and Byrd's LLC among others. That judgment awarded Putnam $548.00 in costs, *set aside* Byrd's transfer of the property to Byrd's LLC, and *permanently enjoined* Byrd and his LLC "from *selling, transferring, conveying, assigning or otherwise disposing* of [the] property." (The Putnam quiet title judgment, italics added.)

Addy forwarded to plaintiff copies of the Putnam attachment and the lis pendens on March 14, 2011, along with her e-mail to Byrd explaining that she could not transfer title with the new Putnam lien on it.

CTC issued another preliminary report dated March 17, 2011; this report excepted from coverage the Putnam attachment and Putnam's lis pendens. Plaintiff did not ask CTC for any documents listed in this preliminary title report.

At some point, Addy indicated that escrow needed a new deed from Byrd's LLC to plaintiff because Byrd's LLC was the record owner. Notwithstanding the Putnam quiet title judgment

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[3] In his declaration in opposition to the summary judgment motions, executed six months after his deposition, Schild stated that he had no idea what the Putnam attachment and lis pendens meant because they were not " 'hyperlinked' " to the title reports and no one explained them to him. Plaintiff did not ask CTC for copies, which were always available.

entered against Byrd 14 days earlier enjoining him and Byrd's LLC from transferring the property, Byrd executed a deed on March 25, 2011, purporting to convey the property from Byrd's LLC to plaintiff.

On March 23, 2011, Putnam recorded its default judgment in the quiet title suit.

Plaintiff knew about both of Putnam's lawsuits. Unable to obtain Richard Byrd's signatures on the necessary documents to close escrow, Schild reached out by e-mail to BDI's attorney. Unger commented to Schild on March 24, 2011, "I would have taken the opportunity with your e-mail [to BDI's counsel] to mention the lien – in as much as . . . the lien is a violation of their conditions." Schild replied, "I thought about the lien, *but didn't want to raise as I didn't want them to stall on the close*. I think we are better of[f] closing, *then we go back and say we now see we didn't get clear title, fix that*." (Italics added.) Unger replied, "[Y]ep sounds right."

When Addy informed CTC on March 30, 2011 that plaintiff wanted to close the purchase escrow, CTC's Thomas explained that he would only issue a policy if plaintiff obtained a "new grant deed" from Byrd's LLC instead of the original Byrd deed that had been placed in escrow. Also, CTC's policy would indemnify plaintiff's fee, subject to exceptions from coverage for the various Putnam liens and encumbrance.

On March 30, 2011, Addy informed plaintiff that the last recorded lien was "the one for $548.00," i.e., the Putnam quiet title judgment. Schild replied, "Based on quick review, it appears the new liens [the Putnam quiet title judgment] is [*sic*] just the court filing fee of $500. *As such, this is not a concern. I should* *have her* [plaintiff's attorney Jan Yoss'] *approval*." (Italics added.)

Schild also asked Addy whether the original Byrd deed could be recorded, in addition to the new corporate deed from Byrd's LLC. Addy responded that the original deed could not be recorded because "he deed[ed] it [the property] to his LLC." Schild then asked Addy to "*send* the old [Byrd] deed. WE [*sic*] will need that *to take action against Richard Byrd and Putnam*." (Italics added.) Addy forgot to send the Byrd deed to plaintiff.

CTC's third preliminary title report, issued on March 30, 2011, excepted from coverage the Putnam attachment and leasing judgment, along with the lis pendens and the newly recorded Putnam quiet title judgment. That evening, Thomas e-mailed Addy PDF copies of the minor liens. CTC updated its preliminary report on March 31, 2011. This new report identified the four minor liens in Schedule B, in addition to the exceptions from coverage for the Putnam controversy already listed in the previous day's report.

On March 31, 2011, Addy e-mailed Schild explaining, "The title company had to pull the recording due to all the liens against Richard Byrd's Company and him personally. . . . We think there are more liens about to be filed against Richard, so the sooner we act the better. You can have your attorney call me and I will be able to explain to her what's going on." Schild responded thirteen minutes later, "Please *record immediately. We are OK taking property subject to the lien. We are aware other instruments* are filed against Richard Byrd . . . ." (Italics added.)

5. T*he close of escrow and issuance of the title insurance policy*

Escrow closed on March 31, 2011 when CTC recorded the grant deed from Byrd's LLC to plaintiff and paid off the first and second mortgages and taxes on the property.

On May 4, 2011, First American issued the policy of title insurance dated March 31, 2011. The policy insured a fee interest in plaintiff but excepted from coverage "loss or damage by reason of the matters shown in" Schedule B part 2, including the Putnam controversy and the minor liens. Plaintiff paid no additional premium for the insurance policy or to purchase an ALTA extended policy, beyond the amount it had already paid for the binder.

6. *Plaintiff sues Byrd and Putnam*

At the time it closed escrow, plaintiff understood that the Putnam liens and encumbrance, along with the four minor liens, remained on title. Although plaintiff believed that the February 4, 2009 recording of its option contract gave it an interest in the property prior to that of Putnam, it recognized it might have to take legal action against Byrd and Putnam to clear its title. The day after escrow closed, plaintiff's attorney Yoss informed Putnam that plaintiff was prepared to clear the liens and encumbrances "by an action to Quiet Title."

7. *Plaintiff tenders its claim to the insurer*

Attorney Yoss tendered plaintiff's claim for the Putnam controversy to CTC on May 4, 2011, demanding that CTC and First American defend and indemnify plaintiff. First American denied a defense and indemnification on June 6, 2011 because plaintiff's claim was excluded from the scope of coverage by the policy's Schedule B part 2.

8. *Plaintiff's instant lawsuit ensues*

Plaintiff successfully sued Byrd and Putnam and quieted its title. (*1500 Viewsite Terrace LLC v. Richard Byrd*, et al. (Case No. BC 458774) Plaintiff then brought the instant lawsuit to recover, inter alia, its costs to clear title. The operative complaint alleged causes of action against CTC and Pickford for negligence, breach of fiduciary duty, intentional and negligent misrepresentation, and against First American for declaratory relief, breach of the express terms of the policy, and of the implied covenant of good faith and fair dealing.

The trial court entered summary judgment in favor of defendants, awarded Pickford its attorney's fees pursuant to the escrow instructions and Civil Code section 1717, and dismissed the action. Plaintiff timely appealed. We will address additional facts in the discussion below.

DISCUSSION

I. Principles of Summary Judgment

A court may grant a summary judgment only if "there is no triable issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment must show that one or more elements of the plaintiff's cause of action cannot be established or that there is a complete defense. (*Id*., subd. (p)(2).) The defendant can satisfy its burden by providing evidence that negates an element of the cause of action or by showing that the plaintiff does not possess and cannot reasonably expect to obtain evidence needed to establish an essential element. (*Veera v. Banana Republic, LLC* (2016) 6 Cal.App.5th 907, 914.) If the defendant meets its burden, the burden then shifts to the plaintiff to present evidence showing a triable issue of material fact. (*Ibid.*)

" 'We review the trial court's ruling on a summary judgment motion de novo, liberally construe the evidence in favor of the party opposing the motion, and resolve all doubts concerning the evidence in favor of the opponent. [Citation.]' [Citation.]" (*Veera v. Banana Republic, LLC*, *supra*, 6 Cal.App.5th at p. 914.) We consider the facts in the record that were before the trial court when it ruled on that motion, except the evidence to which the trial court sustained objections. (*Yanowitz v. L'Oreal USA, Inc*. (2005) 36 Cal.4th 1028, 1037.) However, "[t]he trial court's stated reasons for granting summary judgment are not binding on the reviewing court, 'which reviews the trial court's ruling, not its rationale.' [Citation.]" (*Stockton Mortgage, Inc. v. Tope* (2014) 233 Cal.App.4th 437, 446 (*Stockton*).)

After reviewing the record according to the three-step process on summary judgment (*Garcia v. American Golf Corp*. (2017) 11 Cal.App.5th 532, 539), we conclude there are no disputes of material fact. Thus, our analysis is solely a legal one.

II. Principles of Title Insurance

"Title insurance, as opposed to other types of insurance, does *not insure against future events*. It is not forward looking. It insures against losses resulting from differences between the actual title and the record title as of the date title is insured. The policy *does not guarantee the state of the title*. Instead, it agrees to indemnify the insured for losses incurred as a result of defects in or encumbrances on the title. [Citation.]" (*Quelimane Co. v.*

Stewart Title Guaranty Co. (1998) 19 Cal.4th 26, 41, italics added (*Quelimane*).)

The process of obtaining title insurance begins with preliminary title reports. The preliminary title report is prepared by the insurer "on the basis of, and in reliance on, the quality of its own investigation into instruments which, when recorded, impart constructive notice." (*Quelimane*, *supra*, 19 Cal.4th at p. 41.) It is a "declar[ation] in advance of [a policy's] purchase precisely the risk which [the insurer] will agree to assume. [Citation.]" (*Southland Title Corp. v. Superior Court* (1991) 231 Cal.App.3d 530, 538 (*Southland Title*), citing 3 Miller & Starr, Current Law of Cal. Real Estate (2d ed. 1989) § 7:138, p. 244.) Hence, preliminary title reports constitute " '*offers* to issue a title policy subject to the stated exceptions set forth in the reports and such other matters as may be incorporated by reference therein.' (Ins. Code, § 12340.11.)" (*Siegel v. Fidelity Nat. Title Ins. Co*. (1996) 46 Cal.App.4th 1181, 1190, italics added (*Siegel*); *Lee v. Fidelity National Title Ins. Co*. (2010) 188 Cal.App.4th 583, 597 (*Lee*); *Fidelity National Title Ins. Co. v. Miller* (1989) 215 Cal.App.3d 1163, 1175 (*Miller*).) If the buyer chooses to accept the insurer's offer, it does so by purchasing the title policy. (*Lee*, *supra*, at p. 597.)

Functionally, "a title insurance policy contains basic insuring clauses and a statement of specified matters that are excepted or excluded from coverage. Ordinarily, a particular loss is covered *only* if it results from a matter that (1) is within the scope of the insuring risks, *and* (2) is *not expressly excepted or excluded from coverage as provided in the policy*." (Cal. Title Insurance Practice (Cont.Ed.Bar 2d ed. 2017) § 6.4, p. 6-9, italics added.) Title "[i]nsurance policies are written in two parts: an insuring agreement which defines the type of risks being covered [Schedule A], and exclusions, which remove coverage for certain risks which are initially within the insuring clause [Schedule B].” (*Rosen v. Nations Title Ins*. Co. (1997) 56 Cal.App.4th 1489, 1497 (*Rosen*); 3 Miller & Starr, Cal. Real Estate, *supra*, § 7:43, p. 7-118.) Schedule A provides, inter alia, the date and time the policy becomes effective, the vesting of title, the estate, interest, or lien being insured, and the legal description of the property. (3 Miller & Starr, *supra*, at p. 7-116.) Schedule B part 2, “lists specific exceptions . . . from coverage that are disclosed by public records. These exceptions are generally located by the title search performed by the title company. This part will list, among other things, . . . liens shown by public records. . . .” (*Id*. at p. 7-118)

As a title insurance policy is a contract of indemnity, its interpretation is a legal question whose meaning we independently determine. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18.) The ordinary rules of contract interpretation apply to contracts of insurance. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264.)

III. Summary Judgment In Favor Of First American Was Proper

a. *Plaintiff’s complaint and First American’s motion*

The pleadings frame the issues to be decided on summary judgment. (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1253.) In the operative complaint’s declaratory relief and contract causes of action, plaintiff sought a judicial determination that First American was obligated to pay all fees and expenses related to quieting title and removing the minor liens. Plaintiff alleged that First American breached the policy's promise to insure that plaintiff had a marketable legal fee by refusing to indemnify plaintiff when the deed from Byrd's LLC did not convey title at closing, and by failing to indemnify plaintiff for the minor liens. Next, plaintiff alleged that First American's refusal to indemnify plaintiff was a breach of the policy's implied covenant of good faith and fair dealing.

First American's motion to summarily adjudicate the declaratory relief and contract causes of action asserted that plaintiff did not purchase title insurance that indemnified it for matters that arose *after* February 4, 2009, and that the entire Putnam controversy was specifically excluded from the scope of coverage. Also, First American asserted it had no duty to indemnify plaintiff for the minor liens because, among other reasons, plaintiff did not tender them in its claims to CTC and First American. First American next argued, inter alia, that it was entitled to summary adjudication of the insurance bad faith cause of action because it did not breach the contract.

b. A*pplication*

1. *First American did not breach a contract with plaintiff*

A. *The binder did not offer, and the policy did not insure plaintiff, for loss caused by the Putnam controversy or the minor liens*

"A complaint for declaratory relief must demonstrate: (1) a proper subject of declaratory relief, and (2) an actual controversy involving justiciable questions relating to the rights or obligations of a party." (*Brownfield v. Daniel Freeman Marina Hospital* (1989) 208 Cal.App.3d 405, 410.) "The elements of a cause of action for breach of contract are ' "(1) the contract,

(2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff." ' [Citation.]" (*Tribeca Companies, LLC v. First American Title Ins. Co.* (2015) 239 Cal.App.4th 1088, 1109 (*Tribeca*).)

Plaintiff and First American agreed that the insurer "issued the Title Policy *pursuant* to the Binder." (Italics added.) Binders are different than subsequently issued policies of insurance. (*Ahern v. Dillenback* (1991) 1 Cal.App.4th 36, 48.) A binder is issued upon application for insurance and is merely a memorandum of the most important terms of a preliminary contract of insurance that gives temporary protection pending the insurer's investigation of the risk and issuance of a formal policy. (*Ibid.*; accord *Chicago Title Ins. Co. v. AMZ Ins. Services, Inc.* (2010) 188 Cal.App.4th 401, 419.) The binder ceases to be effective by its terms or upon issuance of the policy. (*Ahern v. Dillenback*, *supra*, at p. 49.) The binder "constitute[s] a statement of the terms and conditions upon which the issuer is *willing* to issue its title policy, if such offer is accepted." (Ins. Code, § 12340.11, italics added.) Stated differently, binders are *offers* to insure. (*Ibid.*)

The binder here clearly did not offer to indemnify plaintiff for any lien or encumbrance that arose after February 4, 2009, the date it was issued.[4] The binder's Schedule A, in relevant

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[4] Plaintiff argues that the evidence creates "a material factual dispute as to whether First American failed to recognize that the Option Agreement, on which the binder was issued, identified the wrong optioner." However, the binder did not offer a policy insuring the option contract; it did not mention that contract. Nor did the binder promise a policy insuring that the option contract had any particular legal effect. Rather, the

part, "agree[d that First American would] issue, *as of* [February 4, 2009], its policy of title insurance . . . insuring title to the estate or interest described to be vested in [plaintiff], *subject only to* the exceptions shown herein and to all of the provisions of the policy, **or in the alternative**, *if* valid and sufficient instrument creating an insurable estate, interest or lien if [sic] favor of [plaintiff] *is executed* . . . and recorded within 730 days from the date shown above, the policy will be issued as of the date of recording the instrument, insuring the estate, interest or lien *subject only to* the aforesaid exceptions and provisions of the policy and to *liens, encumbrances and any other matters* affecting title *disclosed of record between the date shown above and the date of recording the instrument* . . . ." (Italics and emphasis added.)

The first alternative in the binder's Schedule A insuring clause indemnified plaintiff for the state of title "*as of*" February 4, 2009. (Italics added.) (*Quelimane*, *supra*, 19 Cal.4th at p. 41.) The second alternative in Schedule A insured title "*subject only to the aforesaid exceptions* . . . of the policy *and to liens, encumbrances, and any other matters affecting title* disclosed of record *between the date shown above* [February 4, 2009] and the date of recording the instrument . . . ." conveying title to plaintiff. (Italics added.) Under either alternative, the binder's offer excluded from coverage loss or damage to title caused by any liens or encumbrances recorded *after* February 4, 2009, the binder's effective date.

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binder promised to issue a title insurance policy once plaintiff obtained an insurable interest in the property.

Plaintiff argues if First American intended both alternatives to exclude coverage for liens and encumbrances recorded after February 4, 2009, then there was no purpose in drafting the second alternative, with the result that its inclusion was ambiguous. Observing that the binder's insuring agreement was drafted by Thomas to accommodate ad hoc the fact that the transaction was an option rather than a straightforward purchase and sale, plaintiff argues that the binder should be interpreted against the insurer. However, we need not construe the binder because it is clear on its face. (*Mirpad, LLC v. California Ins. Guarantee Assn*. (2005) 132 Cal.App.4th 1058, 1069 (*Mirpad*) [if the policy language is clear and explicit, it governs and we do not construe it].) The second alternative was written to accommodate the option's delay in closing, and hence was not redundant. The binder did not offer to indemnify plaintiff for any loss or damage caused by the Putnam controversy or the minor liens, all of which were recorded after 2009.[5]

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[5] Our analysis of the binder obviates the need to address plaintiff's challenge on appeal to the trial court's order striking all allegations about the binder from an earlier version of the complaint. Regardless of whether that order was error (*PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682-1683 [issuing writ of mandate directing that the order sustaining a demurrer be vacated because the defendant did not move to strike and a "demurrer does not lie to a portion of a cause of action"]), we have considered the binder and conclude that it did not indemnify plaintiff for the Putnam controversy and minor liens.

Plaintiff argues it has additional evidence about the binder that it did not submit in opposition to First American's summary

Turning to the policy, it was a standard title insurance contract, consistent with the binder and the preliminary title reports (*Lee*, *supra*, 188 Cal.App.4th at p. 597), that was set out in two parts. The policy's Schedule A insuring agreement insured a fee interest in the property vested in plaintiff. However, Schedule B part 2 declared that the policy did "not insure against *loss or damage* [to plaintiff's fee] by reason of the matters shown in parts one and two following." (Italics added.) Those matters included the Putnam attachment and leasing judgment, the lis pendens and the Putnam quiet title judgment, along with the four minor liens. Thus, although the risk of loss to plaintiff's fee initially fell within the insuring clause of Schedule A, the risk posed by those matters was specifically removed from the scope of coverage in Schedule B part 2. (*Rosen*, *supra*, 56 Cal.App.4th at p. 1497.) The reason plaintiff did not acquire a marketable, legal fee from Byrd's LLC at escrow's closing was that the trial court in the Putnam controversy had just set aside

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judgment motion because references to the binder had already been stricken from the complaint. However, the issue is a legal one and construction of the binder is unnecessary because its language was clear and explicit. (*Mirpad*, *supra*, 132 Cal.App.4th at p. 1069.) Furthermore, First American's summary judgment motion discussed the binder's insuring clause and included the binder as exhibit 1 to its separate statement. Thus, plaintiff had an opportunity to submit evidence in response. We disregard any references plaintiff makes to unspecified evidence that it chose not to submit in connection with its opposition below, as that evidence is outside of the record on appeal. (*Yanowitz v. L'Oreal USA, Inc.*, *supra*, 36 Cal.4th at p. 1037; *Pringle v. La Chapelle* (1999) 73 Cal.App.4th 1000, fn. 2, citing *In re Hochberg* (1970) 2 Cal.3d 870, 875.)

Byrd's transfer of the property to Byrd's LLC and returned title to Byrd individually. Yet, the insurance policy here simply did not cover loss of title caused by that very judgment.

Plaintiff contends that the minor liens were not properly excluded from coverage in Schedule B part 2 because they were not listed on the March 30, 2011 preliminary report. However, the final preliminary report issued by CTC on March 31, 2011 *did* describe the minor liens. Even if the March 30, 2011 preliminary title report was the last one plaintiff saw, the omission of the four minor liens from that report's Schedule B part 2 does not mean First American was obligated to indemnify plaintiff for them because plaintiff never tendered to First American a claim for a defense or indemnity for those liens. Condition 3 of the policy entitled "NOTICE OF CLAIM TO BE GIVEN BY INSURED CLAIMANT" obligated plaintiff as insured to give prompt written notice of any potential claims of interest adverse to that of plaintiff as the insured. Condition 3 further stated in pertinent part: "If prompt notice shall not be given to the Company, then as to that insured all liability of the Company shall terminate with regard to the matter or matters for which prompt notice is required; provided, however, that failure to notify the Company shall in no case prejudice the rights of any insured under this policy unless the Company shall be prejudiced by the failure and then only to the extent of the prejudice."

Plaintiff's May and June 2011 tender letters did not mention the minor liens and so under the policy, First American had no obligation to defend or indemnify plaintiff for them. Plaintiff's first reference to the minor liens was made in its complaint. It also points to a letter about the minor liens attorney Yoss sent to defendants in November 2011. But that letter was sent three months after the complaint was filed, and six months after plaintiff first received the policy. Plaintiff gave no explanation for its failure to tender the minor liens earlier. By waiting until it filed its lawsuit to raise those liens, plaintiff prejudiced First American. Yoss had almost completely resolved the liens at no cost to plaintiff, except for the time Yoss spent making telephone calls, by the time First American was alerted to plaintiff's claim. Plaintiff's failure to timely tender the minor liens prevented First American from resolving them itself, and set the insurer up for a bad faith cause of action. Based on the policy's condition 3, First American was not obligated to defend or indemnify plaintiff for the four minor liens.[6]

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[6] Additionally, the evidence indicates that plaintiff was aware of and accepted the four minor liens. On the evening of March 30, 2011, Thomas e-mailed all of the minor liens to Addy. The following morning, Addy told Schild that the transaction could not close because of "all the liens against" Byrd and his company. Schild agreed to buy the property subject to those liens in his responding e-mail to Addy, stating: "Please record immediately. We are OK taking property subject to the lien. We are aware of other instruments are filed against Richard Byrd, Byrd Development and his Dundee property." (Italics added.) Stated otherwise, plaintiff authorized the closing with knowledge of these liens and accepted them.

Given our conclusions here, we need not address First American's alternative theory for non-coverage, namely that exclusion 3(a) of the policy precluded plaintiff's claim against the insurer because plaintiff participated in creating the quiet title judgment by allowing Byrd to transfer the property to Byrd's LLC for the purpose of evading Putnam's liens.

B. *The policy cannot be construed in favor of coverage*

(i) *The policy was not illusory*

Plaintiff contends that we should interpret the policy in favor of coverage. Otherwise, plaintiff argues, the policy would be illusory because it did not cover plaintiff for its lack of "ownership," which was the very risk plaintiff purchased insurance to indemnify against. Preliminarily, plaintiff did not lack "ownership;" upon close of escrow, plaintiff acquired equitable, if not legal, title. (Cf. *Department of Veterans Affairs of Cal. v. Board of Supervisors* (1948) 31 Cal.2d 657, 659; citing *Eisley v. Mohan* (1948) 31 Cal.2d 637.)

More to the point, the policy was not illusory. "An agreement is illusory and there is no valid contract when one of the parties assumes no obligation. [Citation.]" (*Scottsdale Ins. Co. v. Essex Ins. Co*. (2002) 98 Cal.App.4th 86, 95.) In contrast, an insurance contract is not illusory merely because there are some risks that are not covered. (*Medill v. Westport Ins. Corp*. (2006) 143 Cal.App.4th 819, 836.) In *Medill*, the defendant issued a liability insurance policy insuring any person acting in the course and scope of his duties on behalf of various nonprofit organizations and their nonprofit parent company. (*Id*. at pp. 823-825.) The bondholders who had lost money on municipal bonds issued by the nonprofits to finance the acquisition, operation, and renovation of healthcare facilities for the elderly, brought a class action against the nonprofits alleging that wrongful disbursements and fund comingling caused the nonprofits to go into receivership and foreclosure. (*Id*. at p. 823-824.) In affirming the insurer's summary judgment, *Medill* held the policy was not illusory because the business of the nonprofits was operating health care facilities, not issuing bonds. "Thus, not every lawsuit that could conceivably be brought against the directors and officers [of those nonprofits] would necessarily arise out of those entities' issuance of bonds, failure to pay on those bonds, or breaches of contract in connection with those bonds. For example, the policy specifically covers claims involving wrongful employment practices." (*Id.* at p. 836; accord *Evanston Insurance Company v. Atain Specialty Insurance Company* (N.D.Cal. 2017) __ F.Supp.3d __ (2017 WL 2311401, at p *13.) Exactly as repeatedly offered in the binder and the various preliminary title reports and as contained in standard policies of title insurance, plaintiff's policy indemnified plaintiff for all liens affecting title that arose *prior to* February 4, 2009 and that were *not* excepted from coverage in Schedule B part 2. The policy was not made illusory merely because it excepted from coverage the particular circumstance that gave rise to this lawsuit.

(ii) *The policy was not vague or ambiguous*

Plaintiff next contends that the policy was ambiguous and the trial court found it to be vague,[7] with the result that we must construe it in favor of coverage.

"The rules pertaining to contractual interpretation are clearly delineated in published case law, and apply equally to insurance contracts. . . . ' "[I]nterpretation of an insurance policy

[7] The reasons the trial court gave for granting the motions for summary judgment are irrelevant because interpretation of an insurance policy is a question of law (*Waller v. Truck Ins. Exchange, Inc.*, *supra*, 11 Cal.4th at p. 18), and our review of the grant of a summary judgment motion is de novo (*Stockton*, *supra*, 233 Cal.App.4th at p. 446).

is a question of law." [Citation.] "While insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply." [Citation.] Thus, "the mutual intention of the parties at the time the contract is formed governs interpretation." [Citation.] If possible, we infer this intent solely from the written provisions of the insurance policy. [Citation.] If the policy language "is clear and explicit, it governs." [Citation.]' " (*Mirpad*, *supra*, 132 Cal.App.4th at pp. 1068-1069.)

" 'When interpreting a policy provision, we must give its terms their " 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage.' " [Citation.] We must also interpret these terms "in context" [citation], and give effect "to every part" of the policy with "each clause helping to interpret the other." [Citations.]' [Citation.]" (*Mirpad*, *supra*, 132 Cal.App.4th at p. 1069.) " 'If particular policy language is ambiguous, it is to be resolved by interpreting the ambiguous provisions in accordance with the insured's *objectively* reasonable expectations.' [Citation.]" (*Energy Ins. Mutual Limited v. Ace American Ins. Co*. (2017) 14 Cal.App.5th 281, 290-291, italics added (*Energy Insurance*).)

"An insurance policy provision is ambiguous when it is susceptible of two or more reasonable constructions. [Citation.] If ambiguity exists, however, the courts must construe the provisions in the way the insurer believed the insured understood them at the time the policy was purchased. (Civ. Code, § 1649.) In addition, if, after the court evaluates the policy's language and context, ambiguities still exist, the court must construe the ambiguous language against the insurer, who wrote the policy and is held ' "responsible" ' for the uncertainty. [Citation.]

Particularly, '[i]n the insurance context, . . . ambiguities [are resolved] in favor of coverage' so as to protect the insured's reasonable expectation of coverage. [Citations.]" (*Ameron Internat. Corp. v. Insurance Co. of State of Pennsylvania* (2010) 50 Cal.4th 1370, 1378.) However, " '[c]ourts will not adopt a strained or absurd interpretation in order to create an ambiguity where none exists.' [Citation.]" (*Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.* (1993) 5 Cal.4th 854, 867.)

Plaintiff argues that the policy is ambiguous because Schedule A insured plaintiff's "ownership," that is, that title was "vested in" plaintiff, but Schedule B part 2 excepted from coverage the consequence of the liens listed there. Plaintiff thus reasons that these two schedules "conflict -- rendering the policy ambiguous" and vague, in violation of plaintiff's reasonable expectation that "its ownership of the Property was insured."

The first line of the first page of the policy stated in bold and in large font: "SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B . . . , First American Title Insurance Company . . . insures . . . against loss or damage . . . sustained or incurred by the Insured by reason of [¶] 1. *Title to the estate or Interest described in Schedule A being vested other than as stated hereby* . . . ." (Italics added.)

This clause clearly established that there could be circumstances under which "title to the estate or interest described in Schedule A [was] *vested other than*" *in plaintiff*. As it happened, the very reasons title was not vested in plaintiff were listed in "THE EXCEPTIONS FROM COVERAGE IN SCHEDULE B," namely the Putnam controversy. As First American notes, three courts have quoted this language. No court has found it to be ambiguous. (*Stockton*, *supra*, 233 Cal.App.4th at pp. 442-443; *Dollinger DeAnza Associates v. Chicago Title Ins. Co.* (2011) 199 Cal.App.4th 1132, 1147-1148 (*Dollinger*); *Mortgage Associates, Inc. v. Fidelity & Deposit Co. of Maryland* (2002) 105 Cal.App.4th 28, 36.) Even if the language were ambiguous, no objectively reasonable insured would conclude that this policy indemnified plaintiff for loss caused by the Putnam controversy. (*Energy Insurance*, *supra*, 14 Cal.App.5th at pp. 290-291.)

Plaintiff next contends that exceptions 10 and 11 in Schedule B part 2 are ambiguous and uncertain. Exceptions and exclusions from coverage " 'are construed narrowly and must be proven by the insurer . . . .' " (*Rosen*, *supra*, 56 Cal.App.4th at p. 1497.) "[E]xclusionary clauses are subjected to heightened scrutiny. They must be conspicuous, clear and plain; if they do not meet this test, such clauses will be strictly construed against the insurer." (*Merrill & Seeley, Inc. v. Admiral Ins. Co.* (1990) 225 Cal.App.3d 624, 630.) "When it comes to exclusions, the insurer bears the burden of proving the exclusion applies. Exclusionary language must be plain, clear, and conspicuous." (*ML Direct, Inc. v. TIG Specialty Ins. Co.* (2000) 79 Cal.App.4th 137, 141.)

The policy read in Schedule B part 2:

"(10) An action commenced, notice of which
"Recorded: November 2, 2010 as Instrument No. 2010-1571370, Official Records
"Court: Superior Court of California, County of Los Angeles
"Case No: BC447686
[¶] . . . [¶]
"Plaintiff: Putnam . . . .
[¶] . . . [¶]
"Purpose of action: *To Quiet Title*[.]" (Italics added.)

Plaintiff argues the meaning of exception 10, the lis pendens, was not immediately clear because it only described "An action commenced, notice of which."

Exception 10 was not ambiguous because it stated exactly what the commenced action was about: "*Purpose of action: To Quiet Title*[.]"

Moreover, "[a]n action commenced, notice of which" exactly describes a lis pendens. (Black's Law Dict. (6th ed. 1991) p. 932, col. 1.) Code of Civil Procedure section 405.2 defines "notice" or "notice of pendency of action," as "a notice of the pendency of an action *in which a real property claim is alleged*." (Italics added.) A real property claim is "the cause or causes of action in a pleading which would, if meritorious, *affect* (a) *title to*, *or* the right to *possession of*, specific real property . . . ." (Code Civ. Proc., § 405.4, italics added.) "[A] notice of lis pendens ' "republishes" ' the pleadings [citation]" (*Gale v. Superior Court* (2004) 122 Cal.App.4th 1388, 1396, italics added), and binds subsequent purchasers to the eventual judgment (*Urez Corp. v. Superior Court* (1987) 190 Cal.App.3d 1141, 1144; 4 Miller & Starr, Cal. Real Estate, *supra*, § 10:148, at pp. 10-510 to 10-512).

Indeed, "[t]he whole idea of a notice of lis pendens is to give *constructive notice* of the legal proceeding affecting title to a specific piece of property. [Citation.]" (*Gale v. Superior Court*, *supra*, 122 Cal.App.4th at p. 1396; *Lee v. Silva* (1925) 197 Cal. 364, 373.) " 'Constructive notice' is 'notice arising by presumption of law from the existence of facts and circumstances that a party had a duty to take notice of, such as a registered deed or a pending lawsuit; notice presumed by law to have been acquired by a person and thus imputed to that person.' [Citation.]" (*Nelson v. Superior Court* (2001) 89 Cal.App.4th 565, 574.)

Here, plaintiff had constructive if not actual notice of the legal proceeding described in the lis pendens. Schild and Unger knew about the lis pendens at the latest by February 1, 2011. Moreover, *plaintiff had a copy of the lis pendens itself on March 14, 2011, two weeks before escrow closed*. That document stated that the Putnam "action concerns and *affects title to*, and possession of," the property and the "*object of said action*" was to "obtain an *adjudication*" that the deed to Byrd's LLC was "*void*," and to require that it be "*canceled*." (Italics added.) We reject plaintiff's assertion that, as laypersons, its principals did not understand the legal import of the lis pendens. Plaintiff knew enough to allow Byrd to convey the property to Byrd's LLC to evade Byrd's creditors, such as Putnam. Schild recognized in February 2011 that this Putnam quiet title suit was an effort to get on title. He and Unger discussed the Putnam quiet title suit. Schild told Unger that the lawsuit could be an attempt by Putnam "*perhaps to get on title* somehow." (Italics added.) The two hatched a plan to wait until after closing to tell Byrd about Putnam's liens: "we now see *we didn't get clear title, fix that*." (Italics added.) Exception 10's description of the lis pendens was not ambiguous and in any event, with knowledge that Putnam had a competing interest in title, plaintiff still made the choice to purchase the property.

As for exception 11, plaintiff argues it was ambiguous and that all defendants "misrepresented [it] as an 'Abstract of Judgment' for a mere $548," and not a judgment affecting title.

The policy read in Schedule B part 2:

"(11) An Abstract of Judgment

"Recorded:	March 23, 2011
"Entered:	March 11, 2011
"Case no:	BC447686
"Court:	Superior
	[¶] . . . [¶]
"Amount:	$548.00 plus interest and costs.
"In favor of:	Putnam . . . .
"Against:	Richard William Byrd etc, et al."

Exception 11 listed the same parties and case number as did exception 10 immediately above for the lis pendens; exception 10 stated that the purpose of the Putnam action was to quiet title and the lis pendens itself stated that the object of the lawsuit was to cancel a deed. Thus, exception 11 was obviously the judgment in the same quiet title action and included in its scope the cancellation of a deed to the property.[8] The only way to claim otherwise would be to ignore exception 10. Furthermore, Schild forwarded the Putnam quiet title judgment to plaintiff's attorney

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[8] Plaintiff's citation to Code of Civil Procedure section 697.310 is unavailing as the statute does not provide, as plaintiff puts it, that "an abstract of judgment is *only* allowed to reflect a money judgment, not a Judgment Affecting Title. (CCP § 697.310.)" (Italics added.)

for approval before closing and so the encumbrance was not a surprise. We will not "impose coverage by adopting a strained or absurd interpretation in order to create an ambiguity where none exists. [Citation.]" (*Rosen*, *supra*, 56 Cal.App.4th at p. 1497.)

Plaintiff contends that its "reasonable expectation was that its ownership of the Property was insured, and it would never have knowingly agreed to an exception providing otherwise." But, "the doctrine of satisfying the insured's reasonable expectation of coverage comes into play only after the court finds a policy exclusion to be ambiguous." (*Watamura v. State Farm Fire & Casualty Co.* (1988) 206 Cal.App.3d 369, 371-372.) Exception 11 here was not ambiguous. Even if the language were ambiguous, resolution would turn on the insured's *objectively* reasonable expectation. (*Energy Insurance*, *supra*, 14 Cal.App.5th at pp. 290-291.) Plaintiff could not have reasonably expected that exception 11 failed to exclude coverage for damage to title attributable to the Putnam controversy, given plaintiff's actual knowledge of the likely cloud caused by the Putnam lis pendens and quiet title judgment. Indeed, no reasonable insured would have expected, simply because exception 11 stated a dollar amount, that it did not also encompass other aspects of the quiet title judgment. Stated otherwise, no reasonable insured would understand the title policy to exclude the lis pendens but not the ultimate result of the action for which the lis pendens was recorded. No reasonable insured would objectively believe this policy would insure plaintiff's reckless choice to take title. There being no triable issues of material fact, First American did not breach the policy.[9]

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[9] Plaintiff also contends that First American is liable for *CTC's* alleged misleading and false representations. However,

2. *First American did not breach the implied covenant of good faith and fair dealing*

"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. [Citation.]" (*Waller v. Truck Ins. Exchange, Inc*., *supra*, 11 Cal.4th at p.36.) The covenant is "implied as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct that frustrates the other party's rights to the benefits of the agreement. [Citation.]" (*Ibid.*) As First American did not breach the policy of insurance, it cannot be held liable for insurance bad faith. (*Ibid.*) The trial court did not err in granting summary judgment in favor of First American.

IV. Summary Judgment In Favor Of CTC Was Proper

a. *Plaintiff's Complaint and CTC's Motion*

The operative complaint alleged in the negligence and breach of fiduciary duty causes of action, that as a "statutory

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plaintiff's operative complaint did not allege a cause of action for fraud or misrepresentation against First American. The issues to be addressed on summary judgment are limited by the pleadings, and defendants' summary judgment motions need only respond to the allegations in the complaint. (*Laabs v. City of Victorville*, *supra*, 163 Cal.App.4th at p. 1253.) "To allow an issue that has not been pled to be raised in opposition to a motion for summary judgment [or on appeal] in the absence of an amended pleading, allows nothing more than a moving target" and undermines the efficacy of the summary judgment procedure. (*Id.* at p. 1258, fn. 7.)

escrow agent" and fiduciary " 'sub-escrow' agent," CTC owed plaintiff a duty to "act with honesty and completely disclose . . . all material facts regarding the purchase transaction. . . ." Plaintiff alleged that CTC breached its duties by: recording the wrong deed; issuing a CLTA as opposed to an ALTA policy;[10] "misrepresenting" the legal effect of the Putnam quiet title judgment, and "mandat[ing]" that plaintiff execute an amendment to the escrow instructions accepting the items listed in Schedule B part 2 as exclusions from coverage.

In the third and fourth causes of action for negligent and intentional misrepresentation, plaintiff alleged that CTC misrepresented that escrow could not close without the deed from Byrd's LLC, and that the Putnam quiet title judgment was only a $548 monetary judgment, and concealed the legal effect of the Putnam quiet title judgment.

CTC moved for summary judgment on the grounds it breached no duty to plaintiff and made no actionable misrepresentations causing plaintiff damages.

b. *Application*

1. *CTC's circumscribed duty was not breached*

The existence of a legal duty is an element of both a negligence and a breach of fiduciary duty cause of action. (*Tribeca*, *supra*, 239 Cal.App.4th at p. 1114 [an element of negligence is "a legal duty to use reasonable care;" an element of breach of fiduciary duty is "the existence of a fiduciary duty"].) "The breach of fiduciary duty can be based upon either negligence or fraud, depending on the circumstances. [Citations.]" (*Ibid.*)

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[10] See footnote 2, *ante*.

“ ‘Whether a legal duty exists in a given case is primarily a question of law’ . . . [and] may be resolved on a motion for summary judgment. [Citation.]” (*Nymark v. Heart Fed. Savings & Loan Assn*. (1991) 231 Cal.App.3d 1089, 1095.)

A. *CTC incurred no duty by issuing preliminary title reports*

As an underwritten title company, CTC’s statutory responsibilities were to prepare preliminary title reports and issue a title policy on behalf of the insurer. (Ins. Code, § 12340.5 [“ ‘Underwritten title company’ means any corporation engaged in the business of preparing title searches, title examinations, title reports, certificates or abstracts of title upon the basis of which a title insurer writes title policies”].)

Plaintiff contends that CTC’s preliminary reports gave rise to a duty to accurately represent the state of title. It reasons that by issuing the preliminary title reports, CTC assumed a larger role in the sale transaction and hence a more expanded duty of care than that generally owed by an underwritten title company.

As CTC did not undertake to perform as a title abstractor, its preliminary title reports were nothing more than a statement of the terms and conditions upon which it was offering a title policy. (Ins. Code § 12340.11; *Siegel*, *supra*, 46 Cal.App.4th at p. 1190.) An “abstract of title,” issued by an abstractor is “a written representation, provided pursuant to a contract . . . *intended to be relied upon* by the person who has contracted for the receipt of such representation, listing all recorded conveyances, instruments or documents which, under the laws of this state, impart constructive notice with respect to the chain of title to the real property described therein.” (Ins. Code, § 12340.10, italics added.)

In contrast, however, the preliminary title reports and binders issued by CTC were “nothing more than an offer to issue a title policy. [Citations.]” (*Herbert A. Crocker & Co. v. Transamerica Title Ins. Co*. (1994) 27 Cal.App.4th 1722, 1727, fn. 6 (*Crocker*).) Since the 1981 enactment of Insurance Code sections 12340.10 and 12340.11, preliminary title reports and binders “*shall not be construed as, nor constitute, a representation as to the condition of title to real property*, *but shall constitute a statement of the terms and conditions upon which the issuer is willing to issue its title policy*, if such offer is accepted. (Ins. Code § 12340.11, italics added.)[11] Preliminary title reports and binders do not “ ‘have the legal consequence of an abstract of title.’ ” (*Siegel, supra*, at p. 1192.) Title searches performed by the insurer preparing preliminary title reports are *not* conducted for the benefit of the insured. (*Miller*, *supra*, 215 Cal.App.3d at p. 1175.) Therefore, an action for negligence does not “lie against a title insurance company on the basis of its representations in the preliminary report.” (*Crocker*, *supra*, 27 Cal.App.4th at p. 1728, fn. 6.)

CTC and plaintiff did not enter into an agreement for CTC to provide an abstract of title, or to conduct a survey or inspection of the property, and plaintiff does not point to evidence in the

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[11] Plaintiff’s reliance on pre-1982 cases such as *Chicago Title Ins. Co. v. Great Western Financial Corp*. (1968) 69 Cal.2d 305; *J. H. Trisdale, Inc. v. Shasta County title Co*. (1956) 146 Cal.App.2d 831; *Moe v. Transamerica Title Ins. Co*. (1971) 21 Cal.App.3d 289 is therefore unavailing. Plaintiff also cites *Lee*, *supra*, 188 Cal.App.4th 583, at page 596. But *Lee* does not hold that an insured may rely on preliminary title reports as statements about the condition of title.

record that it told CTC or Pickford it had elected to pay an extra premium to purchase an ALTA policy insuring off-record matters pursuant to paragraph 24 of the option contract.[12] (See *Lick Mill Creek Apartments v. Chicago Title Ins. Co*. (1991) 231 Cal.App.3d 1654, 1659.) Rather, CTC issued a binder and several preliminary title reports that excluded the Putnam instruments from coverage. As preliminary reports and binders constitute merely offers for insurance, as a matter of law, CTC did not incur any duty of care to plaintiff by issuing them to disclose or explain recorded liens or clouds on title, or to give plaintiff legal advice about the state of title, or about which deed should be recorded.

B. *CTC was not a statutory escrow agent and breached no duty as a sub-escrow agent*

Plaintiff contends that CTC incurred the duty of a "statutory escrow agent" and of a fiduciary "sub-escrow agent." Plaintiff argues that "CTC was either the agent or principal of Pickford," because CTC was acting as a sub-escrow agent by paying off trust deeds on the property and by recording documents.

An escrow agent has only circumscribed responsibilities. (*Siegel*, *supra*, 46 Cal.App.4th at p. 1194.) The agency created by the escrow " 'is limited—limited to the obligation of the escrow holder to carry out the instructions of each of the parties to the escrow.' [Citation.] 'No liability attaches to the escrow holder for its failure to do something not required by the terms of the escrow . . . .' " (*Tribeca*, *supra*, 239 Cal.App.4th at p. 1114; *Lee v. Escrow Consultants, Inc*. (1989) 210 Cal.App.3d 915, 921.)

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12 See footnote 2, *ante*.

Here, it is undisputed that CTC was neither a signatory to, nor mentioned in, the option contract which contained the escrow instructions. Nor did CTC sign any amendments to the escrow instructions. It is also undisputed that plaintiff had no privity of contract with CTC, and did not speak to anyone at CTC, or give CTC a single written or oral instruction directly for purposes of carrying out escrow. (Cf. *Markowitz v. Fidelity Nat. Title Co.* (2006) 142 Cal.App.4th 508, 526-528 [where plaintiff was not a party to escrow instructions and had no contact with sub-escrow agent, sub-escrow agent owed no duty to plaintiff].) Accordingly, as a matter of law, CTC was not an escrow agent and did not owe plaintiff a duty of care as one.[13]

Even assuming CTC functioned as a *sub*-escrow agent by recording documents and making payouts, its duty to plaintiff was extremely circumscribed, limited to carrying out those two acts only. "If the agency and fiduciary responsibilities owed by [the escrow company are] limited by the terms of the escrow instructions, [then] *the responsibilities of* [*a title insurer*] *acting as sub-escrow* [*are*] *even more limited*." (*Siegel, supra*, 46 Cal.App.4th at p. 1194, italics added.) The purchasers in *Siegel* sued the title insurance company alleging, inter alia, that the insurer breached its duty as a sub-escrow agent by failing to disclose the existence of a lien in the preliminary report. (*Id*. at p. 1187.) *Siegel* explained that the title insurer there was engaged to perform only the most rudimentary of the escrow functions: (1) pay out funds and (2) record documents. The insurer "did not undertake to prepare or review the escrow documents or ensure that the parties' instructions were carried

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[13] See footnote 18, *post*.

out." (*Id*. at p. 1194.) The *Siegel* court "decline[d] to hold that a third party so engaged thereby becomes the fiduciary of the purchasers for purposes of searching the records or transmitting information regarding title." (*Ibid.*) Similarly, although CTC made payouts and recorded instruments, its duties to plaintiff did not include preparing or reviewing documents in escrow or communicating title information, ensuring plaintiff's instructions were carried out, or giving legal advice.

Plaintiff contends our legal conclusion ignores CTC's "role" in the transaction. Plaintiff recites what it calls "many critical facts that were before the Superior Court" indicating that CTC "insert[ed] itself into the transaction" by having "dealings" with plaintiff, and " 'pulling the strings' " as a " 'Wizard of Oz' behind the curtain," because it "dictated that the [deed from Byrd' LLC] be obtained and, additionally, would not allow the Byrd Deed to be recorded."

Notwithstanding plaintiff's vivid language, the insurance policy was the product of an arm's-length transaction. Plaintiff's opposition to the summary judgment motion cited no evidence that CTC refused to allow the Byrd deed to be recorded, or that CTC told Pickford not to release that deed to plaintiff. Plaintiff did not dispute that CTC never instructed Addy to withhold the Byrd deed. And, plaintiff never instructed *CTC* to record that deed. Most important, CTC was under no legal obligation to insure plaintiff's fee from the Byrd deed. "An insurer does not have a duty to do business with or issue a policy of insurance to any applicant for insurance." (*Quelimane*, *supra*, 19 Cal.4th at p. 43.) Instead, Thomas stated that CTC would issue a policy of title insurance on the deed from Byrd's LLC while excepting from coverage the effects of the Putnam controversy. Plaintiff was always free not to accept this offer and seek a different policy from another insurer. Nonetheless, plaintiff instructed Pickford to close in spite of the liens and encumbrances that plaintiff knew about. Pickford informed CTC that plaintiff wanted to proceed under those terms. CTC performed accordingly. Plaintiff cannot recast undisputed facts to achieve a different outcome.

Plaintiff argues that by "requir[ing]" plaintiff sign a waiver added to the escrow instructions, CTC became a fiduciary escrow agent. Thomas told Addy that CTC would "require an acknowledgement from the buyer that they approve and agree to allow us to show that certain lien in the policy of title insurance," if any recorded liens were to remain on the insurance policy when issued. Addy distributed to plaintiff for signatures an amendment to the escrow instructions that read, "LIEN: Buyers hereby approve and agree to allow California Title Company to show that certain liens in favor of Putnam . . . Notice of Action . . . Abstract of Judgement [sic] . . . in the policy of title insurance."

Yet, plaintiff signed the waiver after telling Addy that counsel was going to review it; thus plaintiff made its decision to accept the waiver independent of CTC. (See *Stewart v. Preston Pipeline Inc.* (2005) 134 Cal.App.4th 1565, 1587.) In any event, the Putnam controversy had already been repeatedly excluded from coverage in Schedule B part 2 of the various preliminary title reports. Plaintiff was always at liberty to reject CTC's offer of insurance and purchase a policy elsewhere.[14] Hence, the waiver did not impose any additional duty of care on CTC.

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[14] As the result of our conclusion here, we need not address plaintiff's arguments about breach, causation, or damages. "[I]f the defendant's showing negates an essential element of the

2. *CTC made no representations upon which plaintiff could rely*

The elements of fraud are " ' "(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." ' [Citation.]" (*Small v. Fritz Companies, Inc*. (2003) 30 Cal.4th 167, 173; Civ. Code, § 1709; 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 772, p. 1121.) A cause of action for negligent misrepresentation is very similar except for the state of mind element. "Negligent misrepresentation lacks the element of intent to deceive." (*Intrieri v. Superior Court* (2004) 117 Cal.App.4th 72, 86.) The tort "encompasses '[t]he assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true' [citation], and '[t]he positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true' [citations]." (*Small v. Fritz Companies, Inc*., *supra*, at p. 174.)

Plaintiff cites *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, to argue that CTC could be held "liable for *false* information provided in a preliminary title report." (Italics added.) *Alliance* was a lender who funded loans to fictitious companies created by the defendants in an elaborate fraud scheme. (*Id*. at p. 1232.) As part of the scheme, the defendants prepared false residential purchase agreements and loan

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plaintiff's case, then no amount of factual conflict on other aspects of the case will preclude summary judgment." (*Yurick v. Superior Court* (1989) 209 Cal.App.3d 1116, 1120.)

applications, deliberately inflated the properties' value in fraudulent appraisals, and drafted inaccurate title reports, among other things. (*Ibid.*) *Alliance* affirmed the court of appeal's holding that a lender's acquisition of security property by full credit bid at a nonjudicial foreclosure sale did not bar the lender from bringing a fraud action against nonborrowers who fraudulently induced the lender to make the loans. (*Id.* at p. 1234.) Based on *Alliance*, plaintiff argues that CTC is liable for misrepresenting that the Putnam quiet title judgment was for $548.00 *only*, and that Byrd's LLC owned the property.

Plaintiff misstates the undisputed facts. Thomas made no oral representations to plaintiff; no one at CTC ever spoke to plaintiff. The only direct communication from CTC to plaintiff was made through the preliminary title reports. Yet, nowhere in the preliminary title reports did CTC state that the judgment was *only* for $548.00. Instead, those reports unambiguously stated that the Putnam quiet title suit was to "quiet title." The exceptions for the lis pendens and the quiet title judgment bore the same name and case number, and were clearly the same action and showed that quieting title to the property was part of that judgment. Plaintiff had copies of the lis pendens itself which stated the purpose of the action was to cancel a deed.[15] More

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[15] Plaintiff argues that among CTC's misrepresentations was "the failure to disclose information concerning," and errors in, the option contract. The trial court struck, among other things, all references in the third amended complaint to the option contract. Plaintiff challenges that order on appeal. Regardless of whether the trial court erred in showing striking the references (*PH II, Inc. v. Superior Court*, *supra*, 33 Cal.App.4th at p. 1683), the operative version of the complaint never alleged that *CTC* concealed facts about the option contract, even before the trial

important, as a matter of law, those reports did not constitute representations, or conceal anything, about liens or clouds on title. (*Miller*, *supra*, 215 Cal.App.3d at p. 1175; *Siegel*, *supra*, 46 Cal.App.4th at p. 1191.) "A title insurer expressly does not intend to *induce* a buyer or lender to consummate a transaction in reliance on a preliminary report of title." (*Southland Title*, *supra*, 231 Cal.App.3d at p. 538, italics added.) Finally, plaintiff pointed to no facts whatsoever to establish CTC intentionally falsified any title information.

Moreover, plaintiff could not justifiably rely on any statement, representation, or omission of fact by CTC in its preliminary title reports. Justifiable reliance is another necessary element of plaintiff's fraud causes of action. (*Small v. Fritz Companies, Inc.*, *supra*, 30 Cal.4th at p. 173.) Yet, the buyer's "*reliance* [on preliminary title reports as an integral part of the sale transaction] *cannot be justified* and is done only at a party's peril." (*Southland Title*, *supra*, 231 Cal.App.3d at p. 537, italics added.) Factually, plaintiff *did not rely* on CTC's alleged misrepresentations in, or omissions from, the preliminary title reports, about the state of title. Rather than to ask CTC about the meaning of the title documents listed in Schedule B part 2, plaintiff forwarded the Putnam quiet title judgment to its attorney, and then promptly instructed Pickford to close escrow. Plaintiff did not rely on any communication or omission made by CTC. There is no dispute of fact and so as a matter of law, CTC

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court's order striking references to that document. Therefore, the pleadings did not raise an issue about any failure of CTC to disclose errors in the option contract that had to be addressed on summary judgment. (*Laabs v. City of Victorville, supra*, 163 Cal.App.4th at p. 1258.)

was entitled to judgment on the fraud cause of action in its favor. The trial court did not err in granting CTC's motion for summary judgment.

V. *Summary Judgment In Favor Of Pickford Was Proper*

a. *Plaintiff's Complaint and Pickford's Motion*

The operative complaint alleged against Pickford in the first and second causes of action for negligence and breach of fiduciary duty, just as it had with CTC, that as escrow and "statutory escrow agent," Pickford was obligated to disclose all matters material to plaintiff or which might affect plaintiff's decision to close the transaction. Pickford allegedly breached its duty by (1) failing to alert plaintiff about flaws in the option contract; (2) failing to assist plaintiff in obtaining marketable title; (3) recording the option contract which was not in the chain of title; (4) "refusing" to record the Byrd deed; (5) recording a grant deed that was not in the chain of title; and (6) failing to obtain an ALTA policy of insurance.

In the third and fourth causes of action seeking damages for negligent and intentional misrepresentation, plaintiff alleged that Pickford misrepresented that (1) escrow could not close without the deed from Byrd's LLC; (2) the Putnam quiet title judgment was for only $548; (3) Byrd's LLC owned the property; and concealed from plaintiff that the Putnam quiet title judgment rescinded Byrd's transfer of the property to Byrd's LLC.

Pickford moved for summary adjudication on the grounds that it breached no duty, made no actionable misrepresentation, and was not the cause of plaintiff's damages. Pickford observed that plaintiff did not dispute it understood and knew of "issues" that could have an impact on title. Nor did plaintiff dispute that it retained attorney Yoss on March 30, 2011 for assistance because it had concerns that Putnam's interest "may impact the property."

The trial court effectively ruled that Pickford breached no duty, with the exception of its failure to "turn[] over " a deed to plaintiff when it was so instructed. The court invited supplemental briefing on the question of whether Pickford's failure "to turn over the deed for Byrd to the plaintiff was a source of damage." The court allowed both parties to "brief it again in light of these additional matters. Look at your escrow instructions and look at the law that applies."

In its supplemental brief, Pickford cited paragraphs 6 and 31 of the supplemental escrow instructions, executed on March 18, 2011, requiring mutual, concurring instructions from the buyer and seller before Pickford could act.[16] Pickford argued that as escrow holder it was not legally obligated to release the *Byrd deed* to plaintiff because it never received concurring, mutual instructions to do so. Pickford also argued that compliance with the option contract's instructions to release the

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[16] Paragraph 6 of the March 18, 2011 supplemental escrow instructions read in pertinent part: "No notice or demand to [Pickford] shall have any validity or affect [*sic*] in this escrow until delivered in writing to [Pickford] and *mutually executed by all parties* and Principals affected thereby." (Italics added.)

Paragraph 31 of the same supplemental escrow instructions entitled "CONFLICTING INSTRUCTIONS," read in relevant part: "[Pickford] may withhold documents and funds held in Escrow, until *concurring mutual instructions* are received from Principals, or [Pickford] receives a final order from a Court of competent jurisdiction." (Italics added.)

"Byrd" deed to plaintiff was impossible because Pickford never had the deed described in the option contract's escrow instructions, namely a deed from *BDI*. After considering the supplemental papers and argument, the court granted Pickford's motion for summary judgment and dismissed the action.[17]

b. *Application*

1. *Pickford breached no duty of care to plaintiff other than in failing to "release" the Byrd deed to plaintiff at closing*

" 'The usual purpose that prompts the creation of an escrow is the desire of persons dealing at arm's-length with each other to have their conflicting interests handled by one person in such a

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[17] We reject plaintiff's procedural challenge that the supplemental briefing constituted a new summary judgment motion. Plaintiff argues that Pickford's supplemental brief constituted a "second" summary judgment motion that was not supported by a separate statement with the result that plaintiff was prejudiced by the court's ruling granting Pickford summary judgment. Supplemental briefing on summary judgment is allowed. (*Brumer v. Los Angeles County Metropolitan Transportation Authority* (1995) 36 Cal.App.4th 1738, 1743 [inviting supplemental briefing on issue in summary judgment]; *Dutton v. City of Pacifica* (1995) 35 Cal.App.4th 1171, 1174 [considering supplemental briefing on summary judgment].) The court's request specifically asked the parties: "*brief* it *again* in light of these additional matters." (Italics added.) Plaintiff also incorrectly contends that the trial court suggested that the damage issue "*might be separate* grounds for summary judgment." Lack of damages was a ground raised by Pickford in its summary judgment motion. Thus, the supplemental briefing was just that; it was not a second motion for summary judgment on a *new*, separate ground.

manner as to adequately protect the rights of each of the parties to the transaction.' [Citation.]" (*Peterson Development Co. v. Torrey Pines Bank* (1991) 233 Cal.App.3d 103, 118.) Hence, " '[a]n escrow holder is the limited agent and fiduciary of all parties to an escrow' and . . . as such it has 'a fiduciary duty "to communicate to his principal knowledge acquired in the course of his agency with respect to material facts which might affect the principal's decision as to a pending transaction . . . ." ' [Citation.]" (*Siegel*, *supra*, 46 Cal.App.4th at pp. 1193-1194, italics added.)

Despite this general characterization of an escrow holder's duty as a fiduciary, " ' "the agency which exists (and the obligations pursuant thereto) is a limited one. 'If the several escrow instructions create in the escrow holder an agency, it must be one limiting the obligations of the escrow holder to each party to the escrow in accordance with the instructions given by such party' . . . . '[I]t is generally held that no liability attaches to the escrow holder for his failure to do something not required by the terms of the escrow or for a loss incurred while obediently following his escrow instructions. [Citations.]' " ' [Citations.]" (*Siegel*, *supra*, 46 Cal.App.4th at p. 1194; accord, *Lee v. Escrow Consultants, Inc.*, *supra*, 210 Cal.App.3d at p. 921.)

Accordingly, an escrow holder owes " 'no general duty to police the affairs of its depositors.' " (*Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co.* (2002) 27 Cal.4th 705, 711; *Hannon v. Western Title Ins. Co.* (1989) 211 Cal.App.3d 1122, 1128.) For example, an escrow holder owed no duty to inform the buyer of the escrow holder's knowledge that the seller was purchasing the property and reselling it to the buyer at a higher price. (*Blackburn v. McCoy* (1934) 1 Cal.App.2d 648, 655.) Escrow agents owe no duty to bring title issues to the buyer's attention, even when the issues rendered the original requirements impossible of performance. (*Axley v. Transamerica Title Ins. Co.* (1976) 88 Cal.App.3d 1, 7 & 10.) The court in *Lee v. Title Ins. & Trust Co.* (1968) 264 Cal.App.2d 160, held that the escrow holder was under no fiduciary duty to "go beyond the escrow instructions" and to disclose a "*suspicious* fact or circumstance," *known to the escrow holder* that might indicate that the sellers were defrauding the buyers, absent any collusion or involvement by the escrow agent. (*Id*. at pp. 162-163 & fn. 2, italics added.) Knowledge alone is insufficient to impose on the escrow holder a duty to disclose. (Cf. *ibid*.) "Absent clear evidence of fraud, an escrow holder's obligations are limited to compliance with the parties' instructions." (*Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co*., *supra*, at p. 711.) To hold otherwise would put the escrow holder in breach of its duty to the other side of the transaction. (*Lee v. Title Ins. & Trust Co*., *supra*, at p. 163.)

Addressing each of the complaint's allegations listed above seriatim, the undisputed evidence shows that Pickford violated no escrow instruction, except the instruction to *release* the deed to plaintiff at closing. First, the amended escrow instructions provided that, "*Escrow company personnel shall not give advice of any nature*." (Italics added.) As it could not give plaintiff legal advice and as it owed no duty to plaintiff to go outside the escrow instructions (*Lee v. Title Ins. & Trust Co*., *supra*, 264 Cal.App.2d at pp. 162-163; *Axley v. Transamerica*, *supra*, 88 Cal.App.3d at pp. 7 & 10), Pickford breached no duty by failing to alert plaintiff to the legal flaws in the option contract. Second and for the same reason, Pickford was not required to adjust documents to "assist plaintiff in obtaining marketable title." Third, the escrow instructions in the option contract called for that document's recording and so Pickford faithfully complied with the instructions by recording it. Fourth, plaintiff produced no evidence that the parties gave mutual instructions to record the Byrd deed. Nor did the option contract authorize recording the Byrd deed; it contemplated a deed from BDI, albeit nicknamed "Byrd." Without Byrd's consent, the Byrd deed could not be recorded, irrespective of any instruction by plaintiff. (See *Diaz v. United California Bank* (1977) 71 Cal.App.3d 161, 169.) Thus, the failure to record the Byrd deed was not a violation of the escrow instructions. Fifth, Pickford recorded the corporate deed from Byrd's LLC at closing as directed, with the result that Pickford breached no duty by complying with these instructions, irrespective of whether the option contract or the corporate deed was in the chain of title.

Finally, Pickford did not breach the escrow instructions by failing to obtain an ALTA policy. Escrow instruction paragraphs 24 and 27(d), contained in the option contract that was penned in part by plaintiff, only required Pickford to arrange for an ALTA extended-coverage owner's form of title policy, "*if elected*" by plaintiff after plaintiff obtained, paid for, and approved an ALTA survey. (Italics added.) Plaintiff pointed to no evidence in the record that it made such an election.

2. *Pickford committed no fraud, misrepresentation, or concealment upon which plaintiff relied, other than to negligently state that escrow could not close without a deed from Byrd's LLC*

As for the fraud allegations, escrow holders are liable for their fraud or concealment. (*Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co.*, *supra*, 27 Cal.4th at p. 711.)

Plaintiff alleged that Pickford misrepresented the extent of the Putnam quiet title judgment, and that escrow could not close without the corporate deed from Byrd's LLC because the LLC owned the property, and concealed that Byrd's transfer of the property to his LLC was set aside by the Putnam quiet title judgment.

However, there is no dispute that Pickford did *not* represent that the Putnam quiet title judgment was for *only* $548; Addy said it was "the one for $548.00." Nor did Pickford conceal the effect of the Putnam quiet title judgment. Pickford was precluded from giving legal advice and would have violated the escrow instructions to go outside them and give advice about that judgment's meaning. (*Lee v. Title Ins. & Trust Co.*, *supra*, 264 Cal.App.2d at pp. 162-163.) Instead, Addy simply told plaintiff to have its attorney call her.

More important, plaintiff cannot demonstrate justifiable reliance, another element of its fraud cause of action. (*Small v. Fritz Companies, Inc.*, *supra*, 30 Cal.4th at p. 173.) Schild conducted his own "quick review," and concluded that the Putnam quiet title judgment was "just the court filing fee of $500. As such, this is not a concern." He also asked his attorney for approval. Therefore, having indisputably made its own assessment, plaintiff did not rely on Addy's comments. (*Ibid.*)

Garton v. Title Ins. & Trust Co. (1980) 106 Cal.App.3d 365 cited by plaintiff, is distinguished. There, the escrow holder defendants prepared a trust deed but omitted that the land the plaintiffs were buying was subject to a reservation of mineral rights. Discovering their error, the defendants altered the trust deed and falsely acknowledged the plaintiffs' signatures to prevent the plaintiffs from learning about the reservation. (*Id.* at pp. 374, 381-382.) But here, plaintiff does not allege that Pickford affirmatively altered any document.

Plaintiff points to Pickford's requirement that plaintiff execute a hold harmless agreement to argue that Pickford included this agreement to conceal Pickford's omissions. That agreement stated: "Hold Harmless: All parties agree to hold Escrow Holder, the Title Company, and the Real Estate Agents harmless from any claims, damages, costs and/or attorney's fees that may arise from the consummation of the option agreement. Escrow holder is not to be further concerned with same and is hereby relieved of any and all past, present and/or future responsibility and/or liability with regards to the consummation of the options."[18] However, given our conclusion that Pickford committed no fraud or concealment upon which plaintiff relied, the hold harmless agreement did not operate to conceal any material fact.

3. *Plaintiff suffered no damages from Pickford's failure to release the Byrd deed to plaintiff or its representation that escrow could not close without a deed from Byrd's LLC because the outcome would have been the same regardless of Pickford's conduct*

According to the option contract, written in part by plaintiff and reviewed by its attorney, Byrd was to provide Pickford's Addy "with a quitclaim deed from BYRD [BDI] to [plaintiff] for

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[18] Addy testified in deposition that she found the language of the hold harmless clause in her computer. She did not know why she included CTC in the provision. Plaintiff presented no evidence that CTC either dictated or reviewed this language before plaintiff signed, with the result that the inclusion of CTC in the document did not thrust upon CTC an added duty of care.

the Property" which Addy would "*release*[] from escrow to [plaintiff] upon the concurrent closing of the sale of the Property." (Italics added.) The failure to "record" the Byrd deed, as alleged by plaintiff, was not a violation of these instructions. Pickford's failure to *release* a deed to plaintiff, however, was a breach. Additionally, plaintiff alleged that Pickford misrepresented that escrow could not close without the deed from Byrd's LLC because the corporation owned the property.

"In California, the causation element of negligence is satisfied when the plaintiff establishes (1) that the defendant's breach of duty (his negligent act or omission) was a substantial factor in bringing about the plaintiff's harm and (2) that there is no rule of law relieving the defendant of liability. [Citations.]" (*Leslie G. v. Perry & Assocs*. (1996) 43 Cal.App.4th 472, 481.) "Where, as here, there is no triable material fact on the issue of causation, it is a question of law properly determined on a motion for summary judgment. [Citations.]" (*Visueta v. General Motors Corp*. (1991) 234 Cal.App.3d 1609, 1616.)

There is no dispute about the facts and so as a matter of law the omission and the misrepresentation did not cause plaintiff damages. With respect to a deed from BDI, that corporation never held title and so its deed would not have conveyed title even if Byrd had deposited it into escrow and Pickford had released it to plaintiff as the escrow instructions contemplated. As for the other two deeds, because of the Putnam quiet title judgment's injunction, neither the old Byrd deed, nor the new corporate deed would or could have conveyed clear title. Regardless of whether plaintiff understood the exact legal effect of the various Putnam liens and encumbrances in its possession, plaintiff understood that the Putnam controversy constituted an effort to "get on title." Plaintiff recognized in late March 2011, that it was not going to acquire clear, marketable fee to the property and expected to take action against Byrd and Putnam to "fix" title problems. Schild asked for the Byrd deed in his March 30, 2011 email to Addy, *not to record it*, but to sue Putnam and Byrd. Plaintiff's attorney Yoss informed Putnam just the day after escrow closed, that plaintiff was prepared to clear the liens and encumbrances "by an action to Quiet Title." Understanding that title was already clouded, plaintiff had three choices: to close escrow and sue to clean up its title, to delay closing, or to walk away from the $1.65 million it had invested in renovations. It chose to close. Thus, plaintiff had to sue to clear its title, irrespective of whether it recorded Byrd's deed or the new deed from Byrd's LLC. Addy's statement that escrow could not close without the corporate deed had no effect on the result. Plaintiff argues there remains a factual question about what would have happened had Pickford turned the Byrd deed over to plaintiff as requested, suggesting that a lawsuit might not been necessary under that circumstance.[19] But, plaintiff already knew that Putnam had an interest in the property. Nothing Pickford said, concealed, did, or failed to do with any of the three deeds at issue caused plaintiff to incur damages because the damage had already been done.[20]

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19 Plaintiff's reference to Byrd's bankruptcy is inappropriate. Plaintiff did not present any *evidence* of a bankruptcy in opposition to Pickford's summary judgment motion and so that proceeding is outside the record here. (*Yanowitz v. L'Oreal USA, Inc.*, *supra*, 36 Cal.4th at p. 1037.)

20 Plaintiff cites as additional damages the "carrying costs" of $49,500, identified in Schild's declaration, incurred while plaintiff

In sum, the trial court did not err in granting Pickford's motion for summary judgment.

VI. The Award of Attorney's Fees to Pickford Was Not Erroneous

The trial court awarded Pickford attorney's fees on the basis of Civil Code section 1717 and section 35(A) of the supplemental escrow instructions. Section 1717 authorizes the award of attorney's fees in "any action on a contract" that provides for attorney's fees and costs incurred to enforce the contract. (*Id.*, subd. (a).) Section 35(A) provided: "Should any legal action arise between a Principal to this Escrow and [Pickford], in any matter in connection with this Escrow, and [Pickford] prevails, [Pickford] shall be entitled to reimbursement of attorney's fees and costs."

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was unable to sell the property, plus the purchase money that was transferred out of escrow before plaintiff acquired marketable title. We need not address plaintiff's challenge to the trial court's ruling excluding the portion of Schild's declaration addressing these costs, because none of these damages was caused by anything Pickford did or failed to do; they were the direct result of plaintiff's decision to close escrow.

Plaintiff also cites as evidence of damage, the trial court's comments made during the hearing on the supplemental briefing, that plaintiff's action to quiet its title "would have cost nothing . . . . Maybe $10,000 bucks." The court's ruminations during oral argument do not constitute findings of fact, particularly where its actual ruling was based on a determination that plaintiff indisputably suffered *no* damages as the result of Pickford's conduct.

Plaintiff contends that the order awarding Pickford attorney's fees was erroneous because plaintiff alleged tort but not contract causes of action against Pickford.

Kangarlou v. Progressive Title Co., Inc. (2005) 128 Cal.App.4th 1174 (*Kangarlou*) is on point. There, the plaintiff sued her escrow holder for breach of fiduciary duty, alleging that her real estate agents were not properly licensed and that they forged her signature on documents, such as the escrow agreement. (*Id*. at p. 1177.) In reversing the trial court's denial of her request for attorney's fees under Civil Code section 1717 for lack of a contract claim, *Kangarlou* explained that "An act such as breach of fiduciary duty may be both a breach of contract and a tort. [Citation.] '[T]ort claims do not "enforce" a contract' and are not considered actions on a contract for purposes of section 1717. [Citation.] [¶] 'Whether an action is based on contract or tort depends upon the nature of the right sued upon, not the form of the pleading or relief demanded. If based on breach of promise it is contractual; if based on breach of a noncontractual duty it is tortious. [Citation.] If unclear the action will be considered based on contract rather than tort. [Citation.] [¶] In the final analysis we look to the pleading to determine the nature of plaintiff's claim.' [Citation.]" (*Kangarlou*, *supra*, at pp. 1178-1179.) The plaintiff buyer in *Kangarlou* was entitled to recover her attorney's fees under Civil Code section 1717 because "An escrow holder has a fiduciary duty to the escrow parties to comply strictly with the parties' instructions. [Citation.] The holder only assumes this duty by agreeing to execute the escrow. The obligation to exercise reasonable skill and diligence in carrying out the escrow instructions, and to comply strictly with the depositor's written instructions are within the duties undertaken in the contract." (*Id*. at p. 1179.)

Just as in *Kangarlou*, the gravamen of plaintiff's claims against Pickford was that the escrow holder failed to comply strictly with the instructions, a duty it assumed only by agreeing to the execute the escrow instructions. Therefore, the action here was based on the contract.[21]

Plaintiff alternatively contends that the attorney's fee award should be reversed because the escrow instructions' fee provision was a contract of adhesion.

Adhesion contract analysis requires us to "look behind the facade of the formalistic standardized agreement in order to determine whether any inequality of bargaining power between the parties renders contractual terms unconscionable . . . ." and unenforceable. (*Steiner v. Mobil Oil Corp*. (1977) 20 Cal.3d 90, 100.) As explained by cases decided soon after enactment of Civil Code section 1717, "[i]t is common knowledge that parties with superior bargaining power, especially in 'adhesion' type contracts, customarily include attorney fee clauses for their own benefit. This places the other contracting party at a distinct disadvantage. Should he lose in litigation, he must pay legal expenses of both sides and even if he wins, he must bear his own attorney's fees. One-sided attorney's fees clauses can . . . be used as instruments of oppression to force settlements of dubious or unmeritorious claims. [Citations.] *Section 1717 was obviously designed to remedy this evil*." (*Coast Bank v. Holmes* (1971) 19 Cal.App.3d 581, 596-597, italics added; *System Inv. Corp. v. Union Bank* (1971) 21 Cal.App.3d 137, 163 ["Section 1717 was

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21 The cases cited by plaintiff are inapposite and unavailing.

enacted to make all parties to a contract, especially an 'adhesion contract,' equally liable for attorney's fees and other necessary disbursements"]; accord *Moallem v. Coldwell Banker Com. Group, Inc.* (1994) 25 Cal.App.4th 1827, 1832.) The attorney's fee provision here is enforceable because section 1717 reciprocated it. Had plaintiff prevailed, it would have been entitled to attorney's fees under Civil Code section 1717 and section 35(A) of the supplemental escrow instructions. Therefore, the attorney's fee provision was enforceable. We affirm the award.

DISPOSITION

The judgment and the attorney's fee order are affirmed. Respondents to recover their costs of appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BACHNER, J.*

We concur:

WILLHITE, Acting P. J.

COLLINS, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.