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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

CHRISTOPHER MIAZGA, Plaintiff and Appellant, v. MID-CENTURY INSURANCE et al., Defendants and Respondents.	B265517 (Los Angeles County Super. Ct. No. BC546968)

APPEAL from a judgment of the Superior Court of Los Angeles County, Marc Marmaro, Judge. Affirmed.

Layfield & Wallace, Philip J. Layfield and Bradley S. Wallace; Layfield & Barrett, Philip J. Layfield and Christopher M. Blanchard for Plaintiff and Appellant.

Haight Brown & Bonesteel and Vangi M. Johnson; Woolls & Peer and Gregory B. Scher for Defendants and Respondents.

Plaintiff and appellant Christopher Miazga (Miazga), the assignee of an insurance bad faith claim, appeals a judgment following the grant of a motion for summary judgment filed by defendants and respondents Mid-Century Insurance Company (Mid-Century) and Fire Insurance Exchange (FIE) (collectively, the insurers).

The essential issue presented is whether the insurers owed a duty to defend Giancarlo Romano (Romano), their insured, in the underlying action. We conclude the claim against Romano in the underlying action did not create a potential for indemnity, and therefore the insurers did not owe a duty to defend Romano in that action. Accordingly, Miazga, as Romano's assignee, has no cause of action against Mid-Century and FIE. The judgment in favor of the insurers is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

In October 2009, Miazga was injured by Romano during an altercation, while inside the home of Johnny Sebetic (Sebetic) and his estranged wife, Anita Sebetic. Allegedly, Miazga and Anita Sebetic were being physically intimate when Sebetic and Romano walked in on them.

Romano was insured under policies issued by Mid-Century and FIE. Miazga contends that his injury met the definition of a covered bodily injury under Romano's policies. Miazga made a demand on Romano to pay damages resulting from his injury, and Romano notified his insurers of Miazga's claim.

1. *Miazga's underlying action against Romano and Sebetic.*

On February 14, 2011, Miazga filed suit against Romano and Sebetic, asserting claims for negligence and intentional tort. Miazga pled in relevant part: "[Sebetic] walked into the home brandishing a large flashlight. [Sebetic] then hit [Miazga's] head with a full swing of the flashlight. [Sebetic] then moved to the back of the sofa and hit [Miazga] approximately 3 to 4 more times with the flashlight with extreme aggression. As this was occurring, Romano pushed [Mrs. Sebetic] out of the way and stood in front of [Miazga] (standing over him) and immediately began to punch [Miazga] in the face. . . . As [Sebetic] was choking [Miazga], Romano continued to punch [Miazga] in

the face. [Miazga] was bleeding severely and was slipping out of consciousness. [Mrs. Sebetic] got to the telephone and started to call 911. Romano pushed [Mrs. Sebetic] again in an attempt to prevent her from making the call. . . . [Sebetic] and Romano continued to beat and choke [Miazga] until the police finally arrived with guns drawn."

Romano tendered the lawsuit to his insurers for defense and indemnification. The insurers advised Romano that the policies did not cover Miazga's injury, and the insurers declined to provide coverage to Romano for any damages resulting from Miazga's injury.

On January 6, 2014, Romano (and Sebetic) stipulated to a judgment against them that provided in relevant part: they did not dispute Miazga's negligence claim; they assigned to Miazga any claims they might have against the insurers arising out of the insurers' refusal to defend or indemnify them; and Miazga's damages amounted to $250,000 for past and future emotional distress, pain, suffering and inconvenience. In addition, Miazga agreed to dismiss his intentional tort claims, and agreed not to execute any judgment against Romano or Sebetic personally. On February 13, 2014, Miazga filed an Acknowledgement of Satisfaction of Judgment in Full as to Romano, and in May 2014, he filed the same as to Sebetic.

2. *The instant action*.

On May 28, 2014, Miazga filed the instant action against the insurers, asserting two causes of action: (1) breach of their contractual duty to defend and indemnify Romano in the underlying action; and (2) breach of the implied covenant of good faith and fair dealing owed to Romano.[1]

[1] Romano was insured by Mid-Century under a homeowners policy and by FIE under a policy that covered a duplex behind his residence. Romano also sued Farmers Insurance Company, Inc., but later dismissed that entity from the action.

a. *The insurers' motion for summary judgment*.

The insurers moved for summary judgment, contending they had no duty to defend or indemnify Romano in the underlying action. The insurers argued Miazga could not recover from them under any theory because they owed no coverage obligation to Romano in the underlying action. Both policies provided coverage for bodily injuries resulting from an "occurrence," which the policies defined as an "accident," but Miazga did not allege in the earlier action that Romano's injury-producing acts were accidental or negligent. "To the contrary, [Miazga] alleged both in the complaint filed in the Underlying Action and in his responses to special interrogatories in the Underlying Action that *Romano repeatedly punched him in the face*." (Italics added.)

The insurers also contended Miazga could not prevail because he was not a judgment creditor, having filed an acknowledgement of satisfaction of judgment in full.

b. *Miazga's opposition to the summary judgment motion*.

In opposition (and at odds with Miazga's allegations in the underlying action that Romano had attacked him), Miazga contended that Romano "acted in self-defense and thus his negligent conduct was accidental for insurance purposes, not willful or wrongful." According to Miazga, Romano's position in the underlying action was that the injuries inflicted by Romano "were the result of self-defense required when the combat between Sebetic and [Miazga] did not cease as Romano had intended." Miazga relied primarily on Romano's responses to interrogatories in the underlying action, wherein Romano stated he made contact with Miazga in self-defense. In his responses to special interrogatories, Romano had stated "[Miazga] lunged at [Romano] which resulted in [Romano] having to defend himself," "[Romano] believed that he was in danger of physical assault and grave danger by an individual [Romano] knew had a history and propensity for violence. [Romano] did not physically attack [Miazga]."

Miazga also contended his acknowledgment of satisfaction of judgment was intended only to release Romano and was not intended to release Romano's insurers from liability.

c. *Trial court's ruling granting summary judgment.*

On March 10, 2015, after hearing the matter, the trial court granted summary judgment. The trial court's tentative ruling, which it adopted as the final order in the matter, stated in relevant part:

With respect to the effect of Miazga's filing a satisfaction of judgment as to the judgment against Romano, the trial court "assume[d] for purposes of this motion that [Miazga] does have standing to pursue this action."

The trial court found no triable issue of material fact as to whether the policies covered Romano's conduct. In reliance on *Delgado v. Interinsurance Exchange of Automobile Club of Southern California* (2009) 47 Cal.4th 302 (*Delgado*), the trial court ruled that "[w]here the insured inflicts injury on a third party, 'the injury producing event is not an "accident" within the policy's coverage language when all of the acts, the manner in which they were done, and the objective accomplished occurred as intended by the actor.' (*Id*. at pp. 311-312.) That is the case here." The trial court acknowledged "[Miazga's] primary argument is that Romano's conduct constitutes an 'accident' because Romano acted in self-defense on the reasonable belief that he was in danger after [Miazga] lunged at him and Sebetic." However, "*Delgado* precludes any conclusion that Romano's assaultive conduct could be considered an 'accident.' Indeed, it makes clear that assaultive behavior, even in self-defense, and regardless of whether that self-defense is reasonable or unreasonable, is and remains intentional conduct which cannot be considered an 'accident.' "

Miazga filed a timely notice of appeal from the judgment.

CONTENTIONS

Miazga contends: there is a genuine dispute of material fact as to whether Mid-Century and FIE had a duty to defend and indemnify Romano, and he has standing to assert claims against the insurers on Romano's behalf.

DISCUSSION

1. *General principles regarding an insurer's duty to defend.*

" '[A] liability insurer owes a broad duty to defend its insured against claims that create a potential for indemnity. (*Gray v. Zurich Insurance Co*. [(1966)] 65 Cal.2d 263.) . . . . "[T]he carrier must defend a suit which *potentially* seeks damages within the coverage of the policy." [Citation.] Implicit in this rule is the principle that the duty to defend is broader than the duty to indemnify; an insurer may owe a duty to defend its insured in an action in which no damages ultimately are awarded.' " (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 295 (*Montrose*).)

The " 'determination whether the insurer owes a duty to defend usually is made in the first instance by comparing the allegations of the complaint with the terms of the policy. Facts extrinsic to the complaint also give rise to a duty to defend when they reveal a possibility that the claim may be covered by the policy. [Citation.]' . . . . '[F]or an insurer, the existence of a duty to defend turns not upon the ultimate adjudication of coverage under its policy of insurance, but upon those facts known by the insurer at the inception of a third party lawsuit. [Citation.] Hence, the duty "may exist even where coverage is in doubt and ultimately does not develop." ' " (*Montrose*, *supra*, 6 Cal.4th at p. 295.)

The determination whether an insurance company had a duty to defend is a proper subject for summary judgment. (*Montrose*, *supra*, 6 Cal.4th at pp. 298-301; *Frank & Freedus v. Allstate Ins. Co*. (1996) 45 Cal.App.4th 461, 468.) An insurer may seek summary judgment on the ground that " 'no potential for liability exists and thus it has no duty to defend.' " (*Montrose*, *supra*, at p. 298.)

In "broadly outlining the law of summary judgment, the Supreme Court stated: 'If a party moving for summary judgment in any action . . . would prevail at trial without submission of any issue of material fact to a trier of fact for determination, then he should prevail on summary judgment. In such a case . . . the "court should grant" the motion "and avoid a . . . trial" rendered "useless" by nonsuit or directed verdict or similar

device.' (*Aguilar* [*v. Atlantic Richfield Co*. (2001)] 25 Cal.4th [826,] 855.) [¶] . . . . [W]e review the 'trial court's ruling, not its rationale; thus, we are not bound by the trial court's stated reasons for granting summary judgment.' " (*Rombe Corp. v. Allied Ins. Co*. (2005) 128 Cal.App.4th 482, 487-488 [affirming summary judgment in favor of insurer on ground of no potential for coverage under the policy].)

2. *Grant of summary judgment was proper; the insurers did not owe a duty to defend Romano because there was no potential for coverage under the policies*.

a. *The pertinent insurance policies*.

Mid-Century issued a homeowner's policy to Romano, effective July 14, 2009. The policy provides the insurer will pay damages which its insured becomes legally obligated to pay because of "[b]odily injury resulting from an occurrence." The policy defines an occurrence as "an accident, including exposure to conditions, which occurs during the policy period and which results in bodily injury . . . during the policy period."

FIE issued a special form standard dwelling policy to Romano, effective July 9, 2009. This policy similarly states the insurer will pay damages which an insured becomes legally obligated to pay because of bodily injury resulting from an occurrence, and defines occurrence as "[a]n accident, including continued or repeated exposure to the condition, neither expected nor intended by a reasonable person in the position of any insured, which results in bodily injury."

b. *Allegations of Miazga's complaint in the underlying action did not reveal a possibility to Romano's insurers that Miazga's claim against Romano might be covered under the policies*.

We begin with the allegations of Miazga's complaint against Romano, bearing in mind the terms of Romano's insurance policies.

Miazga's lawsuit against Romano, in which Miazga pled causes of action for general negligence and intentional tort, contained identical allegations of wrongful conduct in the two causes of action, to wit: "[Sebetic] walked into the home brandishing a large flashlight. [Sebetic] then hit [Miazga's] head with a full swing of the flashlight.

[Sebetic] then moved to the back of the sofa and hit [Miazga] approximately 3 to 4 more times with the flashlight with extreme aggression. As this was occurring, *Romano* pushed [Mrs. Sebetic] out of the way and stood in front of [Miazga] (standing over him) *and immediately began to punch* [*Miazga*] *in the face*. . . . As [Sebetic] was choking [Miazga], *Romano continued to punch* [*Miazga*] *in the face*. [Miazga] was bleeding severely and was slipping out of consciousness. [Mrs. Sebetic] got to the telephone and started to call 911. Romano pushed [Mrs. Sebetic] again in an attempt to prevent her from making the call. . . . [Sebetic] and *Romano continued to beat and choke* [*Miazga*] until the police finally arrived with guns drawn." (Italics added.)

Thus, Miazga's complaint against Romano alleged that Romano repeatedly punched him in the face, and beat and choked him. These pertinent allegations in Miazga's complaint against Romano cannot reasonably be read to assert that any of Miazga's alleged injuries resulted from an "accident" or an event not "expected or intended by a reasonable person" in Romano's position. Accordingly, the allegations of Miazga's complaint did not reveal to Romano's insurers that the action against Romano might be covered by their policies.

Nonetheless, Miazga points out that the underlying complaint included a cause of action sounding in negligence in addition to a cause of action sounding in intentional tort. This argument is unavailing. Merely because Miazga's complaint against Romano pled a cause of action for "general negligence" as an alternative to "intentional tort" is an irrelevancy because the two causes of action were predicated on the identical underlying factual allegations of assaultive conduct by Romano. "The scope of the duty [to defend] *does not depend on the labels* given to the causes of action in the third party complaint; instead it rests on whether the alleged facts or known extrinsic facts reveal a possibility that the claim may be covered by the policy." (*Atlantic Mutual Ins. Co. v. J. Lamb, Inc.* (2002) 100 Cal.App.4th 1017, 1034, italics ours, original italics omitted.) Irrespective of the labels Miazga assigned to his causes of action in the prior action, the factual allegations in his complaint did not disclose a potential for coverage.

c. *Extrinsic facts likewise did not reveal a potential for coverage.*

In addition to the pleadings in the underlying action, we consider facts extrinsic to the complaint that reveal potential coverage under the policies for Miazga's claim against Romano. (*Monticello Ins. Co. v. Essex Ins. Co.* (2008) 162 Cal.App.4th 1376, 1386.) As we now discuss, the extrinsic evidence does not reveal a potential for coverage.

(1) *Miazga's discovery responses*.

During discovery in the underlying action, Miazga's responses to special interrogatories were consistent with the allegations of Miazga's complaint. Miazga responded as follows: "Defendant Romano hit Plaintiff [Miazga] repeatedly as Plaintiff was being restrained by Defendant Sebetic's choke hold. Defendant Romano did this for about twenty to thirty minutes while Plaintiff was defenseless. Defendant Romano prevented Anita Sebetic from calling the police by forcing her to the ground twice and continuing the assault on Plaintiff. Defendant Romano continued participating in the assault regardless of Plaintiff's consciousness or the amount of blood involved. Defendant Romano would not stop hitting Plaintiff until he knew the police were coming."

Nothing in these discovery responses by Miazga suggested the injuries inflicted by Romano were accidental so as to give rise to a potential for coverage.

(2) *Romano's statements to Mid-Century*.

On December 16, 2011, Romano provided Mid-Century with a statement, although it was not recorded. Romano told Jon Moench, the claim handler, that when he and Sebetic came home and found Miazga in bed with Sebetic's wife, Miazga began to attack Sebetic, Mrs. Sebetic jumped on Sebetic's back to break up the fight, and that he, Romano, "tried to get Mrs. Sebetic off of Mr. Sebetic and in the middle of all of the melee, he was hit in the head with a flashlight."

Thereafter, on May 1, 2013, Moench obtained a recorded statement from Romano. When asked "how did you become involved in what was going on with those three people?," Romano stated "Well, seeing those two guys fighting, I was trying to diffuse

the situation and I tried to get in between Anita and Johnny [to] to bring, uh, Anita away."

In both statements, Romano asserted he purposefully became involved in the altercation. There was nothing in these statements to suggest that Romano's involvement in the melee was an accident so as to give rise to a potential for coverage.

(3) *Romano's interrogatory responses, asserting he acted in self-defense.*

The final piece of extrinsic evidence consists of Romano's discovery responses in the underlying action.[2] In responding to Miazga's special interrogatories, Romano denied having attacked Miazga. Romano stated: "Plaintiff [Miazga] lunged at Responding Party [Romano] which resulted in Responding Party having to defend himself. . . . Any conduct directed at [Miazga] by [Romano] was in self-defense, based upon the reasonable belief that [Romano] was in imminent danger of physical assault and grave injury from an individual whom [Romano] knew had a history and propensity for violence."

Relying on Romano's assertion that Romano acted in self-defense, Miazga contends that if his injuries were caused by Romano's *reasonable* acts of self-defense, the insurers had a duty to defend Romano in the underlying action. The argument is unavailing.

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[2] At oral argument on appeal, Romano's counsel also relied on an April 26, 2013 letter to Farmers Insurance Group (Appellant's Appendix, pp. 328-329), wherein Romano's attorney asserted "Romano's testimony will be that the only actions he took were efforts to stop the altercation between the plaintiff and Mr. Sebetic. The evidence is quite clear that Mr. Romano was actually struck in the head with a flashlight by Mr. Sebetic as he attempted to separate him from the plaintiff." This letter, which was attached to the Moench declaration below in support of the motion for summary judgment as Exhibit 9, was not mentioned in Romano's opposing separate statement below, and therefore requires no discussion. (*City of Pasadena v. Superior Court* (2014) 228 Cal.App.4th 1228, 1238, fn. 4.) Moreover, this letter, asserting that Romano deliberately interjected himself into the struggle between Miazga and Mr. Sebetic, and that Romano was struck in the head by Mr. Sebetic with a flashlight, cannot be construed as advising the insurers that Romano accidentally struck Miazga.

Delgado, supra, 47 Cal.4th 302, is controlling. There, following an assault and battery by the insured, the injured party (Delgado) sued the insured (Reid), alleging that the insured had acted under the unreasonable belief of having to defend himself, an act that according to the injured party fell within the policy's coverage of " 'an accident.' " (*Id*. at p. 305.) The issue presented in the subsequent action against the insurance company was whether the insurer had a duty to defend Reid in that action. *Delgado* concluded that no duty was owed. (*Ibid*.)

Plaintiff Delgado contended that because insured Reid's assault and battery was motivated by Reid's unreasonable belief in the need for self-defense, the act fell within the policy's definition of an " 'accident,' " since from the perspective of Delgado, the injured party, the assault was an " 'unexpected, unforeseen, and undesigned' " happening or consequence. (*Delgado, supra*, 47 Cal.4th at pp. 308-309.) In other words, Delgado asserted that whether an event is an "accident" depends on whether it was expected by the injured party, not whether it was intended by the person causing the injury. The *Delgado* court rejected the contention that whether there was an accident within the meaning of the policy must be determined from the perspective of the injured party. (*Id*. at p. 309.) It stated: "Under California law, the word 'accident' in the coverage clause of a liability policy refers to the conduct of the insured for which liability is sought to be imposed on the insured. [Citations.] This view is consistent with the purpose of liability insurance. Generally, liability insurance is a contract between the insured and the insurance company to provide the insured, in return for the payment of premiums, protection against liability for risks that are within the scope of the policy's coverage. Insurance policies are read in light of the parties' reasonable expectations and, when ambiguous, are interpreted to protect the reasonable expectations of the insured. [Citation.] Therefore, the appropriate inquiry here is not, as Delgado would have it, confined to viewing the pertinent event from the perspective of the injured party." (*Id*. at p. 311.)

Further, an insured's unreasonable, subjective belief in the need for self-defense does not convert "into 'an accident' an act that is purposeful and intended to inflict injury." (*Delgado*, *supra*, 47 Cal.4th at p. 311.) *Delgado* explained, "an injury-producing event is not an 'accident' within the policy's coverage language *when all of the acts, the manner in which they were done, and the objective accomplished occurred as intended by the actor*. [Citations.] Here, insured Reid's assault and battery on Delgado were acts done with the intent to cause injury; there is no allegation in the complaint that the acts themselves were merely shielding or the result of a reflex action. Therefore, the injuries were not as a matter of law accidental, and consequently there is no potential for coverage under the policy. [Citation.]" (*Id*. at pp. 311-312, italics added.)

Miazga contends the *Delgado* decision only precludes an insured's *unreasonable* acts of self-defense from being covered as an accident, and that *Delgado* does not bar acts of *reasonable* self-defense from coverage. Miazga's attempt to distinguish *Delgado* or to limit its application to acts of unreasonable self-defense is unpersuasive. *Delgado* explains that coverage for an accident does not depend on an insured's subjective belief. (*Delgado*, *supra*, 47 Cal.4th at p. 311.) Rather, the inquiry is whether the insured engaged in purposeful or volitional acts. To reiterate, "an injury-producing event is not an 'accident" within the policy's coverage language when all of the acts, the manner in which they were done, and the objective accomplished occurred as intended by the actor. [Citations.]" (*Id*. at pp. 311-312.) Here, crediting Romano's assertion that he acted in reasonable self-defense in striking Miazga, there is nothing to suggest that Romano's acts were not purposeful or volitional. Therefore, Miazga's injuries were not as a matter of law accidental, and consequently there was no potential for coverage under the policies. (*Ibid*.)

Accordingly, the insurers did not owe Romano a duty to defend in the underlying action.

3. *Remaining issues not reached*.

Because the duty to defend is broader than the duty to indemnify, our conclusion that the insurers did not have a duty to defend Romano is dispositive of Miazga's claim that the insurers had a duty to indemnify. (*Delgado*, *supra*, 47 Cal.4th at p. 308, fn. 1.) That conclusion also obviates the need to address Miazga's contention that his filing of the satisfaction of judgment as to Romano did not preclude him from suing Romano's insurers. (*Ibid*.)

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

ALDRICH, J.

HOGUE, 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.