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Court of Appeal, Second District, Division 4, California.

Ernst VAN DE BOVENKAMP et al., Plaintiffs and Appellants,
v.
UNITED TITLE COMPANY et al., Defendants and Respondents.

No. B180752.
|
(Los Angeles County Super. Ct. No. BC292307).
|
Dec. 8, 2006.

APPEAL from a judgment of the Superior Court of Los Angeles County, Teresa Sanchez-Gordon, Judge. Affirmed in part, reversed in part and remanded.

Attorneys and Law Firms

Goodstein & **Berman** and **Bruce** A. **Berman** and Gary J. Goodstein for Plaintiffs and Appellants.

Paul, Hastings, Janofsky & Walker and Lisa A. Popovich and Miguel Sanqui for Defendants and Respondents.

Opinion

MANELLA, J.

***1** Appellants Ernst and Sharynlee Van de Bovenkamp brought suit against respondents United Title Company (United) and Chicago Title Insurance Company (Chicago Title), and their parent Fidelity National Insurance Company (Fidelity National),[1] seeking to enforce a title insurance policy. Appellants have been unable to locate a copy of the policy, but maintain that one was issued or should have been issued when Ernst purchased the couple's home, and that respondents owed them a duty to defend or indemnify when a third party claimed to hold an easement over their property. The trial court sustained respondents' demurrer to appellants' claims as alleged in their third and fourth amended complaints. The court subsequently awarded respondents attorneys' fees as the prevailing parties on appellants' breach of contract claims. We reverse with respect to Ernst's claims for breach of contract and breach of implied covenant and reverse the attorneys' fee award, but otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Certain background facts are not in dispute. Ernst[2] purchased real property on Passmore Drive in Los Angeles in August 1987. A few years later, Pacific Alliance Holdings (the Developer), claimed an easement over the property. The Developer filed a lawsuit against appellants in 2002, essentially seeking to quiet title (the Underlying Action). The Developer was insured under a policy of title insurance through Chicago Title, which, therefore, absorbed the Developer's litigation costs.

Appellants tendered a claim to Chicago Title. Prior to commencement of the instant litigation, Chicago Title communicated to appellants or their counsel through Douglas Avery, a vice president and senior claims counsel.[3] In correspondence, Avery stated, among other things, that although Chicago Title had opened a file and was processing a claim on behalf of appellants, he had been "unable to locate a copy of any policy and therefore [did] not know with certainty a policy was ever ordered or paid for." Avery also stated that, "the recorded easement in fact burdens your property and therefore there is no defense that can be raised" and "I have reviewed the public records and was unable to find any reason why the recorded easement might arguably be defective." Consequently, Chicago Title retained an appraiser "to determine the diminution in value to your property (if coverage exists)."

Original Complaint, FAC, and SAC

Appellants believed that they were entitled to a defense in the Underlying Action based on their view that the easement claimed by the Developer was not valid. Accordingly, they brought a lawsuit against United, Chicago Title, and Fidelity National. The original complaint, for breach of contract, breach of the covenant of good faith and fair dealing, intentional infliction of emotional distress, and fraud was filed in March 2003, at which time appellants were representing themselves. It was followed by a first amended complaint (FAC), also

filed by appellants acting in pro per, which added claims for breach of fiduciary duty, constructive fraud, negligent misrepresentation, unfair business practices in violation of Business and Professions Code section 17200, and negligent infliction of emotional distress.

***2** A demurrer was sustained to all causes of action in the FAC with leave to amend, except with regard to the claim for intentional infliction of emotional distress. Appellants, now represented by counsel, filed a second amended complaint (SAC) that was, in most essential respects, identical to the complaint it replaced.[4] The court sustained the demurrer to the SAC as to all causes of action on the ground of "uncertainty." Leave to amend was granted except as to the cause of action for breach of fiduciary duty, which was said to be "duplicative" of the cause of action for breach of the implied covenant of good faith and fair dealing.

Motion to Compel Arbitration

Before we turn to the specific allegations of the third and fourth amended complaints-which are the primary focus of this appeal-we discuss certain information contained in an unsuccessful motion to compel arbitration filed by respondents after being served with the FAC.[5] In supporting declarations, spokespersons for all three respondents explained that, while no copy of the title insurance policy protecting appellants as owners of the Passmore Drive property had been located, there could be no question that such policy contained an arbitration clause because: "The jackets for the CLTA and ALTA policies that Fidelity [National] and other title insurers issue, including the 1987 ALTA Residential Title Insurance Policy, the 6-1-87 ALTA Residential Title Insurance Policy, the 6-1-87 Plain Language Owner's Title Insurance Policy One-to-Four Family Residences Enhanced Version, the 1988 CLTA Standard Coverage Policy of Title Insurance and the 1990 CLTA Standard Coverage Policy of Title Insurance [all of which were attached to the declaration], do not vary from client to client.[6] Moreover, the Department of Insurance requires all proposed policies to be submitted to the Department for review before any such policies are issued. In the event that the Department would disapprove of the policy, the Department of Insurance could require the title insurance company to revise the policy before it can be issued to customers." All of the attached sample policy jackets stated that they provided coverage where "[s]omeone else has an easement on your land."

In addition, United's vice president and chief title officer stated in a declaration that "in 1987, United was an agent for [Chicago Title] and issued policies underwritten by Chicago [Title]."[7]

Third Amended Complaint

In the Third Amended Complaint (TAC), appellants contended they were both owners of the Passmore Drive property, although Ernst alone purchased the house in 1987 and appeared on the grant deed as title owner. According to the TAC, in August 1987, "Ernst and [United] entered into a written contract for title insurance ... for the residence located [on Passmore Drive]." Appellants were "informed and believe" that United issued a policy in August or September 1987. Elsewhere, the TAC alleged that respondents, "and each of them, either issued policies of insurance or are the successor insurers to policies of insurance obtained by [appellants] ." In another paragraph, the TAC alleged "on information and belief" that "United, Chicago [Title] and/or Fidelity [National] was the underwriter for the 1987 title insurance policy."

***3** Respondents "have claimed the policy cannot be found, does not exist, and/or have objected to its production and refused to produce the policy." Appellants did, however, obtain a copy of the 1992 lender's title insurance policy that provided coverage for a refinance loan for the Passmore Drive property, and attached schedules from that policy as exhibits to the TAC. The schedules established that Chicago Title "did not except from coverage the Disputed Access Easement in the Underlying [Action]," and appellants were "informed and believe" that the same schedules "would have been part of ... the 1987 Title Policy ... issued to Ernst."

The TAC further alleged that Ernst "has performed all conditions, covenants, and promises required of him to be performed in accordance with the terms and condition[s] of the 1987 ... Title Polic[y]" and specifically, "paid the amount requested for title insurance for the premiums due under the cont[r]act[ ] of insurance."

Although Sharynlee was apparently not a party to the insurance contract or named in the policy, the TAC contended that she was a proper plaintiff in the lawsuit because she was married to Ernst, had been sued by the Developer in the Underlying Action, and was treated by respondents as if she were an insured in prelitigation negotiations and in their motion to compel arbitration.

Appellants alleged that they tendered a claim based on the dispute with the Developer to Chicago Title in March 2001. Chicago Title "misrepresented to [the Developer] and deceived him by claiming to the Developer that an alternative access easement for his benefit existed and

encumbered [appellants'] propert [y]" and also informed appellants "that [appellants'] original issued title policy of August 1987 was defective because [respondents] failed to disclose at the time the policy was issued to [appellants] that [appellants'] property was burdened with an easement for the benefit of [the Developer]." Chicago thereafter "underwrote the costs, fees, and expenses to sue [appellants] ... with a frivolous and abusive independent action [the Underlying Lawsuit]." This resulted, according to the TAC, in lis pendens being recorded against various properties owned by appellants, a preliminary injunction issuing against appellants, and appellants being "forced" to pay their lender's legal defense fees.

According to the TAC, the "material terms of the insurance polic[y]" stated that "in exchange for premiums paid, [respondents] promised to defend and indemnify [appellants] against claims such as those alleged in the Underlying Lawsuit." Additionally, "[respondents] agreed "to compensate [appellants] for any damage to their interest in the [Passmore Drive] Property as a result of the claims of the type asserted in the Underlying Lawsuit and/or in the event that the [Developer's] Property was deemed to possess an easement applicable to the [Passmore Drive] Property." Respondents "failed to honor its [sic] obligations to defend [appellants] in the [Underlying Lawsuit], failed to properly investigate [appellants'] tender and/or defense of the lawsuit, and/or failed to agree to indemnify [appellants]."

***4** Based on these general allegations, the TAC set forth two separate causes of action for breach of contract: one based on breach of the duty to defend under the 1987 title insurance policy (claim one) and another based on breach of the duty to indemnify (claim three).[8] Quoting from "the information provided by [respondents] in their motion to compel arbitration," the breach of duty to defend cause of action alleged that the following provision of appellants' title policy was breached: "Upon written request by an insured ..., the Company, at its own cost and without unreasonable delay, shall provide for the defense of such insured in litigation in which any third party asserts a claim adverse to the title or interest as insured." The TAC further alleged that appellants tendered the defense and indemnity of the Underlying Lawsuit to respondents, that the Underlying Lawsuit was a covered claim under the 1987 title insurance policy, that respondents were required to appoint an attorney to defend appellants against the Underlying Lawsuit or to pay their litigation expenses, and that they refused to accept tender. The breach of duty to indemnify cause of action alleged that under the 1987 policy, respondents "were obligated to indemnify [appellants] for any damages in any lawsuits affecting the title of the property" and "to indemnify [appellants] against any awards including costs and attorney's fees arising out of the Underlying Lawsuit." The prayer sought declaratory relief on all the breach of contract causes of action, including a declaration that respondents were obligated to defend and indemnify appellants.

The TAC contained a separate cause of action for breach of implied covenant (claim four) based on both the failure to defend and indemnify and the "false [ ]" statement "that there was no defense to the Underl[y]ing Lawsuit because the Developer's allegations of a burdening easement against [appellants'] property were correct" when "in fact no easement existed for the benefit of the [D]eveloper on [appellants'] property." Appellants sought punitive damages in connection with this claim.[9]

The ninth cause of action for negligent infliction of emotional distress appeared to be based on the representations made by Chicago Title concerning the validity of the Developer's easement and the fact that Chicago Title paid the Developer's litigation expenses, rather than on respondents' refusal to defend appellants. It contained numerous unintelligible statements, along with lengthy allegations concerning appellants' suffering and emotional anguish caused by the tying up of their property and the Underlying Action. The allegations supporting this cause of action appeared to have been copied, almost verbatim, from the intentional infliction of emotional distress cause of action in the FAC, to which demurrer had been sustained without leave to amend. That claim, too, had been based on mental and emotional anguish caused by the existence of the disputed easement and Underlying Action itself, rather than on appellants' inability to defend the lawsuit without the financial assistance of respondents.

***5** The tenth and eleventh causes of action for negligence and breach of fiduciary duty were asserted against United only. Appellants alleged for the first time that rather than being the title insurer, United was "the escrow company for the 1987 purchase of the [Passmore Drive property] by Ernst." The tenth cause of action alleged that "if the trial [sic] of fact determines that a title insurance contract does not exist between [appellants], in particular Ernst, and [respondents] for the 1987 purchase of the [Passmore Drive property], (a[n] eventuality that [appellants] deny) [then], [United] breached its duties to Ernst by failing to obtain an owner's title insurance policy for Ernst while obtaining a title insurance policy for the lender." The eleventh cause of action similarly alleged: "[I]f the trial [sic] of fact determines that a title insurance contract does not exist between [appellants], in particular Ernst, and

[respondents] for the 1987 purchase of the [Passmore Drive property] (a[n] eventuality that [appellants] deny) [then], [United] breached its fiduciary duties to Ernst by failing to obtain an owner's title insurance policy for Ernst while obtaining a title insurance policy for the lender." In the prayer, appellants requested attorneys' fees for all causes of action.

Demurrer to Third Amended Complaint

Respondents demurred to the TAC. The demurrer to the claims for breach of contract and breach of implied covenant were based on the failure to either plead the terms and provisions of the title policy or to attach a copy to the TAC. Respondents further contended that even if appellants' "baseless" allegation that the 1992 lender's policy mirrored the 1987 owner's policy were true, appellants failed to plead that the easement at issue was covered under either policy. Respondents took the position that "[t]o assert a claim for breach of a title policy, [appellants] must describe the property[,] including the easement and the language of the coverage provision establishing that their purported loss is encompassed by the coverage provisions of the title policy," and that "[u]nless ... [appellants] identify the material terms of the policy, including the location of the easement at issue in this case and whether the subject easement was shown as an exception to coverage, they cannot maintain a breach of contract claim against [respondents]." Respondents contended that the negligent infliction of emotion distress claim did not establish the basis for a duty of care, in the absence of a contractual duty.

With respect to the two new causes of action, the tenth and eleventh based on United's failure as escrow company to procure title insurance, respondents contended that the allegations were contradicted by other allegations that a policy of title insurance actually issued. They also argued that the claims failed to specifically assert that the escrow instructions required United to obtain title insurance. The eleventh cause of action for breach of fiduciary duty was also said to be in violation of the court's earlier order, in which respondents' demurrer to a cause of action for breach of fiduciary duty asserted against all respondents was sustained without leave to amend.

Court's Order

***6** The court sustained the demurrer to the TAC without leave to amend as to all causes of action except the tenth (United's alleged negligence in failing to procure a policy). As to that cause of action, demurrer was sustained with leave to amend.

The court explained its reasoning: "As to the first cause of action for breach of contract[ual] duty to defend ... no title insurance or quotes from the policy in question were produced" and "[appellants] admit there is no policy, and [respondents] have not produced one." Essentially the same rational supported the court's decision to sustain the demurrer to the second, third, and fourth causes of action for breach of contract and breach of implied covenant. The lack of a contract meant that appellants had failed to establish a duty for purposes of their cause of action for negligent infliction of emotional distress. On the eleventh cause of action against United as escrow agent for breach of fiduciary duty, the court stated: "Th[eir] cause of action was previously dismissed. It looks like negligence, and the court does not believe that there is such a cause of action."

Appellants were granted leave to amend the tenth cause of action for negligence against United as escrow company.

Fourth Amended Complaint

Another new attorney substituted in for appellants, and a fourth amended complaint (Fourth AC) was filed. The Fourth AC contended that United was acting both as the escrow company "that oversaw and coordinated various portions of the purchase and sale of the residence, including conveying instructions to and from the title insurance company" and as the title insurer in the 1987 purchase of the Passmore Drive property. Accordingly, appellants alleged, United "was in a fiduciary relationship with [appellants]" and "owed a duty of care to [appellants] to protect the financial interests insofar as they were reasonably related to that real estate transaction." The duty of care "[b]ased upon standards of practice within either the escrow industry, or the title insurance industry, or both" included "ensuring that title insurance was in fact purchased when requested by [Ernst]."

A demurrer to the Fourth AC was based primarily on the fact that its allegations contradicted appellants' previous allegations that title insurance existed, and on the failure to allege that United violated any escrow instructions. Appellants filed a statement of non-opposition to the demurrer. Their attorney stated at that time: "[I]n my opinion the negligence cause of action is and must honestly be based fundamentally upon the existence of an insurance policy. Without the ability to assert that theory, [appellants] are left having to tiptoe around the court's ruling essentially prohibiting mention of an insurance

policy while still trying to assert viable claims against defendants whose primary failure was to fulfill their obligations under that policy. The Fourth [AC] represents my best effort at that task, but I acknowledge the likelihood that the Demurrer to it will be sustained.... On the basis of that acknowledgement, I have requested and received authority from my clients to file the instant Notice of Non-Opposition so that we may move forward with an appeal that seeks to reinstate all of the previously-asserted causes of action based [on] [respondents'] failure to fulfill their obligations pursuant to the title insurance policy that was issued to [Ernst] in 1987."

***7** Demurrer was sustained without leave to amend.

Request for Attorneys' Fees

After judgment was entered in favor of respondents, they filed a motion for attorneys' fees, seeking in excess of $250,000. The motion was based on Civil Code section 1717 and the allegations of the various complaints that there was "a written insurance contract between the parties, pursuant to which [appellants] alleged that they were entitled to their attorneys' fees." The court awarded fees in the amount of $200,000. This appeal from both the attorneys' fees order and the judgments of dismissal timely followed.

DISCUSSION

I

Contract Claims

The essential elements of a cause of action for breach of contract are: the contract, plaintiff's performance or excuse for nonperformance; defendant's breach; and damage to the plaintiff. (4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 476, p. 570.) With respect to insurance contracts, it is said that "[a]n insured can pursue a breach of contract theory against its insurer by alleging the insurance contract, the insured's performance or excuse for nonperformance, the insurer's breach, and resulting damages." (*San Diego Housing Com. v. Industrial Indemnity Co.* (1998) 68 Cal.App.4th 526, 536.)

"A written contract is usually pleaded by alleging its making and then setting it out verbatim ('in haec verba') in the body of the complaint or as a copy attached and incorporated by reference." (4 Witkin, Cal. Procedure, *supra*, Pleading § 479 at p. 572.) "The other method of pleading a written contract is according to its legal effect, by alleging the making, and then proceeding to allege the substance of its relevant terms." (*Id.*, § 480, p. 573, italics omitted.) "[T]he plaintiff need not allege every promise of the defendant, but only those that he claims were breached and others that affect them." (*Id.*, § 481, p. 574, italics omitted.)

In the TAC, appellants pled that in August 1987, "Ernst and [United] entered into a written contract for title insurance ... for the residence located [on Passmore Drive]" and that appellants were "informed and believe" that United issued a policy in August or September 1987. The TAC further contended on information and belief that "United, Chicago [Title] and/or Fidelity [National] was the underwriter for the 1987 title insurance policy." The TAC alleged that there were specific provisions in the 1987 title insurance policy obligating respondents to defend the insured "in litigation in which any third party asserts a claim adverse to the title or interest as insured," quoting a typical provision from a standard title policy provided by respondents in connection with their motion to compel arbitration. This is sufficient to establish the existence of a contract for title insurance between Ernst and respondents.

With respect to the element of Ernst's performance, the TAC alleged that Ernst "performed all conditions, covenants, and promises required of him to be performed in accordance with the terms and condition[s] of the 1987 and 1992 Title Policies" and "paid the amount requested for title insurance for the premiums due under the contracts of insurance." Since the primary obligation of an insured is to pay premiums, this appears to sufficiently allege Ernst's performance of his contractual obligations.

***8** With respect to the element of respondents' breach, the TAC clearly states that the dispute with the Developer involves an asserted easement affecting appellants' Passmore Drive property, that the defense of it was tendered in 2001, that it was a covered claim, and that respondents "failed to honor [their] obligations to defend [appellants] in the lawsuit filed by the [Developer], failed to properly investigate [appellants'] tender and/or defense of the lawsuit, and/or failed to agree to indemnify [appellants]."

Respondents contend that "[t]he TAC ... failed to allege whether the particular easement at issue in this case was covered under any title insurance policy" and dismiss

appellants' argument that the policy issued to the lender in 1992 "somehow supports [their] claim that [appellants] had unspecified title policies in 1987...." Yet in the motion to compel arbitration, respondents themselves contended that title policies issued at or around the same time are the same in their essential terms.[10] (See also *Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal .4th 1059, 1074, fn. 5 [recognizing that policies are usually issued on standard forms that are often employed industrywide]; 3 Miller & Starr, Cal. Real Estate, *supra*, Title Insurance, § 7:5, p. 7-25 ["The form and content of title insurance policies used by most title insurers in this state have been standardized through endeavors of the California Land Title Association (CLTA) and the American Land Title Association (ALTA). Member companies generally use the forms of title policies designed by these associations."].)

In addition, if a title search conducted in 1992 failed to uncover a specific easement for purposes of a lender's policy, it is logical to assume that it was not uncovered four years earlier for purposes of an owner's policy. The TAC alleged that the 1992 lender's title insurance policy for the Passmore Drive property did not "except" the easement that was the focus of the dispute in the Underlying Action with the Developer. A cloud on title that is not excepted by the title insurer is covered by the policy.[11] By alleging that the 1992 lender's policy did not except the disputed easement, the TAC was effectively alleging that the easement was not located in the 1992 title search. This means, more likely than not, it was not located and excepted in the earlier title search conducted in 1987. In other words, if, as the TAC alleged, the easement was not excepted from the 1992 lender's policy, an inference can reasonably be drawn that the easement was not found in the 1987 title search or excepted in any title policy issued at that time. Thus, by alleging on information and belief that the schedules listing exceptions to coverage attached to the lender's 1992 policy were the same for the title policy allegedly issued to protect the owner in 1987, Ernst adequately pled that the easement was covered under the 1987 policy.

***9** In *Construction Protective Services, Inc. v. TIG Specialty Ins. Co.* (2002) 29 Cal.4th 189, the Supreme Court expressed its agreement with the proposition that "[i]n an action based on a written contract, a plaintiff may plead the legal effect of the contract rather than its precise language." (*Id.* at pp. 198-199.) The court further stated that "though the complaint could have been clearer, it satisfactorily alleged (1) that the insurance policy obligated [the insurer] to defend and indemnify [the plaintiff] against suits seeking damages, and (2) that under the terms of the policy, [a third party's] setoff claim fell within the scope of that contractual obligation. Whether [the plaintiff] can prove these allegations ... remains to be seen, but the allegations are sufficient to establish a prima facie right to relief." (*Ibid.*) The same is true here. While the TAC could have been clearer and more succinct, the allegations were sufficient to support Ernst's claims for breach of the duty to defend in the first cause of action and declaratory relief whether a duty to indemnify exists on the third cause of action.

On appeal, respondents wisely abandon the position that the insurance policy must be attached or quoted in haec verba. (See *Dart Industries, Inc. v. Commercial Union Ins. Co.*, *supra*, 28 Cal.4th 1059, 1071 [the contents of a lost insurance policy may be proved by secondary evidence; the burden is on the claimant to establish the substance of each policy provision essential to the claim of relief].) They argue instead that appellants failed to plead the legal effect of the policy or the substance of each policy provision essential to their claim. Other than their contention that the TAC failed to allege that the disputed easement was covered by the policy, discussed above, respondents give no examples of any important provisions that appellants failed to set forth in substance. In our view, nothing essential was omitted.

Respondents further contend that appellants should have provided the full legal description of the Passmore Drive property and the disputed easement. Respondents cite no authority for this novel proposition, and we can conceive of no reason why this level of detail should be required. All that is required is that the "pleading as a whole apprise[ ] the adversary of the factual basis of the claim." (*Kiseskey v. Carpenters' Trust for So. California* (1983) 144 Cal.App.3d 222, 234.) Here, the easement itself was the subject of the quiet title action identified in the TAC that respondents were pursuing on behalf of the Developer against appellants. Respondents cannot seriously claim to have been unaware of the property at issue or the purported easement.

Respondents urge us to disregard the allegations pertaining to the existence of a title policy because in the TAC's ninth and tenth causes of action, appellants raised the possibility that no title policy ever issued, and sought to hold United, as escrow company, liable for failing to procure one. Respondent's argument represents a misunderstanding of the rules of pleading. The traditional rule is that a plaintiff may plead alternative or inconsistent counts, especially where he or she "is in doubt as to some of the ultimate facts, which may perhaps be largely within the knowledge of the defendant." (4 Witkin, Cal. Procedure, *supra*, Pleading, § 364 at p. 467; see *Beatty v. Pacific States S. & L. Co.* (1935) 4 Cal .App.2d 692, 697

["It has ... long been held that the causes of action arising out of one transaction may be separately stated in different ways, even though they are inconsistent with each other."].) In such situations, "[t]he facts are inconsistently alleged because the plaintiff does not know which of the alternatives is true or can be established by the evidence." (4 Witkin, *supra*, § 364, p. 467; accord *Rader Co. v. Stone* (1986) 178 Cal.App.3d 10, 29 ["Where the exact nature of the facts is in doubt, or where the exact legal nature of plaintiff's right and defendant's liability depend on facts not well known to the plaintiff, the pleading may properly set forth alternative theories in varied and inconsistent counts."].)

***10** The authority on which respondents primarily rely, *Manti v. Gunari* (1970) 5 Cal.App.3d 442, purported to cite *Beatty v. Pacific States S. & L. Co., supra*, 4 Cal.App.2d 692, for the proposition that "[w]hile inconsistent *theories* of recovery are permitted [citation], a pleader cannot blow hot and cold as to the *facts* positively stated." (5 Cal.App.3d at p. 449.) In fact, the court in *Beatty* stated in reference to verified complaints only: "[T]he rule does not permit the pleader to blow both hot and cold in the same complaint on the subject of facts *of which he purports to speak with knowledge under oath.*" (4 Cal.App.2d at p. 697, italics added.) No doubt there are situations where unexplained inconsistencies in pleading facts that should reasonably be known to the plaintiff may properly be used as an admission to support a demurrer or other defense. (See, e.g., *Ochs v. PacifiCare of California* (2004) 115 Cal.App.4th 782, 797 [leave to amend properly denied where plaintiffs initially alleged defendant and third party with whom plaintiffs regularly dealt were unrelated, and later sought to amend complaint to allege defendant and third party were agents of each other]; *Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 384 [demurrer properly sustained to amended complaint asserting plaintiff was injured while on defendant's property, when prior complaint alleged plaintiff was on public street used for defendant's commercial benefit]; *Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 877 [plaintiff who had acknowledged existence of multiplicity of competing claims to fund in earlier interpleader action could not contradict those statements by asserting that interpleader action had been maliciously prosecuted].) Here, appellants have consistently asserted that they believe a title policy issued in 1987 when Ernst purchased the property, but that if it did not, United was negligent in failing to procure one. Whether an owner's title policy actually issued in 1987 is a fact better known to respondents than to appellants, and there is no basis for faulting appellants for pleading inconsistently with regard to this factual matter.[12]

Respondents assert that the obligation to indemnify necessary to support the third cause of action had not yet ripened. We understand that the Underlying Action had not concluded when the TAC was filed, and there was as yet no final determination of a dollar amount to attribute to the indemnification claim. But a declaratory relief action seeking to establish the right to indemnity can go forward when the third-party action is still pending. (See, e.g., *Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 301; *Horace Mann Ins. Co. v. Barbara B.* (1993) 4 Cal.4th 1076, 1085.) Respondents contend that "[appellants] failed to allege the existence of a contract upon which to seek declaratory relief." For the reasons discussed, that is not correct with respect to Ernst.

***11** The same is not true for Sharynlee. Nothing in the TAC or any prior complaint asserted the existence of a contract or insurance policy to which she was a party. Appellants' opening brief makes no specific argument with respect to her standing to assert a breach of insurance contract claim. As appellants concede, she was not involved in the purchase of the property and is not a title owner. That she is now married to Ernst and has been sued by the Developer does not give her standing to pursue a claim under a policy that could not have included her. Nor does the fact that Chicago Title addressed correspondence to both Ernst and Sharynlee when appellants first tendered their claim. Accordingly, the first and third causes of action for breach of contract should be reinstated as to Ernst only. (See *Alex Robertson Co. v. Imperial Casualty & Indemnity Co* . (1992) 8 Cal.App.4th 338, 343 [recognizing that duty to defend extends only to the insured].)

II

Breach of Implied Covenant Claim

Because the nature of an insurance contract is to provide peace of mind to the insured and economic protection against calamity rather than simply the benefits of the bargain, an insured left unprotected by its insurer can pursue a claim for tort damages, including punitives in some instances, under a theory of breach of the implied covenant of good faith and fair dealing. (See, e.g., *Old Republic Ins. Co. v. FSR Brokerage, Inc.* (2000) 80 Cal.App.4th 666, 684; *Love v. Fire Ins. Exchange* (1990) 221 Cal.App.3d 1136, 1153["[W]hen benefits are due an insured, delayed payment based on inadequate or tardy

investigations, oppressive conduct by claims adjusters seeking to reduce the amount legitimately payable and numerous other tactics may breach the implied covenant because it frustrates the insured's primary right to receive the benefits of this contract-i.e., prompt compensation for losses."].) Like a claim for breach of contract, however, this claim is available only to a party to the insurance contract, not to family members, no matter how foreseeable their suffering might have been. (See, e.g. *Hatchwell v. Blue Shield of California* (1988) 198 Cal.App.3d 1027, 1034; *Austero v. National Cas. Co.* (1976) 62 Cal.App.3d 511, 517.)

As with the claim for declaratory relief or indemnity, the only objection raised by respondents is that there was no properly pled insurance contract. Because we have rejected that argument as it pertains to Ernst, his claim for breach of the implied covenant must also be reinstated.

III

Emotional Distress Claims

Unlike breach of implied covenant claims, claims for infliction of emotional distress do not automatically follow from an insurer's bad faith failure to pay insurance claims or breach of its duty to defend. To support a claim for intentional infliction of emotional distress against an insurer, the plaintiff must allege conduct exceeding all bounds usually tolerated by a decent society especially calculated to cause mental distress of a very serious kind. (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 904-905; see *Isaacson v. California Ins. Guarantee Assn.* (1988) 44 Cal.3d 775, 788-789 [where insurer refused to pay settlement in excess of $400,000 and sent letter to plaintiffs' counsel stating that settlement in excess of $500,000 would be unwarranted, a possible policy violation, and breach of good faith, the actions alleged fell short of extreme and outrageous conduct needed to plead an action for intentional infliction of emotional distress]; *Schlauch v. Hartford Accident & Indemnity Co.* (1983) 146 Cal.App .3d 926, 936 ["The failure to accept an offer of settlement or the violation of statutory duties under [the Insurance Code] does not in itself constitute the type of outrageous conduct which will support a cause of action for intentional infliction of emotional distress"]; *Ricard v. Pacific Indemnity Co.* (1982) 132 Cal.App.3d 886, 895 [allegations of failure to pay a medical claim did not support claim for intentional infliction of emotional distress].) Pleading a claim for negligent infliction of emotional distress is not subject to the same stringent requirements, but the usual negligence elements of duty, breach of duty, and damages caused thereby must be adequately set forth. (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1072.)

***12** In their attempt to assert a claim that respondents engaged in extreme and outrageous conduct or breached a duty of care by doing something other than failing to defend or accept tender, appellants' emotional distress claims focused on Chicago Title's actions in paying the Developer's litigation expenses for the Underlying Lawsuit and the mental anguish caused by being involved in that lawsuit. Appellants concede, however, that Chicago Title owed a contractual duty to the Developer, having issued it a title policy. A title insurer's decision to accept a duty to defend a party insured under a valid policy cannot be construed as extreme and outrageous conduct. Nor can the title insurer be held responsible for the actions of counsel in vigorously seeking to enforce their client's rights.

Moreover, by basing a claim on the existence of the easement and ensuing litigation, it appears that appellants are seeking to avoid the well-established rule that title insurers are not liable to real estate purchasers merely because an overlooked title defect exists and is revealed after the real estate transaction closes. (See, e.g ., *Siegel v. Fidelity Nat. Title Ins. Co., supra*, 46 Cal.App.4th at p. 1191; *Southland Title Corp. v. Superior Court* (1991) 231 Cal.App.3d 530, 536.) "The policy of title insurance ... does not constitute a representation that the contingency insured against will not occur." (*Fidelity National Title Ins. Co. v. Miller, supra*, 215 Cal.App.3d at p. 1175.) As we have seen, the issuance of the policy merely seeks to assure the real estate purchaser (or lender) that the insurer will pay any "loss or damage suffered by the insured caused by a defect in the insured's title that was not excepted by the terms of the policy." (3 Miller & Starr, *supra*, Title Insurance, § 7:230, p. 7-530.) As this court explained in *Siegel v. Fidelity Nat. Title Ins. Co., supra*, at page 1191: "[T]he function of title insurance is to protect against the possibility that liens and other items not found in the search or disclosed in the preliminary report exist. The records pertaining to real property are complex and encumbrances may be missed by even the most thorough search. Title insurance is an acknowledgement that errors may have been made."

Even if respondents had provided the defense requested by appellants, appellants would still have suffered the distress caused by the assertion of an easement across their property and would still have been involved in litigation with the Developer. Thus, even if Ernst

establishes that a title policy was issued to protect his interest in the Passmore Drive property, neither he nor his wife can recover for the mental suffering caused by any recorded easement across their land or by the fact that a third party sought to quiet title to that easement through litigation.

IV

Claims Against United as Escrow Agent

Appellants realized belatedly during the course of the litigation that if no title policy protecting Ernst could be found, one may never have issued, and that some party could be liable for failing to ensure that such a policy was procured prior to allowing the 1987 purchase to close. The initial attempt to assert the claim fell short. The tenth and eleventh causes of action in the TAC for "negligence" and "breach of fiduciary duty" assert that United was "the escrow company for the 1987 purchase of the [Passmore Drive property] by Ernst" and that United "breached its duties to Ernst by failing to obtain an owner's title insurance policy for Ernst while obtaining a title insurance policy for the lender." It nowhere attempted to explain how such a duty might have arisen.

***13** In the Fourth AC, appellants added the allegations that United "in addition to acting as title insurance company, also acted as the escrow company that oversaw and coordinated various portions of the purchase and sale of the residence, including conveying instructions to and from the title insurance company." From this it alleged that "[b]ased upon standards of practice within either the escrow industry, or the title insurance industry," United's duty of care included "ensuring that title insurance was in fact purchased when requested by [Ernst]." But appellants did not attempt to defend this version of the claim when respondents demurred. Instead, they filed a statement of non-opposition and permitted the demurrer to be sustained without leave to amend. Thus, any argument they could make with respect to the version of the claim set forth in the Fourth AC was waived. (*Redevelopment Agency v. City of Berkeley* (1978) 80 Cal.App.3d 158, 166["[A]n appellant may waive his right to attack error by expressly or impliedly agreeing at trial to the ruling or procedure objected to on appeal."]; *Nevada County Office of Education v. Riles* (1983) 149 Cal.App.3d 767, 779 ["The Superintendent has in effect waived his right to attack the trial court's decision ... by expressly defending or agreeing to the administrative and trial court action he now objects to on appeal."].)

Moreover, whether we consider the allegations of the TAC by themselves or in conjunction with the allegations of the Fourth AC, we do not believe the trial court's order sustaining the demurrer to the claims against United as escrow company should be reversed. In their brief, appellants cite authority for the proposition that (1) an escrow company owes "an obligation to diligently perform all acts required of it as described by escrow instructions and an implied obligation to do 'all things normally done by an escrow agent that are not expressly excluded by the escrow instructions' " (quoting *Kirk Corp. v. First American Title Co.* (1990) 220 Cal.App.3d 785, 806-807) and (2) "the escrow agent typically procures title insurance pursuant to instruction" (citing 3 Miller & Starr, Cal. Real Estate, supra, Escrows, § 6.1). But appellants did not mention escrow instructions covering the purchase of title insurance in either the TAC or Fourth AC. The TAC states that United "breached its duties to Ernst by failing to obtain an owner's title insurance policy for Ernst" without stating the basis for any such duty. The trial court was under no obligation to assume the existence of facts not alleged. (*Kramer v. Intuit Inc.* (2004) 121 Cal.App.4th 574, 578.)

The current rule requires the escrow agent to obtain title insurance only if instructed to do so by the buyer. (See 3 Miller & Starr, Cal. Real Estate, supra, Escrows, § 6:1, p. 7["[T]he escrow agent is not responsible for making a title search, or for reporting or disclosing the condition of the title, or for the contents of the insurance policy other than to assure that it complies with the buyer's instructions."].) By citing *Kirk Corp. v. First American Title Co., supra,* 220 Cal.App.3d 785, 806-807 for the proposition that an escrow company owes an implied obligation to do "all of the things normally done by an escrow agent which [are] not expressly excluded by the escrow instructions," appellants apparently invite the creation of a rule that escrow agents owe a duty to purchase title insurance on behalf of real estate purchasers and are liable whenever purchasers sustain loss as the result of failure to obtain title insurance-without regard to whether the procurement of such insurance was set forth in the escrow instructions or whether the funds to pay the substantial premium for such insurance was placed in the hands of the escrow company. We decline appellants' invitation. The creation of such a rule would place unwarranted liability on escrow agents.

***14** To support their position, appellants cite Civil Code section 1057.6. That law, enacted in 1992, requires a written caution to be given to real estate purchasers stating that "it may be advisable to obtain title insurance

in connection with the close of escrow since there may be prior recorded liens and encumbrances....” Section 1057.6 undercuts appellants’ contention that escrow agents must obtain title insurance for purchasers in the normal course of events; were such a duty recognized in law, the mandate of section 1057.6 that purchasers be advised to consider obtaining such insurance would be unnecessary.

Appellants did not below, and do not here, seek leave to amend the tenth and eleventh causes of action or discuss what further facts could be added to the pleadings if leave were granted. (See *Titus v. Canyon Lake Property Owners Assn.* (2004) 118 Cal.App.4th 906, 917 [“It is the plaintiff’s burden to show either the trial court or the reviewing court how the complaint can be amended to state a cause of action.”].) Even if they had, however, because they have filed five complaints, they have had a fair opportunity to correct defects in their pleadings. There is no obligation to give them permission to make further attempts at stating a cognizable claim against United as escrow company. (*Id.* at p. 918.)

V

Attorneys’ Fees

Our disposition reversing the judgment on the breach of contract claims as to Ernst requires the attorneys’ fees award to be reversed. Respondents could, however, seek to revive the award against Sharynlee. Respondents claim they are entitled to such fees because appellants “repeatedly asserted that they were entitled to attorneys’ fees arising from a purported breach of contract.” As appellants point out, however, the complaints do not refer to any attorneys’ fees provision in the alleged title policy but to the fees awardable as damages should appellants establish respondents breached the duty to defend. Moreover, under the majority view, “[a] prevailing party is not entitled to fees simply because the opposing party requested them.” (*Hasler v. Howard* (2005) 130 Cal.App.4th 1168, 1171.) A party moving for attorneys’ fees based on the reciprocal rights found in Civil Code section 1717 must “establish that the opposing party actually would have been entitled to receive them if the opposing party had prevailed. The mere allegation in a complaint that the plaintiff is entitled to receive attorneys’ fees does not provide a sufficient basis for awarding them to the opposing party if the plaintiff did not prevail .” (*Sessions Payroll Management, Inc. v. Noble Construction Co.* (2000) 84 Cal.App.4th 671, 681-682; accord, *M. Perez Co., Inc. v. Base Camp Condominium Assn. No. One* (2003) 111 Cal.App.4th 456, 467; *Sweat v. Hollister* (1995) 37 Cal.App.4th 603, 616-617, disapproved in part on another ground in *Santisas v. Goodin* (1998) 17 Cal.4th 599; *Super 7 Motel Associates v. Wang* (1993) 16 Cal.App.4th 541, 548-549.)

***15** While there is contrary authority (see, e.g., *Manier v. Anaheim Business Center Co.* (1984) 161 Cal.App.3d 503, 508; *Jones v. Drain* (1983) 149 Cal.App.3d 484, 489-490), we agree with the court in *M. Perez Co.*, *supra*, that a “fallacy” underlies the rule that a claim for attorneys’ fees on the part of the plaintiff, without more, should entitle the defendant to fees if he or she successfully defends.[13] (111 Cal.App.4th at p. 468.) It presumes that a plaintiff who merely claims attorneys’ fees in the complaint will recover such fees if he or she prevails. In fact, that party “must still prove that the contract allows attorney fees[;][t]he mere allegation is not enough.” (*Ibid.;* accord, *Leach v. Home Savings & Loan Assn.* (1986) 185 Cal.App.3d 1295, 1307 [“[Plaintiff’s] bare *allegation* that she is entitled to receive attorney’s fees would not have been sufficient to prove her case; she must also have established that the attorney’s fees clauses in the promissory note and the deed of trust *actually* entitled her to recover fees.”].) Neither in their moving papers nor in their brief on appeal, do respondents point to any provision in a standard title policy that awards attorneys’ fees to the prevailing party; nor do they otherwise seek to establish that appellants would have been entitled to fees had they prevailed. Their claim was based entirely on the allegations of the various complaints. Respondents needed more than appellants’ unproven allegations in order to prevail on their motion for attorneys’ fees.

DISPOSITION

The judgment is affirmed in part, reversed in part, and remanded for further proceedings as to the first, third, and fourth causes of action set forth in the third amended complaint as to Ernst only. The order granting attorneys’ fees is reversed. Appellants are to recover their costs on appeal.

We concur: EPSTEIN, P.J., and SUZUKAWA, J.

All Citations

Not Reported in Cal.Rptr.3d, 2006 WL 3530473

Footnotes

1 Fidelity National is frequently also referred to as “Fidelity National Title Insurance Company.”

2 To avoid confusion, appellants are referred to individually by their first names.

3 Appellants were apparently represented by counsel prior to filing their original complaint, but were not represented again until after filing the first amended complaint.

4 In opposing a demurrer to the SAC, counsel explained that his computer had crashed shortly before it was due to be filed and his re-written version of the complaint had been “corrupted.” Thus, “the text of the [FAC] had to be used as the format in order for the [SAC] to be served [within the court-imposed time frame for amendment].”

5 The denial of the motion to compel arbitration is not a subject of this appeal. However, certain representations made by respondents in connection with the motion are relevant to the issues raised here.

6 Respondents did not define the term “jacket.” We understand it to mean in this context the pages in the policy that contain its standardized terms.

7 As explained by one of the leading treatises in this area, “A title company may be either a title insurer or an underwritten title company.... Only a title insurance company is authorized to write policies of title insurance. An underwritten title company is not authorized to write its own policies of insurance but contracts with one or more title insurance companies to issue policies for that insurer as its limited agent.... The underwritten title company ... issues the policy as a limited agent of the title insurer pursuant to the terms of the underwriting or agency agreement with the title insurer.” (3 Miller & Starr, Calif. Real Estate (3d ed. 2000) Title Insurance, § 7:3, pp. 7-15-7-16.)

8 A third cause of action for breach of contract was based on the existence of an owner’s title insurance policy issued in connection with the refinance in 1992 (claim two). That claim is not discussed in the briefs on appeal, and we presume appellants no longer seek to assert it.

9 These representations were also the basis for claims of fraud (claims five and six) and misrepresentation (claim seven), which appellants do not seek to revive. Appellants’ brief likewise does not address the claim for unfair business practices under Business and Professions Code section 17200 (claim 8). We presume that claim, too, is abandoned.

10 Respondents stated in their memorandum in support of the motion to compel arbitration that “[t]he [title insurance] policy does not vary from client to client; instead, only one standard policy jacket, containing the conditions or the Conditions and Stipulations, which have been reviewed by the Department of Insurance, is issued to [the insurer’s] customers.”

11 As has been recognized by many courts and codified in the Insurance Code, prior to issuing policies, title insurers conduct searches of public records for clouds on title and prepare preliminary title reports containing their findings. (See, e.g., *Siegel v. Fidelity Nat. Title Ins. Co.* (1996) 46 Cal.App.4th 1181, 1193; Ins.Code § 12340.11.) Items located are excluded from coverage. (See, e.g., *Fidelity National Title Ins. Co. v. Miller* (1989) 215 Cal.App.3d 1163, 1175 [“A preliminary report ... reflects the terms under which the insurer is willing to issue a policy of title insurance. The terms and conditions under which the policy of insurance may be issued may or may not reflect the true condition of record title”]; Ins.Code § 12340.11 [“Preliminary reports” are “reports furnished in connection with an application for title insurance and are 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”].) “The insurer is liable for the loss or damage suffered by the insured caused by a defect in the insured’s title that was not excepted by the terms of the policy”. (3 Miller & Starr, Cal. Real Estate, *supra,* Title Insurance, § 7:229, p. 7-530.)

12 In response to appellants’ original tender, Chicago Title’s vice president and senior claims counsel referred to a specific policy by number. A subsequent letter from Chicago Title referred expressly to “the owner’s policy issued to Mr. Van De Bovenkamp.” In seeking to compel arbitration, respondents stated: “On August 21, 1987, [respondents] issued to [appellants] a title insurance policy insuring the property located at 2977 Passmore Drive” and that the policy contained an arbitration provision.

13 Respondents also cite *International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175, 1190. They overlook that the *International Billing Services* court reversed itself three years later in *M. Perez Co., supra,* stating: "[T]here is no sound policy or legal basis for the broad rule adopted by this court in *International Billing Services.* That rule would instead violate the very policy considerations it purports to serve. We agree with the many state court decisions refusing to apply estoppel against a losing party who sought attorney fees under circumstances where that party would not have been entitled to such fees had it prevailed." (111 Cal.App.4th at p. 470.)

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