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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MAJID MORTAZAVI et al., Plaintiffs and Appellants, v. FEDERAL INSURANCE COMPANY et al., Defendants and Respondents.	D072923 (Super. Ct. No. 37-2013-00076435-CU-IC-CTL)

APPEAL from judgments of the Superior Court of San Diego County, Joan M. Lewis, Judge. Affirmed.

Worthington Law Offices and Brian P. Worthington, for Plaintiffs and Appellants.

Tressler and Mohammed S. Mandegary, for Defendant and Respondent Federal Insurance Company.

Fidelity National Law Group and Kevin R. Broersma, for Defendant and Respondent Chicago Title Insurance Company.

Traub Lieberman Straus & Shrewsberry and Robert D. Dennison, for Defendant and Respondent State National Insurance Company, Inc.

Plaintiffs Majid Mortazavi (Majid) and Soodabeh Mortazavi (Soodabeh), husband and wife (sometimes Mortazavis), and Rancho Farm Construction Company (Rancho Farm) (the Mortazavis and Rancho Farm are sometimes collectively referred to as plaintiffs) appeal the judgments in favor of defendants Federal Insurance Company (Federal), State National Insurance Company, Inc. (State National), and Chicago Title Insurance Company (Chicago Title) (sometimes Federal, State National, and Chicago Title are collectively referred to as defendants). Defendants, under their respective policies of insurance, separately refused to defend plaintiffs in the third-party lawsuit titled *Sive v. Mortazavi, et al.*, San Diego County Superior Court case No. 37-2012-00090738-CU-OR- CTL (sometimes underlying action).[1]

Plaintiffs[2] contend the court erred in finding defendants had no duty to defend them in the underlying action, after they were sued by the buyer of real property developed by plaintiffs that is located in San Diego on Rancho Capistrano Bend (the Property). Specifically, plaintiffs contend Federal and State National owed them a duty to defend because plaintiffs' unintentional, but admitted, placement of a portion of the improvements to the Property on the adjacent property owned by Pardee Homes (Pardee)

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1 Also named in the underlying action was the Mortazavi Family Trust UTD (the Trust), which ultimately ended up owning and later selling real property to the buyer that was the subject of the underlying action. The Trust is not a party in this appeal.

2 Plaintiffs in their opening brief state that the Mortazavis, but not Rancho Farm, seek coverage under the Federal policy; that the Mortazavis and Rancho Farm seek coverage under the State National policies; and that Majid alone seeks coverage under the Chicago Title policy. In light of our analysis in this case, we deem it unnecessary to distinguish plaintiffs on a policy-by-policy basis.

constituted "property damage" caused by an "occurrence" as separately defined in the policies of insurance issued by each insurer. Plaintiffs further contend Chicago Title also had a duty to defend them in the underlying action based on the "title risks" covered by its policy. As we explain, we independently conclude the court properly granted summary judgment for defendants. Affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

As noted by the trial court in its ruling granting summary judgment in favor of defendants and denying plaintiffs' cross-motion for summary adjudication on the duty to defend, myriad facts in this case are undisputed, including those set forth below.

Overview

Majid and Soodabeh at all times relevant were the president and vice-president, respectively, and the sole shareholders, of Rancho Farm. At all times relevant, Majid was a licensed contractor and Rancho Farm was a licensed construction company that sometimes constructed "spec" homes on undeveloped land purchased by the Mortazavis.

On October 6, 2004, Majid acquired the (undeveloped) Property from Pardee as his sole and separate property. The Property was located next to a development known as "Rancho Pacifica." This development at all times relevant was managed by the Rancho Pacifica Homeowners Association (Rancho HOA). At the time of its purchase, the Mortazavis intended to build a home and live on the Property. However, because of the downturn in the economy, in about 2008 or 2009 the Mortazavis instead decided to build a custom home on the Property and sell it to a third party.

Before construction began, Majid hired a surveyor to "mark the lot lines" of the Property. Majid relied on the surveyor's boundary markers when constructing the improvements on the Property. Plaintiffs in July 2008 began excavation and construction on the Property's eastern boundary line, adjacent to the Pardee property. Rancho Farms was the general contractor.

As it turned out, the eastern boundary lot line was incorrect. As a result, the "swimming pool was marked for excavation[] approximately five feet west of the eastern boundary line," on Pardee's property. The "excavation of the swimming pool bowl . . . began [in] and was completed prior to 2009." A "large date palm tree on the southeast corner of the Property began to be planted and was completed by the end of 2009." Also, the "large rock formations/boulders began to be placed and [were] completely placed near the date palm tree in the southeast corner of the Property by the end of 2009."

"By no later than February 2009, Plaintiffs began trenching and laying the concrete footing along the entirety of the eastern boundary line for the concrete masonry wall." "The trenching, digging the footing, laying of the concrete footing and construction of the concrete masonry block wall was completed no later than August 2009 ('CMU Wall')." "On top of some portion of the CMU Wall, Plaintiffs installed a wrought[-]iron fence. [¶] On top of other portions of the CMU Wall, Plaintiffs installed additional concrete blocks." "The CMU Wall was constructed on the eastern boundary line to demarcate the Property from the adjacent Pardee's property."

"The issues concerning the trenchings for the footing of the CMU Wall beyond the property line and onto the Pardee's property were brought to Majid's attention by the

Rancho HOA in January 2009." Moreover, in "a letter dated February 12, 2009, the Rancho HOA informed the Mortazavis that a Bird of Paradise tree was planted on the slope to the east of the Property, which was actually the Pardee [p]roperty." The Rancho HOA in this same letter demanded that the tree be removed, which was done by the Mortazavis about two or three days later.

On July 16, 2009, Majid transferred the Property to himself and Soodabeh as community property, who together then transferred the Property into the Trust. Rancho Farm at no time was an owner of the Property.

About a month later, the Rancho HOA Design Review Committee met and discussed the fact that the Mortazavis "may have encroached onto the Pardee [p]roperty." On August 13, 2009, "Majid attended a meeting with the Rancho HOA, which addressed a 'palm tree and the retaining wall installed on Mr. Mortazavi's property, neither of which were in accordance with the approved plans for the property.' " Also at this same meeting, "Majid was informed that the CMU wall appeared to be extending past the southeast corner property monument." As a result of this information and at the request of the Rancho HOA, after the August 13 meeting a "City inspector determined that Majid's concrete footing for the CMU Wall was two inches beyond the monuments and Majid was told to cut the footing to fix it." Majid complied with this instruction in 2009 "by excavating the footing and removing the footing that encroached onto Pardee's property."

The Property was "substantially completed by mid-2010," and was listed for sale on May 27, 2010. Thereafter, nobody lived on the Property. About a year later, plaintiffs

and third-party buyer Glynis Arlene Sive entered into an agreement whereby Sive agreed to pay about $2.825 million to buy the Property. Escrow closed on July 1, 2011, the same day the grant deed was recorded.

Sive in January 2013 filed the underlying action against the Mortazavis alleging causes of action for rescission-fraud, rescission-negligent misrepresentation, rescission-mistake, breach of contract, fraud, and negligent misrepresentation. Sive in her complaint alleged in part as follows: " 'In and around May 2011 and June 2011 during the course of [Sive's] purchase of the Property, the Mortazavis completed several written disclosure statements regarding the condition of the Property. Through these disclosures, the Mortazavis affirmatively represented that the Property did not encroach onto any of the adjoining properties and that the Property, and its improvements, met all applicable zoning and setback requirements. The representations made by the Mortazavis were in fact false. The true facts were the Property encroached onto an adjoining property by approximately eight feet by one hundred feet (8' x 100'). Without the encroaching area, the Property will substantially diminish in value and be rendered unsalable."

Sive's complaint in the underlying action further alleged that plaintiffs orally represented that the "Property abutted an open space area in which future development would not occur," which turned out to be false because the Property "abutted an area in which development is planned to occur, including home sites directly abutting and directly behind the Property."

The Mortazavis in February 2012 cross-complained against Pardee, which pleading they amended in February 2014 to also include Rancho Pacifica HOA. In their

amended cross-complaint, the Mortazavis alleged as follows: "Specifically, it is stated in written Minutes from a RANCHO PACIFICA meeting on January 28, 2009 that 'Homeowner' — meaning Cross-Complainants — 'built on Pardee property.' Therefore, it appears that all of those persons present at the meeting were aware of the alleged encroachment, and yet no one informed Cross-Complainants of the alleged encroachment."

In April 2012, Pardee filed its own cross-complaint against the Mortazavis, which it amended in September 2013 to include Rancho Farm and which asserted causes of action for express indemnity, declaratory relief, and trespass. Pardee in its amended cross-complaint alleged that Majid and Rancho Farm " 'constructed improvements, including but not limited [to] a home, a pool and landscaping (e.g., retaining wall and fence)' " on the Property that encroached "onto the Pardee [p]roperty by up to eight feet"; and that Pardee never gave plaintiffs "permission to build on, or encroach onto, the Pardee [p]roperty."

In October 2015, a jury in the underlying action awarded Sive $275,000 in damages against Majid only for breach of contract.

The Federal Policy

Federal issued an insurance policy to plaintiffs[3] (Majid) effective from

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3 As noted *ante* in footnote 2, we deem it unnecessary to distinguish between plaintiffs when analyzing whether any of them were entitled to a defense in the underlying action under one or more of the policies separately issued by defendants.

October 21, 2010 to October 21, 2011, providing home and contents coverage for the Property, as well as personal and liability coverage (policy No. 13670270-01). The Federal policy included a definition section defining "You" to mean the "person named in the Coverage Summary, and a spouse who lives with that person"; and "Business" to mean "any employment, trade, occupation, profession, or farm operation including the raising or care of animals." (Emphasis in original deleted.)

Regarding personal liability coverage, the Federal Policy stated, "We cover damages a covered person is legally obligated to pay for personal injury or property damage which take place anytime during the policy period and are caused by an occurrence, unless stated otherwise or an exclusion applies." The Federal policy defined "occurrence" to mean "an accident or offense to which this insurance applies and which begins within the policy period. Continuous or repeated exposure to substantially the same general conditions unless excluded is considered to be one occurrence." The Federal policy defined " '[p]roperty damage' " in part as follows: "[P]hysical injury to or destruction of tangible property, and the resulting loss of its use."

Among the exclusions in the Federal policy was for "[b]usiness pursuits," which provided in part as follows: "We do not cover any damages arising out of a covered person's business pursuits, investment or other for-profit-activities, any of which are conducted on behalf of a covered person or others, or business property. [¶] But we do cover damages arising out of . . . incidental business property, . . . unless another exclusion applies." The Federal policy stated that " '[i]ncidental business property' is

limited to the rental or holding for rental, to be used as a residence, of . . . a one or two family dwelling owned by you. . . ."

The Federal policy also excluded damages for "[p]rofessional services," noting: "We do not cover any damages for any covered person's performing or failure to perform professional services, or for professional services for which any covered person is legally responsible or licensed."

By letter dated April 20 and 24, 2012, counsel for the Mortazavis tendered the Sive complaint and Pardee cross-complaint to Federal. On April 27, 2012, Federal acknowledged receipt of the tender letters and thereafter began an investigation into the claims, including sending a May 2, 2012 letter to counsel for the Mortazavis asking a series of questions in order to "understand the who, what, where, when and how facts" for this claim. The following day, counsel for the Mortazavis responded by e-mail in part as follows: "1. Mr. Mortazavi built the home and improvements in 2008. The encroachments, as alleged in the [Sive] Complaint . . . are approximately 8 ft. x. 100 ft., do not include the house on the property but includes landscaping, fence and/or pool." In early June 2012, Federal informed the Mortazavis that it was continuing to investigate the tender of the claim arising from the underlying action.

On June 26, 2012, Federal denied coverage under the Federal policy for the claims asserted against plaintiffs in the underlying action. Based on a request for reconsideration of its denial, Federal on July 18 and 26, August 22 and 29, and September 18, 2012 requested the Mortazavis provide "additional facts, documents or legal authority" that they contended supported their request for reconsideration. Federal

notified the Mortazavis in mid-October 2012 that it was maintaining its position that there was no coverage under its policy, and thus denied their reconsideration request.

The State National Policies

State National issued two consecutive commercial general liability insurance policies to plaintiffs (Rancho Farm), policy number NS1200058, effective September 17, 2008 to September 17, 2009, and policy number NS1203368, effective between September 17, 2009 to September 17, 2010. Both policies contained the "same relevant insuring agreement" pursuant to the standard Insurance Services Office form CG 00 01 12 04 (2003) general liability policy.

On or about April 24, 2012, the broker of the Mortazavis tendered the claims arising from the underlying lawsuit to State National. In late April 2012, a representative of State National made a request for additional information before the insurer could make a coverage determination. When it received no response, State National made myriad other requests for information, which was provided by the Mortazavis (through new counsel) in July 2012.

The State National polices provided coverage for "bodily injury" and "property damage" liability in part as follows: "We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. We will have the right and duty to defend the insured against any 'suit' seeking those damages. However, we will have no duty to defend the insured against any 'suit' seeking damages for 'bodily injury' or 'property damage' to

which this insurance does not apply. We may, at our discretion, investigate any 'occurrence' and settle any claim or 'suit' that may result."

The State National policies defined an "insured" as follows: "An organization other than a partnership, joint venture or limited liability company, you are an insured. Your 'executive officers' [i.e., Majid and Soodabeh] and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders [i.e., same] are also insureds, but only with respect to their liability as stockholders. . . . No person or organization is an insured with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declarations."

Under the State National policies, coverage applied to "bodily injury" and "property damage" only if such was "caused by an 'occurrence' that takes place in the 'coverage territory.' " "Occurrence" was defined to mean "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." "Property damage" was defined to mean "[p]hysical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or [¶] [l]oss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the 'occurrence' that caused it."

State National on July 19, 2012, issued its denial of coverage to the Mortazavis, which denial subsequently included Rancho Farm after it was named as a cross-defendant in the underlying action. State National denied coverage under both of its policies based

on the "fact that the Mortazavis were not insureds under the State National policies for their alleged conduct in the [u]nderlying [a]ction, and because there was no property damage caused by an 'occurrence' alleged in the [u]nderlying [a]ction."

Chicago Title

In connection with Majid's purchase of the Property from Pardee, Chicago Title issued a policy of title insurance to plaintiffs (Majid) effective October 6, 2004 (No. T128CL128). The Chicago Policy included 14 potential risk provisions that it would cover, subject to conditions, exclusions and exceptions, if one or more of these risks "affect the insured's title on the Policy Date."

In connection with the sale of the Property to Sive on July 1, 2011, Majid, for himself only, claimed "there were no other liens, or encumbrances on the Property that were not disclosed, and paid off through escrow." The underlying action did "not allege that [the Mortazavis] or Rancho Farm conveyed the Property to any other person, or that the Property was subject to undisclosed encumbrances and there [were] no claims for breach of warranty."

Court's Ruling

1. Federal

The court found that the claims made in the "Sive [c]omplaint," which it noted were "essentially misrepresentations," "did not constitute an 'occurrence' (i.e., an 'accident' or 'offense') under the [Federal] policy." The court also found there was no "personal injury" or "property damage" as defined under the Federal policy "with respect to the claims made by Sive." In fact, the court noted plaintiffs appeared to concede that

there was no potential for coverage for the Sive complaint, inasmuch as plaintiffs did not address this issue in their opposition to Federal's motion for summary judgment.

The court next turned to Rancho Farm. It noted plaintiffs again conceded for purposes of this motion that Rancho Farm was not an insured under the Federal policy and thus, did not seek coverage under that policy.

That left the Pardee cross-complaint against plaintiffs. The court found that Federal "met its burden of demonstrating that the Pardee Cross-Complaint — and any available extrinsic evidence — did not concern claims that could constitute an accident"; that quite simply, "[e]ncroachment on another's property is not an 'accident[]' [s]ee *Fire Ins. Exch. v. Superior Court* (2010) 181 Cal.App.4th 388 [(*Fire Ins.*)]"; and that "even *if*" Pardee's claims against plaintiffs involved property damage "as a result of the *defective* (as opposed to *improper*) construction of the [retaining] wall," and "even if such a claim constituted an 'accident,' the more important issue with respect to Federal concerns the timing of the purported accident in light of the fact the policy specifically provided that to be a covered accident, the accident must 'begin[] within the policy period' and, as well, that the property damage 'take place during the policy period.' "

Because the court found it "undisputed" that the "construction of the CMU wall was completed no later than August 2009," "well before the inception of the Federal Policy on October 21, 2010," and because the court also found summary judgment was proper on other grounds as summarized *ante*, it granted Federal's summary judgment motion.

2. State National

Also relying on *Fire Ins.*, the court engaged in a similar analysis in finding that State National met its burden of showing there was no potential for coverage of the claims asserted against plaintiffs in the underlying action. Specifically, the court found that the "claims in both the Sive Complaint and the Pardee Cross-Complaint did not involve an 'occurrence' (i.e., 'accident')" within the meaning of the State National policies.

As was the case with respect to the Federal policy, the court found that plaintiffs conceded that there "there was no potential for coverage relative to the claims made in the Sive Complaint"; and that their main "focus" in arguing they were entitled to a duty to defend was based on the Pardee cross-complaint, which they further argued included a "claim that Plaintiffs' improper construction of [the] retaining wall caused property damage to the slope on Pardee's land."

In rejecting this argument, the court noted that plaintiffs conceded that "these facts were not actually pled by Pardee. [Citation.] Plaintiffs contend that the improper construction constituted an 'occurrence' (or [']accident[']) under the policy because there was no intent to build the wall in a way that would cause damage to the slope of Pardee's land."

The court, however, found there was "no evidence that Pardee made a claim that the wall caused any damage other than encroachment onto Pardee's property." In so finding, the court again "distinguish[ed] a claim for 'improper' construction with what Plaintiffs really appear to be suggesting — 'defective' construction. The nature of an

encroachment would be an improper construction. . . . The Court could locate no evidence that Pardee at any time claimed slope damage due to the wall being defective. Again, for this reason, the Court finds Plaintiffs' construction defect authorities distinguishable." The court therefore granted State National summary judgment.

3. Chicago Title

Finally, the court found this insurer also was entitled to summary judgment because there was "no applicable covered title risk that would apply in this case; that any claims raised in the underlying action arose after the date of the policy; that Plaintiffs created the harm[;] and that, at any rate, the policy ceased being effective upon the sale of the property to Sive."

In reaching its decision, the court rejected plaintiffs' argument that there was a potential for coverage under two of the 14 enumerated title risks: "3. . . . [F]raud, . . . [and] [¶] 11. Your tile is unmarketable, which allows another person to refuse to perform a contract to purchase, to lease or to make a mortgage loan." "With respect to the fraud risk, Plaintiffs contend that because the claims made in the Sive Complaint concerned allegations of fraud there was a potential for coverage. The Court rejects that argument because (1) the alleged fraud in the Sive Complaint did not concern fraud affecting the Plaintiffs' title on the date of the policy [as also required]; and (2) Plaintiffs cited no authority that *their own fraud* could support coverage.

"The court similarly rejects the argument that the unmarketable title risk would apply. Again, the unmarketable title, under the policy, would have had to have been in existence as of the date of the policy. The conduct that Plaintiffs claim rendered the

property unmarketable (the encroachment) occurred several years after the date of the policy[.]

"The Court also agrees with Chicago Title that there is a distinction between *property* being unmarketable in the sense of a loss of value and *title* to property being unmarketable. As Chicago Title argued, Sive acquired the entirety of the property from the Plaintiffs as described in Schedule A to the policy. There was nothing unmarketable about the title." Based on these reasons as well as others the court also granted Chicago Title summary judgment.

DISCUSSION

A. *Principles Governing Summary Judgment Review*

"Summary judgment . . . provide[s] courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute. [Citations.] A defendant moving for summary judgment or summary adjudication may demonstrate that the plaintiff's cause of action has no merit by showing that (1) one or more elements of the cause of action cannot be established, or (2) there is a complete defense to that cause of action." (*Collin v. CalPortland Co.* (2014) 228 Cal.App.4th 582, 587 (*CalPortland*).)

Generally, "the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if [that party] carries [t]his burden of production, [the moving party] causes a shift, and the opposing party is then subjected to a burden of production of his [or her] own to make a prima facie showing of the existence of a triable issue of material fact."

(*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) In moving for summary judgment, "all that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action—for example, that the plaintiff cannot prove element X." (*Id.* at p. 853.)

"After the defendant meets its threshold burden [to demonstrate that a cause of action has no merit], the burden shifts to the plaintiff to present evidence showing that a triable issue of one or more material facts exists as to that cause of action or affirmative defense. [Citations.] The plaintiff may not simply rely on the allegations of its pleadings but, instead, must set forth the specific facts showing the existence of a triable issue of material fact. [Citation.] A triable issue of material fact exists if, and only if, the evidence reasonably permits the trier of fact to find the contested fact in favor of the plaintiff in accordance with the applicable standard of proof." (*CalPortland*, *supra*, 228 Cal.App.4th at p. 588.)

"On appeal, the reviewing court makes ' "an independent assessment of the correctness of the trial court's ruling [regarding summary judgment], applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law." ' " (*Hesperia Citizens for Responsible Development v. City of Hesperia* (2007) 151 Cal.App.4th 653, 658.) Our task is to determine whether a triable issue of material fact exists. (*CalPortland*, *supra*, 228 Cal.App.4th at p. 588.) In independently examining the record on appeal "to determine whether triable issues of material fact exist" (*Abriz v. Kelegian* (2007) 146 Cal.App.4th 1519, 1530), we " 'consider[ ] all the evidence set forth

in the moving and opposition papers except that to which objections were made and sustained.' " (*Ibid.*)

B. *The Duty to Defend*

In independently reviewing the grant of summary judgment in a dispute over the interpretation of the provisions of a policy of insurance, we apply " ' "settled rules governing the interpretation of insurance contacts." ' " (*Stellar v. State Farm General Ins. Co.* (2007) 157 Cal.App.4th 1498, 1503.) An "insurer is entitled to summary [judgment] that no potential for indemnity exists and thus no duty to defend exists if the evidence establishes as a matter of law that there is no coverage." (*Smith Kandal Real Estate v. Continental Casualty Co.* (1998) 67 Cal.App.4th 406, 414.)

" ' "While insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply." [Citations.] "The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties." [Citation.] "Such intent is to be inferred, if possible, solely from the written provisions of the contract." ' " (*Powerine Oil Co., Inc. v. Superior Court* (2005) 37 Cal.4th 377, 390.) "Whether a clause is ambiguous and whether [an insured] has an objectively reasonable expectation of coverage in light of the insuring language are questions of law." (*Windsor Food Quality Co., Ltd. v. Underwriters of Lloyds of London* (2015) 234 Cal.App.4th 1178, 1185.) "Courts do not engage in forced construction of insuring clauses to find coverage, nor will they strain to create an ambiguity where none exists." (*Ray v. Valley Forge Ins. Co.* (1999) 77 Cal.App.4th 1039, 1044 (*Ray*).)

"An insurer's duty to indemnify and its duty to defend an insured 'lie at the core of the standard [insurance] policy.' [Citation.] The duty to defend is broader than the duty to indemnify. [Citation.] 'Unlike the obligation to indemnify, which is only determined when the insured's liability is established, the duty to defend must be assessed at the very outset of a case.' " (*Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277, 286–287 (*Hartford Casualty*).)

When determining whether a duty to defend exists, the insurer must compare the allegations of the complaint and the terms of the insurance policy. (*Hartford Casualty, supra*, 59 Cal.4th at p. 287.) Furthermore, the insurer must consider " 'extrinsic facts known to the insurer suggest[ing] that the claim may be covered.' " (*Ibid.*) "[W]here the extrinsic facts eliminate the potential for coverage, the insurer may decline to defend even when the bare allegations in the complaint may suggest potential liability. [Citations.] This is because the duty to defend, although broad, is not unlimited; it is measured by the nature and risks covered by the policy." (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 19 (*Waller*).)

C. *Analysis*

1. <u>There Was No "Accident" within the meaning of the Federal and State National Policies</u>

As noted, Federal's policy covered "damages a covered person is legally obligated to pay for personal injury or property damage which take place anytime *during the policy period and are caused by an occurrence*, unless stated otherwise or an exclusion applies." (Italics added.) The Federal policy in turn defined an "occurrence" to mean "an accident

or offense to which this insurance applies and which begins within the policy period." The State National policies similarly provided that coverage applied to "bodily injury" and "property damage" only if such was "caused by an 'occurrence,' " which in turn was defined in the State National polices as "an accident, including continuous and repeated exposure to substantially the same general harmful conditions."

Federal and State National separately contend that the action of plaintiffs in constructing a portion of the pool, retaining wall, and other improvements on Pardee's property did not constitute an "accident" within the meaning of their respective polices, but instead was an intentional act. We agree.

The *Fire Ins.* case relied by the trial court informs our analysis on this issue. There, plaintiff homeowners brought an action against their homeowners insurer after it refused to defendant the homeowners in a quiet title action involving the homeowners' neighbors. (*Fire Ins.*, *supra*, 181 Cal.App.4th at p. 390.) The trial court in that case had denied the insurer's motion for summary judgment based on the argument that building a structure on another's property, even in the "good faith but mistaken belief that [the homeowners] were legally entitled to build where they did" (*ibid.*), was not an accident for purposes of an "occurrence." (*Ibid.*) The court of appeal disagreed with the trial court, and thus granted the insurer's petition for writ of mandate directing the court to grant summary judgment. (*Ibid.*)

Similar to the language in the Federal and State National policies regarding an "occurrence," the policy in *Fire Ins.* defined an " 'occurrence' . . . as 'an accident including exposure to conditions which results during the policy period in . . . property

damage.' " (*Fire Ins., supra,* 181 Cal.App.4th at p. 392.) The homeowners in *Fire Ins.*, much like the Mortazavis here, argued that their mistaken belief that they owned the property where they built a portion of their improvements, which turned out to be their neighbors' property, was an "accident" for purposes of an "occurrence."

In rejecting this argument, the *Fire Ins.* court found that the word " 'accident,' " when given a " 'commonsense interpretation,' " means " 'an unintentional, unexpected, chance occurrence.' " (*Fire Ins., supra,* 181 Cal.App.4th at p. 392.) The court then explained as follows that an accident "does not occur when the insured performs a deliberate act unless some additional, unexpected, independent, and unforeseen happening occurs that produces the damage. (*Merced Mutual Ins. Co. v. Mendez* (1989) 213 Cal.App.3d 41, 51 [(*Merced*)]. *Merced* explains the distinction by the following examples: When a driver intentionally speeds and as a result, negligently hits another car, the speeding is an intentional act. However, the act directly responsible for the injury—hitting the other car—was not intended by the driver and was fortuitous. Accordingly, the occurrence resulting in injury would be deemed an accident. This situation is distinct from an instance where a driver speeds and deliberately hits the other car.

"Where the insured intended all of the acts that resulted in the victim's injury, the event may not be deemed an 'accident' merely because the insured did not intend to cause injury. (*Ray*[, *supra,*] 77 Cal.App.4th [at pp.] 1045–1046; see also *Collin v. American Empire Ins. Co.* (1994) 21 Cal.App.4th 787, 810 (*Collin*).) The insured's subjective intent is irrelevant. (*Quan v. Truck Ins. Exchange* (1998) 67 Cal.App.4th 583, 598

(*Quan*); *Lyons v. Fire Ins. Exchange* [(2008)] 161 Cal.App.4th 880 [(*Lyons*)].) Indeed, it is well established in California that the term 'accident' refers to the nature of the act giving rise to liability; not to the insured's intent to cause harm. (*Collin*, at p. 810.)

"In several cases pertinent to our analysis, the courts have refused to find an accident in circumstances where the insured committed an act based on a mistaken belief in the legal right to engage in that conduct. Thus, in both *Quan* and *Lyons* a third party claimed the insured committed some act of sexual assault and the insured relied on a mistaken belief that there was consent. Because the insured intended to commit the act, the occurrence was not an accident even if the insured believed it was consensual. (*Quan*, *supra*, 67 Cal.App.4th at p. 598; *Lyons . . ., supra*, 161 Cal.App.4th 880.) Similarly in *Merced . . ., supra,* 213 Cal.App.3d 41, acts of oral copulation and attempted oral copulation were held not to be accidents notwithstanding [the] insured's mistaken belief that victim consented. (See also *J.C. Penney Casualty Ins. Co. v. M.K.* (1991) 52 Cal.3d 1009, 1014 [homeowners policy as a matter of law did not provide coverage for child molestation regardless of lack of intent to harm].) Our Supreme Court has recently reaffirmed this principle in *Delgado v. Interinsurance Exchange of Automobile Club of Southern California* (2009) 47 Cal.4th 302, where it concluded that 'an insured's unreasonable belief in the need for self-defense does not turn the resulting purposeful and intentional act of assault and battery into "an accident" within the policy's coverage clause.' (*Id.* at p. 317.)

"The principle that an insured's mistake of fact or law does not transform a purposeful act into an accident has been applied in situations other than those involving

sexual contact and assault and battery. In *Collin*, *supra*, 21 Cal.App.4th 787, a misunderstanding of legal rights did not turn conversion of property into an accident. (See also *Swain v. California Casualty Ins. Co.* (2002) 99 Cal.App.4th 1 [mistaken belief that acts were lawful did not render wrongful eviction of tenant an accident]; *Lipson v. Jordache Enterprises, Inc.* (1992) 9 Cal.App.4th 151, 159 [An employment termination, even if due to a mistake of fact, is an intentional act and the mistake of fact does not transform it into an accident that triggers an insurer's duty to defend].) …

"[¶] . . . [¶]

"Also instructive is *Modern Development Co. v. Navigators Ins. Co.* (2003) 111 Cal.App.4th 932, where the insured owned a swap meet and was sued by a disabled person for failing to comply with accessibility requirements because he was unable to access a restroom. The insured filed suit against its insurer for breach of contract after the insurer refused to defend. The policy defined an 'occurrence' to mean 'accident.' The trial court granted summary judgment in favor of the insurer, concluding that there was no 'occurrence' that triggered coverage. The Court of Appeal affirmed, stating that the disabled person's alleged injuries were caused by the architectural configuration of the swap meet and the owner's alleged failure to remove architectural barriers, not by an accident. 'The Swap Meet intended for the bathrooms to be configured as they were. The result is that the incident involving [the disabled person] is not a covered event.' (*Id.* at p. 943.)

"So too here, the [homeowners] intended to build the house where they built it. Accepting their contention that they believed they owned the five and one-half foot strip

of land and had the legal right to build on it, the act of construction was intentional and not an accident even though they acted under a mistaken belief that they had the right to do so. The [homeowners] insist that their engineer failed to obtain and include an executed grant deed in the Lot Line Adjustment application resulting in their failure to obtain the legal right to build where they did. They argue that this failure was merely an unintended aspect in the causal series of events leading to the encroachment. However, the reasons for their failure to obtain title is irrelevant to the determination whether the act in locating the building where they did can be characterized as an accident. There was no unexpected and unintended event between the intentional construction of the building and the encroachment. [The homeowners thus] acted under a mistaken belief that they owned the property and had the legal right to take the action they did. Just like the insureds in *Quan* or *Lyons*, who acted under a mistaken belief that there was consent, the [homeowners'] mistaken belief in their legal right to build does not transform their intentional act of construction into an accident. Accordingly the trial court erred in denying summary judgment because, based on the uncontested facts, there is no potential for coverage." (*Fire Ins.*, *supra*, 181 Cal.App.4th 388, 392–396.)

Here, the record shows that plaintiffs, much like the homeowners in *Fire Ins.*, acted under the good faith, albeit mistaken, belief that the improvements they were making to the Property near the eastern border lot line were entirely on their property, when in fact a portion of the pool, the large rock and boulder formations, and the concrete masonry block wall encroached on the Pardee property. Although plaintiffs did not intend to encroach on the Pardee property and/or to cause any injury or damage to that

property, their deliberate acts of placing a portion of these various improvements on the Pardee property was not the result of an "accident" under the Federal and State National policies of insurance.

As such, we independently conclude the claims made by Sive and/or Pardee in the underlying action were not covered under the Federal and State National policies, as there was "no unexpected and unintended event between the intentional construction [by plaintiffs] of [a portion of the improvements] and the encroachment [onto the Pardee property]." (See *Fire Ins., supra,* 181 Cal.App.4th at p. 396; see also *Albert v. Mid-Century Ins. Co.* (2015) 236 Cal.App.4th 1281, 1284 [affirming summary judgment for insurer because the claims asserted against the plaintiff homeowner by the plaintiff's neighbor arose from "nonaccidental conduct" when the plaintiff "erected an encroaching fence[] and pruned nine mature olive trees" on her neighbor's property, and in so doing, noting that it was "undisputed that the contractor [hired by the plaintiff] intended to cut the trees, and absolutely no facts exist, in the complaint or otherwise, indicating that some unforeseen accident (such as a slip of the chainsaw) caused the damage to the trees" belonging to the plaintiff's neighbor].)

2. <u>There Also Was No "Accident" or "Property Damage" Taking Place During the Federal "Policy Period"</u>

Moreover, we further independently conclude the grant of summary judgment for Federal was proper because the Federal policy only provided coverage for "personal injury" or "property damage" that "take place anytime during the policy period . . . ." Federal's policy, as noted *ante,* was effective from October 21, 2010 to October 21, 2011.

The *undisputed* facts in the instant case show that by the end of 2009, plaintiffs had completed excavation of the pool, had planted the large date palm tree, had placed large rocks/boulders near the eastern border of their property line, and had erected the concrete masonry block wall; that a portion of such improvements encroached on the Pardee property; that the Rancho HOA as early as January 2009 informed Majid that certain improvements made by plaintiffs encroached on Pardee's property; that in mid-August 2009, Majid attended a Rancho HOA meeting and was again informed some of the improvements made by plaintiffs encroached on Pardee's property; and that the home on the Property was "substantially completed by mid-2010" and was listed for sale in late May 2010.

Based on these undisputed facts, the record shows that even *if* plaintiffs' intentional act of encroaching on the Pardee property qualified under the Federal policy as an "accident," and even *if* the encroachment of a portion of the improvements made by plaintiffs somehow constituted "property damage" within the meaning of that policy, we nonetheless independently conclude as a matter of law that neither the "accident" nor the "property damage" involved claims by Sive and/or Pardee that began or occurred within the "policy period" (i.e., between October 21, 2010 and October 21, 2011). For this separate reason, we independently conclude the court properly granted summary judgment for Federal.[4]

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4 In light of our decision, we need not decide whether the "business pursuits" and/or "provisional services" exclusions in the Federal policy apply in this case.

3. There Was No Potential Title Defect that Existed at the Time of the Effective Date of the Chicago Title Policy

As noted *ante*, it is undisputed that the effective date of the Chicago Title policy issued was October 6, 2004 — the same date plaintiffs (Majid) acquired the Property from Pardee. It also is undisputed that the Chicago Title policy included 14 potential coverage provisions that would provide coverage (subject to conditions, exclusions and/or exceptions) if any of these risks "affect the insured's title on the *Policy* Date" (italics added); that when Majid acquired the Property in 2004, none of the 14 potential coverage risks under the Chicago Title policy applied; that *before* plaintiffs began to make improvements on the Property in 2008, again none of the 14 potential coverage risks applied; and that it was only the result of the nonaccidental conduct of plaintiffs in making such improvements to the Property that led Sive in 2012 and ultimately, Pardee in 2013, to sue plaintiffs in the underlying action. Based on these undisputed facts, we conclude Chicago Title met its burden to show there was no applicable covered title risk that would apply to its policy on the "Policy Date."

As they did in the trial court, plaintiffs on appeal argue the "fraud" and "unmarketable title" risks afforded them the potential for coverage under the Chicago Title policy. We disagree.

First, as we have just noted, for these or any other risks to provide the potential for coverage, the risks must have been in existence when the title policy issued, in this case on October 6, 2004. The undisputed facts show otherwise.

Second, a title insurance policy does not cover, and thus a title insurer such as Chicago Title does not owe a duty to defend, an insured for claims based on the insured's tortious or fraudulent conduct. (See e.g., *Safeco Title Ins. Co. v. Moskopoulos* (1981) 116 Cal.App.3d 658, 665-666 (*Moskopoulos*) [concluding that title insurance does not protect against alleged tortious conduct by the insured in acquiring title because the policy only insured against loss or damage sustained by reason of "[a]ny defect in or lien or encumbrance on [the] title"].) " 'Title insurance is a contract to indemnify against loss through defects in the title or against liens or encumbrances that may affect the title at the time when the policy is issued.' " (*Elysian Investment Group v. Stewart Title Guaranty Co.* (2002) 105 Cal.App.4th 315, 320; see *Rosen v. Nations Title Ins. Co.* (1997) 56 Cal.App.4th 1489, 1500 [noting changes in the condition of title *after* the insurer issues the policy are outside the scope of coverage].)

Unlike other types of insurance such as homeowners (i.e., the Federal policy) or general liability (i.e., the State National policies), "title 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." (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 41 (*Quelimane*).) Thus, title insurance protects against the possibility that liens or other encumbrances exist, even though they were missed in the title search or the preliminary title report. (*Siegel v. Fidelity Nat. Title Ins. Co.* (1996) 46 Cal.App.4th 1181, 1191; see *Quelimane*, *supra*, at p. 41 [noting a title insurer issues its policies on the basis of, and in reliance on, its own investigation into recorded instruments].)

Turning to the instant case, we conclude any claims of tortious or fraudulent conduct made by Sive and/or Pardee against plaintiffs in the underlying action as a matter of law are not covered risks under the Chicago Title policy. (See *Moskopoulos*, *supra*, 116 Cal.App.3d at pp. 665–666; see also *Liberty National Enterprises, L.P. v. Chicago Title Ins. Co.* (2013) 217 Cal.App.4th 62, 81 [noting the title insurer correctly denied the tender of defense by a majority faction of a family that owned an interest in a commercial building, after being sued by the minority faction of the same family who owned a 9.5 percent interest in that building, because the minority faction's lawsuit "was based on the tortuous conduct 'in the manner' in which the majority had acquired title" to the building, and not as a result of a defect in the title existing on the date the policy issued].)

We reach the same conclusion with respect to the "unmarketable title" risk. We note this particular risk applied to "title" to the Property, not to the Property itself. A similar distinction was made by our high court in the vintage case of *Hocking v. Title Ins. & Trust Co.* (1951) 37 Cal.2d 644 (*Hocking*).

In *Hocking*, the plaintiff purchased two unimproved lots in a subdivision that did not meet the City of Palm Springs's requirements for the issuance of a building permit. The plaintiff made a claim under the title insurance policy for the lots, contending that the title to the lots was unmarketable. (*Hocking*, *supra*, 37 Cal.2d at pp. 646–647.) In rejecting the plaintiff's contention, the *Hocking* court ruled that "[a]lthough it is unfortunate that plaintiff has been unable to use her lots for the building purposes she contemplated, it is our view that the facts which she pleads do not affect the marketability of her *title* to the land, but merely impair the market *value* of the property. She appears to

possess fee simple title to the property for whatever it may be worth; if she has been damaged by false representations in respect to the condition and value of the land her remedy would seem to be against others than the insurers of the title she acquired. It follows that plaintiff has failed to state a cause of action under the title policy." (*Id.* at p. 652; see *Lick Mill Creek Apartments v. Chicago Title Ins. Co.* (1991) 231 Cal.App.3d 1654, 1661–662 (*Lick Mill*) [noting the distinction recognized by *Hocking* between the marketability of land and the marketability of its title in finding that costs incurred by the plaintiffs for the removal and clean-up of hazardous substances on land they had purchased involved a claim for the property's physical condition and not for its marketability of title].)

In the instant case, while the claims of Sive and/or Pardee may have affected the marketability of the Property in general — including diminishing its market value (as found by the jury in the underlying action when it awarded Sive damages against Majid only) — as a result of plaintiffs' unintended encroachment on the Pardee property, those claims did *not* affect the Property's marketability of title, as *Hocking* and *Lick Mill* teach. We therefore independently conclude that plaintiffs have failed to show there is a triable issue of material fact with respect to the unmarketability of title risk in the Chicago Title policy. As such, we further conclude the court properly granted Chicago Title summary judgment.[5]

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[5] In light of our decision, we deem it unnecessary to reach the other arguments advanced by the parties in this case.

DISPOSITION

The judgment in favor of defendants Federal, State National, and Chicago Title is affirmed. Defendants to recover their costs of appeal.

BENKE, Acting P. J.

WE CONCUR:

HUFFMAN, J.

AARON, J.