NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 19 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

GASHAW DESALEGN, through and by his Guardian Ad Litem Dereje Desalegn, Plaintiff-Appellant, v. CENTURY SURETY COMPANY, Defendant-Appellee.	No. 17-17329 D.C. No. 3:15-cv-05678-JD MEMORANDUM[*]

Appeal from the United States District Court
for the Northern District of California
James Donato, District Judge, Presiding

Submitted March 15, 2019[**]
San Francisco, California

Before: WALLACE, SILER,[***] and McKEOWN, Circuit Judges.

In this diversity action, Gashaw Desalegn appeals from the district court's dismissal of his action alleging that Century Surety Co. breached its duty to defend

---

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[***] The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

under California insurance law. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

We apply California law to Desalegn's claims, and we follow the decisions of the California Courts of Appeal unless there is convincing evidence that the California Supreme Court would decide the matter differently. *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 889 (9th Cir. 2010). Under California law, an insurer breaches its duty to defend by failing to defend its insured, "until the insurer can establish *conclusively* that there is no potential for coverage and therefore no duty to defend." *Amato v. Mercury Casualty Co.*, 53 Cal. App. 4th 825, 833 (1997) (emphasis in original). An insurer may conclusively establish that there is no potential for coverage through an assault and battery exclusion if the exclusion applies when the insured's claim "arises from" an assault and battery and no version of the facts exists such that an assault and battery has not occurred. *See Century Transit Sys., Inc. v. Am. Empire Surplus Lines Ins. Co.*, 42 Cal. App. 4th 121, 129 & n.8 (1996) ("An act of self-defense necessarily involves resistance to an assault and battery by another"); *Zelda, Inc. v. Northland Ins. Co.*, 56 Cal. App. 4th 1252, 1262 (1997) ("These documents support two versions of the altercation . . . an unwarranted assault and battery [and] self-defense. Both versions of the altercation trigger the exclusion").

In this case, the district court properly dismissed Desalegn's action for failure to state a claim because his allegations conclusively established that there was no potential for coverage. The language of the exclusion was drafted expansively to include "'bodily injury', 'property damage', or 'personal and advertising injury' arising out of or resulting from . . . any actual, threatened or alleged assault or battery." As a result, under *Century Transit* and *Zelda* there is no version of the facts under which the claim did not "arise out" of an assault or battery: the facts known to Century when the defense was tendered showed that either the bouncer assaulted Desalegn or Desalegn assaulted the bouncer. Either way, there was no potential for coverage because Desalegn's injury arose out of an assault.

We also reject Desalegn's argument that the exclusion rendered the policy ambiguous. *See Century Transit*, 42 Cal. App. 4th at 129 ("The policy must be read as a whole and it cannot be said that an exclusion is in 'conflict' with an insuring clause. The very purpose of an exclusion is to withdraw coverage which, but for the exclusion, would otherwise exist"). Desalegn's other arguments — based on the date stamp on the documents, what Century knew when it denied coverage, and enforceability — are meritless.

AFFIRMED.