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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

WANDA A. SELL, individually and a Trustee of the Nancy A. Muhs Trust,)	2:09-cv-01584-GEB-GGH
)	
Plaintiff,)	<u>ORDER GRANTING IN PART AND</u>
)	<u>DENYING IN PART DEFENDANT'S</u>
v.)	<u>MOTION FOR SUMMARY JUDGMENT,</u>
)	<u>AND IN THE ALTERNATIVE, FOR</u>
NATIONWIDE MUTUAL INSURANCE COMPANY and DOES 1 through 10, inclusive,)	<u>SUMMARY ADJUDICATION*</u>
)	
Defendant.)	
_____)	

Defendant National Mutual Insurance Company ("National") moves for summary judgment on Plaintiff Wanda A. Sell's ("Sell") breach of contract and breach of the implied covenant of good faith and fair dealing claims, and on Sell's request for punitive damages. These claims concern an insurance coverage dispute between Sell and National.

I. Legal Standard

A party seeking summary judgment bears the initial burden of demonstrating that there is no genuine issue as to any material fact concerning issues on which summary judgment is sought. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If this burden is satisfied, "the non-moving party must set forth, by affidavit or as otherwise provided

* This matter is deemed suitable for decision without oral argument. E.D. Cal. R. 230(g).

1 in [Federal] Rule [of Civil Procedure] 56, specific facts showing that
2 there is a genuine issue for trial." T.W. Elec. Serv., Inc. v. Pac.
3 Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (quotations
4 and citation omitted) (emphasis omitted). Defendant "must either produce
5 evidence negating an essential element of the [plaintiff's claim] or
6 show that the [plaintiff] does not have enough evidence of an essential
7 element to carry [her] ultimate burden of persuasion at trial." Nissan
8 Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc., 210 F.3d 1099, 1102
9 (9th Cir. 2000) (citations omitted). "Where disputed issues of material
10 fact exist, we assume the version of the material facts asserted by the
11 non-moving party. All reasonable inferences must be drawn in favor of
12 the non-moving party." Bryan v. McPherson, 608 F.3d 614, 619 (9th Cir.
13 2010) (citations omitted).

14 Since jurisdiction over this action is based on diversity,
15 "California law is the governing substantive law." See Burns v. Int'l
16 Ins. Co., 929 F.2d 1422, 1424 (9th Cir. 1991) ("Where a federal court
17 has jurisdiction by virtue of diversity of citizenship of the parties,
18 the court must follow state law."). Under California law governing
19 insurance coverage:

20 Determination of the duty to defend depends, in the
21 first instance, on a comparison between the
22 allegations of the [third-party] complaint and the
23 terms of the policy. But the duty also exists where
24 extrinsic facts known to the insurer suggest that
25 the claim may be covered.

26 Scottsdale Ins. Co. v. MV Transp., 36 Cal. 4th 643, 654 (2005) (citation
27 omitted). "Conversely, where the extrinsic facts eliminate the potential
28 for coverage, the insurer may decline to defend even where the bare
allegations in the complaint suggest potential liability." Food Pro
Int'l Inc. v. Farmers Ins. Exch., 169 Cal. App. 4th 976, 986 (2008)

1 (quotation and citations omitted). "Any doubt as to whether the facts
2 give rise to a duty to defend is *resolved in the insured's favor.*"
3 Horace Mann Ins. Co. v. Barbara B., 4 Cal. 4th 1076, 1081 (1993)
4 (emphasis added). Further, an insurer moving for summary judgment
5 "must establish *the absence of any . . . potential*' for coverage, i.e.,
6 that the underlying complaint *'can by no conceivable theory raise a*
7 *single issue which could bring it within the policy coverage.'*"
8 Cunningham v. Univ. Underwriters, 98 Cal. App. 4th 1141, 1147 (2002)
9 (citing Montrose Chem. Corp. v. Superior Court, 6 Cal. 4th 287, 300
10 (1993)) (emphasis in original).

11 **II. Summary Judgment Factual Record**

12 Sell "is a trustee and beneficiary under the Trust of Nancy A.
13 Muhs ("Trust")." (Def.'s SUF ¶ 6.) The Trust corpus includes real
14 property located at 13091 Willow Glen Road, Stockton, California (the
15 "Property"). Id. ¶ 7. As a beneficiary, Sell was entitled to reside at
16 the Property and to eventually own the Property free of the Trust if she
17 complied with certain Trust terms. Id. Specifically, the Trust terms
18 state before Sell could own the Property, Plaintiff had to "commence
19 residing on the [Property] within ninety days of being offered
20 possession," and to reside and maintain her principal residence at the
21 Property for a "five year period" Id. The Trust also states:
22 "[i]n the event that [Sell] fails to commence residing on the [Property]
23 within ninety days of being offered possession, or vacates the residence
24 prior to the expiration of the five year period, then and in either of
25 such events, [Sell's] rights . . . shall cease and terminate"
26 Id. A subsequent beneficiary would then have the right to reside at the
27 Property and eventually take sole ownership upon meeting the same
28 conditions. Id.

1 One of the subsequent beneficiaries listed in the trust named
2 Rigoberto Ocegueda argues Sell has not satisfied the occupancy condition
3 precedent. Ocegueda "filed a Petition for Order against [Sell] in San
4 Joaquin County Superior Court" in March of 2007, in which he alleges:
5 "(1) [Sell] had the right to possession and control of the Property
6 since June 26, 2005," but never occupied the Property as her residence;
7 (2) "on December 26, 2006, [Ocegueda], as a residual beneficiary under
8 the Trust, demanded to be provided possession of the Property; (3) after
9 [Ocegueda's] demand to occupy the premises, [Sell] responded that she
10 was going to occupy the Property and not allow [Ocegueda] to reside on
11 the Property; (4) [Ocegueda] sought an order that [Sell] provide him
12 possession and control of the Property and allow him to occupy it, and
13 for an accounting of rent proceeds from the property as to which he
14 alleged he would be entitled, as the beneficiary entitled to occupy,
15 possess and reside on the property." Id. ¶¶ 8,9; (Def.'s Req. for
16 Judicial Notice in Supp. of its Mot. for Summ. J. ("Def.'s Judicial
17 Notice") Ex. 6B.)

18 On March 16, 2007, Sell tendered defense of Ocegueda's
19 Petition to National, which insured the Property under a Farmowner's
20 Policy ("Policy"). (Def.'s SUF ¶¶ 1, 17.) The insurance coverage dispute
21 concerns two provisions in the Policy. The first provision covers
22 "personal and advertising injury." Id. ¶ 3. The policy definition of
23 "personal and advertising injury" includes "[t]he wrongful eviction
24 from, wrongful entry into, or invasion of the right of private
25 occupation of a room, dwelling or premises that a person occupies,
26 committed by or on behalf of its owner, landlord or lessor; . . ." Id.
27 The second provision concerns property damage caused by an "occurrence,"
28 which is defined in the policy as an "accident." Id.

1 "On April 11, 2007, [National] issued a written denial" of
2 Sell's tendered claim. Id. ¶ 19. Sell requested reconsideration of the
3 denial on April 17, 2007. Id. ¶ 20. National reasserted its denial of
4 coverage on April 27, 2007. Id. ¶ 25.

5 **III. Discussion**

6 **A. Breach of Contract**

7 National argues it did not owe Sell a duty to defend under the
8 personal and advertising injury provision and, therefore, cannot be
9 liable for breach of contract based on not defending under this
10 provision. National's argument is premised on the meaning of the word
11 "occupies" in the phrase: "The wrongful eviction from, wrongful entry
12 into, or invasion of the right of private occupation of a room, dwelling
13 or premises that a person *occupies*" (Emphasis added). National
14 contends the word "occupies" unambiguously means a claimant must have
15 *actual* possession and control of property, and since the evidence does
16 not establish that Ocegueda actually possessed and controlled the
17 Property, Sell's tendered claim is not potentially covered.

18 However, National has not shown that its argued definition of
19 the word "occupies" is consistent with how some California courts have
20 construed this word in similar phrases. Courts have construed the
21 "wrongful entry or eviction . . . offense [phrase] as applying to tort
22 claims arising out of the interference with an *interest* in real property
23" Zelda, Inc. V. Northland Ins. Co., 56 Cal. App. 4th 1252, 1264
24 (1997) (citing Gen. Accident Ins. Co. v. West Am. Ins. Co. (1996) 42
25 Cal. App. 4th 95, 103 (1996)) (emphasis added). For instance, Zelda
26 indicates "that the wrongfulness of the ejection must consist in, or
27 attach to, an invasion of the right of occupation." Id. at 1265. General
28 Accident states: "provid[ing] coverage for injury arising out of

1 wrongful entry or eviction, or other invasion of the right of private
2 occupancy" is a phrase "adopted by the insurance industry as part of the
3 standard broad form comprehensive general liability endorsement, [and]
4 has been construed as applying to tort claims arising out of the
5 interference with an interest in real property." Gen. Accident Ins. Co.,
6 42 Cal. App. 4th at 103. This authority suggests that Ocegueda's actual
7 possession and control is not required before National owes Sell a duty
8 to defend under the disputed provision.

9 Therefore, National has not shown that no potential for
10 coverage exists under the personal and advertising injury provision of
11 the Policy. Accordingly, National's request for summary judgment on
12 Sell's breach of contract claim is denied.

13 **B. Breach of the Implied Covenant of Good Faith and Fair Dealing**

14 National also seeks summary judgment on Sell's breach of the
15 implied covenant of good faith and fair dealing claim. "[E]very
16 insurance policy contains an implied covenant of good faith and fair
17 dealing that neither party will do anything to injure the other party's
18 right to receive the benefits of the agreement." Campbell v. Superior
19 Court, 44 Cal. App. 4th 1208, 1319 (1996). "The mistaken withholding of
20 policy benefits, if reasonable or if based on a legitimate dispute as to
21 the insurer's liability under California law, does not expose the
22 insurer to bad faith liability." Tomaselli v. Transamerica Ins. Co., 25
23 Cal. App. 4th 1269, 1280-81 (1994). This rule is known as the "genuine
24 issue rule." See Amadeo v. Principal Mut. Life Ins. Co., 290 F.3d 1152,
25 1161. "Although summary judgment may be awarded under the genuine issue
26 rule where the insurer reasonably construes ambiguous language in its
27 policy, summary judgment is not appropriate when the insurer's
28 interpretation of the policy is sufficiently arbitrary or unreasonable

1 that a jury could conclude it was adopted in bad faith." Id. at 1162
2 (internal citations and quotations omitted).

3 **1. Personal and Advertising Injury Provision**

4 Neither party has cited a case factually similar to this
5 matter in which a third-party claimed the right to possession and
6 control of property in the situation where the third-party does not
7 occupy the property. National relies on the genuine issue rule as
8 support for its argument that it did not deny Sell coverage under the
9 personal and advertising injury provision in bad faith. Phrases similar
10 to "invasion of the right of private occupation" in the provision sub
11 judice have been held ambiguous because they are "subject to more than
12 one reasonable interpretation." See Lakeland Vill. Homeowners Ass'n v.
13 Great Am. Ins. Grp., --- F. Supp. 2d ----, 2010 WL 2891250 at *5 (E.D.
14 Cal. 2010) (citing Martin Marietta Corp. v. Ins. Co. of N. Am., 40 Cal.
15 App. 4th 1113, 1134 (1995)). Additionally, Sell has not argued or cited
16 to any evidence showing that National's interpretation of the personal
17 and advertising injury provision was arbitrary or unreasonable.
18 Therefore, National was not arbitrary or unreasonable in its
19 interpretation of the policy as requiring Ocegueda to have actual
20 possession and control of the property. See Franceschi v. American
21 Motorists Ins. Co., 852 F.2d 1217, 1220 (9th Cir. 1988) (finding
22 insurer's incorrect interpretation of the term "medical treatment" was
23 reasonable since term was ambiguous and not defined in insurance
24 policy); c.f. Amadeo, 290 F.3d at 1162-63 (finding insurer's
25 interpretation of phrase "duties of your regular occupation in which you
26 were engaged" was not reasonable when insurer included "unemployment" as
27 being an occupation in which a party was engaged).

1 However, Sell argues that National's failure to properly
2 investigate her claim constitutes bad faith. An insurer need not engage
3 in additional investigation of a tendered claim if its initial decision
4 denying coverage was based on a reasonable interpretation of a policy.
5 Brinderson - Newberg Joint Venture v. Pac. Erectors, Inc., 971 F.2d 272,
6 282-83 (9th Cir. 1992). Since National's denial of coverage under the
7 personal and advertising injury provision was based on a reasonable
8 interpretation of the policy and on evidence Sell provided, Sell does
9 not prevail on this issue.

10 **2. Property Damage Provision**

11 Further, National argues it cannot be found to have acted in
12 bad faith in denying coverage to Sell under the property damage
13 provision because it owed no coverage to Sell under this provision. "It
14 is clear that if there is no potential for coverage and, hence, no duty
15 to defend under the terms of the policy, there can be no action for
16 breach of the implied covenant of good faith and fair dealing because
17 the covenant is based on the contractual relationship between the
18 insured and the insurer." Waller v. Truck Ins. Exch., Inc., 11 Cal. 4th
19 1, 36 (1995).

20 The basis of National's argument is that the circumstances
21 giving rise to Ocegueda's claim against Sell do not constitute an
22 "accident" and, therefore, are not an "occurrence" under the property
23 damage provision. Under California law, an accident is defined as "an
24 unexpected, unforeseen, or undesigned happening or consequence from
25 either a known or an unknown cause." Delgado v. Interinsurance Exch. of
26 Auto. Club of S. California, 47 Cal. 4th 302, 308 (2009) (quotations and
27 citations omitted). Under this definition, "where the insured intended
28 all of the acts that resulted in the victim's injury, the event may not

1 be deemed an 'accident' merely because the insured did not intend to
2 cause injury." Merced Mut. Ins. Co. v. Mendez, 213 Cal. App. 3d 41, 50
3 (1989).

4 Here, the factual record contains no evidence showing an
5 "accident" is involved with Ocegueda's claim. Since no "accident" was
6 involved, Sell does not have coverage under this provision of the
7 policy, and this provision cannot be a basis for finding National
8 liable for acting in bad faith in denying coverage.

9 Since National has shown it did not act in bad faith in
10 denying Sell coverage under either the personal and advertising injury
11 provision or the property damage provision of the Policy, "punitive
12 damages are unavailable." Am. Gas Co. of Reading, Pennsylvania v.
13 Krieger, 181 F.3d 1113, 1123 (9th Cir. 1999).

14 **IV. Conclusion**

15 For the stated reasons, National's motion for summary judgment
16 is denied on Sell's breach of contract claim, and granted on Sell's
17 breach of the implied covenant of good faith and fair dealing claim and
18 request for punitive damages.

19 Dated: November 16, 2010

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GARLAND E. BURRELL, JR.
United States District Judge