

United States District Court
For the Northern District of California

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

RANDY STEVENS, ELISSA STEVENS, dba FLAMINGO PROPERTIES,)	Case No. 3:14-CV-02043 SC
)	
Plaintiffs,)	ORDER GRANTING DEFENDANT'S
)	<u>MOTION FOR SUMMARY JUDGMENT</u>
v.)	
)	
ZURICH AMERICAN INSURANCE COMPANY,)	
)	
Defendant.)	

Now before the Court is Zurich American Insurance Company's ("Zurich") motion for summary judgment. ECF No. 36 ("Mot."). The motion is fully briefed,¹ and the Court finds it suitable for disposition without oral argument pursuant to Civil Local Rule 7-1(b). The essential facts are undisputed. For the reasons set forth below, Zurich's motion for summary judgment is GRANTED.

I. BACKGROUND

This case involves an insurance dispute between Plaintiffs Randy Stevens, Elissa Stevens, and Flamingo Properties

¹ ECF Nos. 44 ("Opp'n"); 46 ("Reply").

1 (collectively "Plaintiffs" or "Stevens") and Defendant Zurich
2 regarding business income that was allegedly lost as a result of
3 water intrusion and property that was allegedly stolen by Stevens's
4 landlord, F&A Properties. Stevens purchased the commercial
5 insurance policy at issue ("the Policy") from Zurich in February
6 2010, with a coverage period from February 19, 2010 to February 19,
7 2011.² See ECF No. 36-29 at ZA6838.

8 Stevens owned and operated a Jiffy Lube Service Center
9 franchise in Rohnert Park, California from July 1, 2005 to April 9,
10 2010. Throughout that time, the facility's basement would flood
11 during rainstorms due to cracks in the foundation and basement
12 walls. Stevens claims that whenever it rained, the business was
13 forced to close for half a day to clean up the water in the
14 basement. As a result of having to close, Stevens alleges that he
15 lost thousands of dollars of business income.

16 In 2009, Stevens's Jiffy Lube store began facing financial
17 difficulties and fell behind on rent. By March 9, 2010, total
18 unpaid rent amounted to \$34,447. On April 5, 2010, Stevens's
19 landlord, F&A Properties, delivered a "Three Day Notice to Pay Rent
20 or Quit."³ Upon receiving the Notice, Stevens began to move out of
21 the Rohnert Park location. Stevens personally removed all of the
22 cash from the store, and instructed his employee, Ben Turnbow, to
23 remove inventory and equipment. See ECF Nos. 36-11 ("Phillips
24

25 ² Stevens cancelled his coverage on April 23, 2010. See ECF No.
36-32.

26 ³ A "Three Day Notice to Pay Rent or Quit" is a step in the
27 unlawful detainer and eviction process. See generally, Cal. Civ.
28 Proc. Code § 1161(2). F&A Properties later filed an unlawful
detainer action against Stevens, which was subsequently amended as
a breach of contract claim.

1 Depo.") at 10:3-9; 36-12 ("EUO Vol. II") at 257:1-15; 36-13
2 ("4/15/15 Turnbow Depo.") at 43:17. Mr. Turnbow proceeded to
3 remove the inventory and some, but not all, of the equipment. See
4 ECF No. 36-5 ("6/5/12 Turnbow Depo.") at 121:9-25; 4/15/15 Turnbow
5 Depo. at 39:19-20. Upon receiving a phone call from Stevens, Mr.
6 Turnbow stopped removing equipment from the store "because it
7 appeared that [the store was] going to be reopening" in light of
8 new negotiations between Stevens and his landlord. 4/15/15 Turnbow
9 Depo. at 38:1-6; see also id. at 55:11-18.

10 Mr. Turnbow returned several days later with the intention of
11 reopening the store for business. His key, however, could no
12 longer open the door. Id. at 58:25-59:2. When he returned later
13 that day, a new oil change company had moved into the facility.
14 Mr. Turnbow testified that he did not attempt to remove anything
15 else from the facility at that point because an individual at the
16 facility told Mr. Turnbow that Mr. Turnbow "didn't really belong
17 there." Id. at 65:9-12.

18 Neither Mr. Turnbow nor Mr. Stevens ever returned to the
19 Rohnert Park store to remove the remaining equipment. Instead,
20 Stevens testified that he filed a police report and hired an
21 attorney to help recover his remaining property. ECF No. 36-14
22 ("Stevens Depo. Vol. I") at 81:6-10. Stevens has not provided any
23 evidence, however, of specific efforts made, if any, by his
24 attorney or anyone else to recover the equipment.

25 On June 3, 2010, the landlord's attorney advised Stevens's
26 attorney that Stevens could return to the store and remove certain
27 property, but Stevens did not do so. See ECF No. 36-19. In
28 addition, both the landlord and the tenants that replaced Stevens

1 at the facility testified that Stevens was free to remove any of
2 the equipment that he left behind at the store. See ECF No 36-20
3 ("Oroz Decl.") ¶¶ 14-16; 36-21 ("Shifflet Depo.") at 65:19-21.
4 Stevens, however, never attempted to make any arrangements to do
5 so.

6 Several months after Stevens moved out of the Rohnert Park
7 facility, Stevens's landlord filed a complaint for breach of
8 contract for unpaid rent and other damages. See ECF No. 36-24.
9 Stevens then filed a cross-complaint seeking, among other claims,
10 damages for equipment remaining at the property. See ECF No. 36-
11 25. The lawsuit settled on August 8, 2013 with Mr. Stevens
12 receiving \$150,000. See ECF No. 36-27.

13 Stevens submitted several insurance claims to Zurich relating
14 to the dispute with his landlord, but each of those claims was
15 denied. Subsequently, Stevens filed the instant action in Napa
16 County Superior Court on April 3, 2014. See ECF No. 1-1
17 ("Compl."). The Complaint alleges, in part, that Zurich breached
18 the terms of the Policy by failing to provide coverage for (1)
19 theft of personal property and (2) the loss of business income due
20 to basement flooding.⁴ All other claims asserted in the Complaint
21 have since been voluntarily dismissed. See Opp'n at 2. Stevens
22 seeks \$103,729 to replace the allegedly stolen property and \$4,789
23 for the loss of business income caused by flooding during the
24 Policy's coverage period. ECF No. 37 at 3, 23. On May 2, 2014,
25 Zurich removed the case to federal court.

26 ///

27 _____
28 ⁴ Plaintiffs also bring a related claim for breach of the covenant
of good faith and fair dealing.

1 **II. LEGAL STANDARD**

2 **A. Summary Judgment**

3 Entry of summary judgment is proper "if the movant shows that
4 there is no genuine dispute as to any material fact and the movant
5 is entitled to judgment as a matter of law." Fed. R. Civ. P.
6 56(a). "In order to carry its burden of production, the moving
7 party must either produce evidence negating an essential element of
8 the nonmoving party's claim or defense or show that the nonmoving
9 party does not have enough evidence of an essential element to
10 carry its ultimate burden of persuasion at trial." Nissan Fire &
11 Marine Ins. Co., Ltd. v. Fritz Cos., Inc., 210 F.3d 1099, 1102 (9th
12 Cir. 2000). "The evidence of the nonmovant is to be believed, and
13 all justifiable inferences are to be drawn in his favor." Anderson
14 v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Summary judgment
15 should be entered against a party that fails to make a showing
16 sufficient to establish the existence of an element essential to
17 its case. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

18 **B. Insurance Contract Interpretation**

19 Where the underlying facts are undisputed, interpretation of
20 an insurance policy is a question of law. Merced Mut. Ins. Co. v.
21 Mendez, 213 Cal. App. 3d 41, 45 (1989); see also Legacy Vulcan
22 Corp. v. Super. Ct., 185 C.A. 4th 667, 688 (2010) ("Contract
23 interpretation, including the resolution of any ambiguity, is
24 solely a judicial function, unless interpretation turns on
25 credibility of extrinsic evidence.").

26 ///

27 ///

28 ///

1 **III. DISCUSSION**

2 Zurich's motion makes three main arguments. First, Zurich
3 argues that the undisputed facts show that the equipment at issue
4 was not stolen. Second, as to Stevens's business income loss
5 claim, Zurich argues that Stevens's purported loss falls outside of
6 the Policy's scope. Third, Zurich asserts that summary judgment
7 should be granted as to both of Stevens's claims because they are
8 barred by the Policy's two year contractual suit limitation period.
9 The Court addresses each of Zurich's arguments in turn.

10 **A. Coverage for Stolen Property**

11 The Policy provides coverage for physical loss or damage to
12 covered property as a result of theft. See ECF No. 36-29 at
13 ZA6860. California courts have held that when undefined in an
14 insurance policy, as here, theft

15 should be given the usual meaning and understanding
16 employed by persons in the ordinary walks of life, and
17 should be construed as common thought and common speech
18 now imagine and describe it. Accordingly, theft involves
19 the idea of a knowingly unlawful acquisition of property;
20 that is, a felonious taking of it.

19 . . .

20 [Thus,] there must exist a criminal intent to steal . . .
21 that consists of the intent, without a good faith claim
22 of right, to permanently deprive the owner of possession.

22 Barnett v. State Farm Gen. Ins. Co., 200 Cal. App. 4th 536, 543,
23 (2011) (quoting Granger v. New York Ins. Co., 108 Cal. App. 290,
24 294 (1930)).

25 Stevens has not presented any evidence to support his claim
26 that Stevens's landlord, F&A Properties, stole the equipment in
27 question. Theft requires the deprivation of property "in a
28 criminal manner, rather than by due process of law." Id. at 544.

1 In response to Stevens' failure to pay rent, F&A Properties
2 delivered a Three Day Notice to Pay Rent or Quit and later filed an
3 unlawful detainer and breach of contract action in which Stevens
4 counterclaimed for the value of his property. F&A Properties and
5 Stevens pursued their rights and settled their dispute regarding
6 the equipment through "due process of law." To the extent that
7 Stevens was deprived of his property, it was not done "in a
8 criminal manner."

9 Stevens contends that his property was stolen because F&A
10 Properties allegedly locked him out of the Jiffy Lube facility. A
11 lockout, without more, does not amount to theft. Stevens was
12 locked out because he did not pay his rent, not because F&A
13 Properties wanted to steal his property. In order to have
14 committed theft, F&A Properties must have intended to permanently
15 deprive Stevens of his equipment. Stevens does not present any
16 evidence to support such a claim, by inference or otherwise. The
17 only evidence on this issue is the landlord's declaration, in which
18 he testified that Stevens was free to pick up the equipment at any
19 point. Oroz Decl. ¶¶ 14-16. Nor has Stevens provided any evidence
20 to demonstrate that he attempted to retrieve the property or that
21 his attempts to retrieve the property were denied. Quite the
22 opposite, the attorney for F&A Properties advised Stevens's
23 attorney that Stevens could return to the store and remove certain
24 equipment, but Stevens failed to do so. See ECF No. 36-19.

25 In short, Stevens's theft claim fails for lack of any evidence
26 showing that the equipment was stolen. As a result, Zurich's
27 motion for summary judgment as to Plaintiffs' theft claim is
28 GRANTED.

1 **B. Coverage for Loss of Business Income**

2 The Policy provides coverage for lost business income
3 sustained due to a suspension of operations "during the 'period of
4 restoration.'" ECF No. 36-30 at ZA6890. The Policy specifies that
5 "the period of restoration" begins "72 hours after the time of
6 direct physical loss or damage" Id. at ZA6897. In
7 addition, the Policy dictates that "[t]he suspension must be caused
8 by direct physical loss of or damage to property at [the]
9 premises" Id. at ZA6890.

10 Even if one were to assume that a flooded basement constitutes
11 a "direct physical loss of or damage to property,"⁵ Stevens's claim
12 for lost business income fails because Stevens's business was
13 closed for only four hours each time it rained. The period of
14 restoration, however, did not commence until 72 hours after each
15 flood. Thus, the four hour closures of the business never came
16 close to meeting the required 72 hour deductible.

17 Stevens argues that the 72 hour deductible does not apply
18 because his claim qualifies as an "Extra Expense," for which the
19 "period of restoration" commences "[i]mmediately after the time of
20 direct physical loss or damage" Id. at ZA6897. "Extra
21 Expense" is defined as "the necessary expenses you incur during the
22 'period of restoration' which you would not have incurred if there
23 had been no direct physical loss or damage to property caused by or
24 resulting from a Covered Cause of Loss." Id. at ZA6890. Stevens's
25 claim is comprised of lost revenue, payroll expenses, and rent

26 ⁵ Zurich argues that the floods are not covered because they merely
27 required cleanup and did not result in physical loss or damage.
28 The Court does not address this issue given the various other
reasons Stevens's claim should be denied.

1 expenses. See ECF No. 36-41 at 23. Payroll expenses and rent
2 expenses are normal ongoing expenses, not necessary expenses that
3 would not have been incurred if there had been no direct physical
4 loss or damage. Lost revenue is an income loss, not an expense.
5 No additional expenses, such as outside cleaning companies,
6 restoration services, or repairs were incurred. Thus, Stevens's
7 claim is for a business income loss which requires a 72 hour
8 waiting period before the period of restoration begins, rather than
9 an Extra Expense claim that does not have a 72 hour waiting period.

10 For these reasons, Zurich's motion for summary judgment as to
11 Plaintiffs' loss of business income claim is GRANTED.

12 **C. Contractual Suit Limitation Period**

13 The Policy also includes a two year contractual suit
14 limitation period restricting an insured's ability to bring a suit
15 related to the Policy. The relevant clause states that "[n]o one
16 may bring a legal action against us under this Coverage Part
17 unless: . . . The action is brought within 2 years after the date
18 on which the direct physical loss or damage occurred." ECF No. 36-
19 29 at ZA6874.

20 California follows the reasonable discovery rule and the
21 equitable tolling doctrine. See Prudential-LMI Com. Ins. v. Super.
22 Ct., 51 Cal. 3d 674, 686-87, 693 (1990). Accordingly, the
23 contractual limitations period begins to run when the insured
24 discovers or should have discovered the property loss or damage,
25 but it is tolled between the time the insured reports the loss to
26 the insurer and the time the insurer denies the claim. See id.

27 Stevens alleges that his property was stolen on April 12,
28 2010. The theft claim was first made on August 12, 2010. Zurich

1 denied his claim on June 15, 2012. Thus, Stevens's theft claim
2 tolled during the 674 day investigation between August 12, 2010 and
3 June 15, 2012. Stevens did not file his Complaint until April 3,
4 2014. Thus, 1453 days passed between the date of loss (April 12,
5 2010) and the date the Complaint was filed (April 3, 2014). After
6 subtracting 674 days for the tolling period, the total equals 779
7 days. Given that two years is equal to 730 days, Stevens's claim
8 for stolen property was filed 49 days late.

9 Stevens submitted his claim for loss of business income from
10 water intrusion on August 3, 2010. The claim tolled during the
11 investigation between August 3, 2010 and June 15, 2012, for a total
12 of 683 days. The total days between the date of loss (February 23,
13 2010) and the date the Complaint was filed (April 3, 2014) is 1500
14 days. After subtracting 683 days for the investigation period, the
15 total equals 817 days. Given that two years is equal to 730 days,
16 Stevens's claim for loss of business income from water intrusion
17 was filed 87 days late.

18 Stevens disputes these calculations. He argues that the June
19 15, 2012 letter denying his claim "was not absolute and asked . . .
20 for more information." Opp'n at 8. The letter, however, did not
21 ask for more information and was unequivocal in its denial of
22 coverage:

23 This letter is to advise the Insured that Zurich American
24 respectfully denies Flamingo Properties Jiffy Lube's
25 claim for first-party benefits under the Policy in its
26 entirety because there has not been a covered loss or
27 damage to the Insured's property. The claim the Insured
has presented to Zurich American is in essence a business
and legal dispute with the landlord Francisco Oroz over
disputed property and is not a covered loss under the
Policy.

28 ECF No. 36-38 at 1.

1 Stevens also argues that there was a second tolling period
2 between October 31, 2013 and January 13, 2014. This period,
3 however, relates to Stevens's separate claim for legal costs
4 associated with the lawsuit filed against him by his landlord. See
5 ECF No. 44-35. Thus, it did not toll his claims for stolen
6 property and lost business income.

7 Because this action is barred by the Policy's two-year
8 contractual suit limitation period, Zurich's motion for summary
9 judgment as to all claims is GRANTED for this independent reason.

10

11 **IV. CONCLUSION**

12 For the foregoing reasons, Zurich's motion for summary
13 judgment is GRANTED.

14

15 IT IS SO ORDERED.

16

17 Dated: September 9, 2015



UNITED STATES DISTRICT JUDGE

18

19

20

21

22

23

24

25

26

27

28