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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BLACK MOUNTAIN CENTER, L.P., and TIMOTHY HAIDINGER)	CASE NO. 17cv1776 JM(JLB)
Plaintiff,)	ORDER GRANTING PLAINTIFFS’ MOTION FOR SUMMARY ADJUDICATION; DENYING DEFENDANT’S MOTION FOR SUMMARY JUDGMENT
v.)	
FIDELITY AND DEPOSIT COMPANY OF MARYLAND)	
Defendants.)	

Pursuant to Fed. R. Civ. P. 56, Plaintiffs Black Mountain Center, L.P. (“BMC”), and its president, Timothy Haidinger (“Haidinger”) move for summary adjudication on the issue of whether Fidelity and Deposit Company of Maryland (“Fidelity”) breached the duty to defend in the underlying state court action. Defendant Fidelity moves for summary judgment on all claims. All motions are opposed. For the reasons set forth below, the court grants Plaintiffs’ motion for summary adjudication on the duty to defend and denies Fidelity’s motion for summary judgment in its entirety.

BACKGROUND

On September 1, 2017, Plaintiffs commenced this diversity bad faith insurance action by alleging two claims for breach of contract (failure to pay defense and settle-

1 ment costs) and a claim for tortious breach of the implied covenant of good faith and fair
2 dealing. Plaintiffs bring this action by alleging that Fidelity wrongfully and unreason-
3 ably refused to defend them against a claim of constructive eviction. In addition to
4 compensatory damages, Plaintiffs seek an award of punitive damages.

5 The following excerpts of the record are not disputed:

6 **The Lease**

7 BMC owns the Haidinger Center, a four building, 3.89 acre site located in San
8 Diego, CA. BMC leases space to tenants for professional, retail, commercial, and light
9 manufacturing purposes. Fidelity, a Maryland corporation, provided business and
10 liability insurance coverage for the property. On May 28, 2014, BMC entered into a
11 lease with Victoria DuPont and Jeff Droege (“Tenants”) for the express purpose to
12 operate a medical marijuana dispensary, and “not for any other purpose.” (Plaintiffs’
13 Exh. N, ¶1.6). The lease also contained a provision addressing regulatory issues.

14 1.10 Regulatory Issues: Tenant is in a highly regulated business which is
15 constrained by numerous approval levels. Tenant agrees that, should Land-
16 lord receive notices from any such agencies that the building or Tenant’s
17 occupancy violates any Federal, State, or local laws, then Tenant agrees,
18 with two weeks notice, to vacate the premises. Landlord agrees that, if
19 Tenant is unable to obtain a license permitting it to operate its business,
20 despite diligently applying for such license, then Tenant may terminate this
21 lease with two weeks notice to Landlord. . . .

22 With respect to cancellation of the lease, Section 1.12 of the lease provides that either
23 party could cancel the lease, prior to Tenants’ occupancy of the premises, with one-
24 month’s written notice.

25 Prior to executing the lease, Haidinger and Tenants agreed that they could operate
26 the dispensary upon receipt of a Conditional Use Permit (“CUP”) from the City of San
27 Diego. Haidinger also represented that he would sign the CUP, a prerequisite for the
28 issuance of a final CUP. In November 2014, Tenants obtained the keys to the premises.

Also in November 2014, Tenants obtained a tentative CUP. After review of the
conditions for the CUP, Haidinger determined that some of the CUP’s conditions were
unacceptable. Specifically, Haidinger objected to the indemnity and the armed security

1 guard provisions in the CUP and BMC's inability to obtain satisfactory insurance for the
2 complex because of the existence of a medical marijuana dispensary. Haidinger believed
3 that the CUP conditions materially altered the allocation of risk under the lease and
4 "concluded that BMC could not go forward with Plaintiffs' project and could not consent
5 to the CUP conditions." (Defendants' UMF 21). On June 5, 2015, Haidinger learned
6 that he was unable to obtain necessary insurance (general/property liability and umbrella
7 policies) in the event a medical marijuana dispensary or armed guards were located on the
8 property. Apparently, neither party anticipated the onerousness of the CUP conditions.

9 After expending substantial time, money, and resources, on March 12, 2015, the
10 San Diego Planning Commission approved the CUP. On June 11, 2015, DuPont met
11 with property owner Tim Haidinger to

12 discuss the required signatures for the CUP and implementing the
13 conditions imposed by the City's Planning Commissioners. Haidinger has
14 refused to sign the CUP and notified DuPont that he is terminating the
15 Lease effective July 11, 2015.

16 (July 10, 2015 Tender Letter, Compl. Exh. A 003). Haidinger refused to sign the CUP.

17 On July 10, 2015, Haidinger received a demand letter from Tenants requesting the
18 sum of \$500,000 in damages or, alternatively, a revised lease that would permit them to
19 operate a marijuana dispensary. (Plaintiffs' Exh. B). The demand letter outlined that
20 Tenants and Haidinger entered into a lease for the operation of a medical marijuana
21 dispensary; Haidinger represented that he would execute the CUP; Haidinger refused to
22 sign the CUP; and Tenants incurred substantial expenses in reliance upon the representa-
23 tions. Id. The demand letter identified potential claims for intentional misrepresenta-
24 tion, interference with prospective economic advantage, and breach of contract, all
25 arising from Haidinger's refusal to sign the CUP.

26 **The Policy**

27 Fidelity, a Maryland corporation, issued a Premier Building Owners Package
28 Policy (the "Policy") to BMC and Mr. Haidinger, designated by policy number 2761644,
and in effect between December 4, 2014 and December 4, 2015. The Policy has

1 applicable limits of \$5,000,000 per occurrence or act, and a deductible of \$10,000.
2 Among other things, the Policy provided a defense and indemnity against a claim for
3 personal injury that arises out of the ownership, maintenance or use of an insured
4 premises as a rental property or as vacant land. The Policy provided bodily injury and
5 property damages coverage under the premises liability provisions; and personal injury
6 and advertising damages coverage under the personal injury and advertising injury
7 provisions.

8 The parties primarily focus on the wrongful eviction provision in the Policy. The
9 Policy also defined personal injury as follows:

- 10 18. Personal Injury means injury other than bodily injury arising out of one or
11 more of the following acts:
12 c. wrongful entry into premises that a person or organization occupies or
13 wrongful eviction of a person or organization from premises that the person
or organization occupies.

14 (Ward Decl. Ex. "A" at p. 53). The Policy does not define the term "wrongful eviction."

15 The Policy also provided the following exclusions:

- 16 A. arising out of oral or written publication of material if done by or at the
17 direction of any insured with knowledge of its falsity.
18 D. arising out of fraud committed by any insured.
19 F. caused by the willful act of any insured but sums awarded as damages
because of negligence are not excluded.

20 (Ward Decl. Exh A).

21 **Fidelity's First Denial of Coverage**

22 On July 11, 2015, Plaintiffs' tendered the pre-suit demand to Fidelity and, on July
23 29, 2015, Fidelity denied the claim stating that Ms. DuPont did not base any theory of
24 recovery on any injury arising out of any act within the definition of personal injury in
25 the Policy. (Plaintiffs' Exh. C). The denial analyzed the claims in context of the claims
26 alleged in the demand letter (intentional misrepresentation, interference with prospective
27 economic advantage, and breach of contract). The denial letter also noted that Tenants
28 were alleging that Haidinger's breach of the lease "will result in loss of the CUP, loss of

1 revenue, and loss of the Property to operate what was specifically researched and chosen
2 based on zoning and ability to meet city requirements.” Id. Fidelity also indicated that
3 the claims were barred by the personal injury, fraud, and willful act exclusions in the
4 Policy and concluded that Tenants do “not base any theory of recovery on any injury
5 arising out of any act within the definition of Personal Injury in the Policy. Id.

6 **The State Court Action**

7 On August 14, 2015, Tenants commenced an action against Plaintiffs in San Diego
8 Superior Court alleging seven claims for relief: breach of contract, breach of the
9 covenant of good faith and fair dealing, intentional misrepresentation, negligent misrep-
10 resentation, promissory fraud, intentional interference with prospective economic
11 relations, and negligent interference with prospective economic advantage. (Plaintiffs’
12 Exh. D). The complaint alleged that Plaintiffs denied Tenants’ quiet enjoyment of the
13 property and breached the lease when Haidinger failed to sign the CUP. The complaint
14 further alleged that operating a medical marijuana dispensary was “the material basis for
15 . . . entering into the Lease.” (Plaintiffs’ UMF 30). Tenants sought damages in the
16 amount of \$3,200,000, plus interest and attorneys’ fees. After the denial of coverage,
17 Plaintiffs funded the defense costs and, ultimately, the settlement of Tenants’ claims.

18 **Plaintiffs’ Notice of Termination of the Lease**

19 On June 15, 2015, Plaintiffs provided Tenants with notice that they were terminat-
20 ing the lease with 30 days notice pursuant to Section 1.12 of the lease. By this date,
21 Tenants had yet to physically occupy the leased premises. Notwithstanding the lease’s
22 termination, Tenants continued to make monthly rent payments, and BMC accepted
23 those payments.

24 **Tenants’ Notice of Termination of the Lease**

25 On April, 25, 2016, Tenants provided Plaintiffs with a Notice of Termination of
26 Lease. The letter stated, in relevant part:

27 [Y]our clients have failed and refused to sign the CUP, making it impossible
28 for Tenants to “use the premises only for a medical marijuana dispensary.”
Therefore, your clients have frustrated the express purpose of the Lease,

1 support its motion with affidavits or other similar materials negating the opponent's
2 claim." Id. (emphasis in original). The opposing party cannot rest on the mere allega-
3 tions or denials of a pleading, but must "go beyond the pleadings and by [the party's]
4 own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file'
5 designate 'specific facts showing that there is a genuine issue for trial.'" Id. at 324
6 (citation omitted). The opposing party also may not rely solely on conclusory allegations
7 unsupported by factual data. Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989).

8 The court must examine the evidence in the light most favorable to the non-
9 moving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). Any doubt as
10 to the existence of any issue of material fact requires denial of the motion. Anderson v.
11 Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). On a motion for summary judgment,
12 when "the moving party bears the burden of proof at trial, it must come forward with
13 evidence which would entitle it to a directed verdict if the evidence were uncontroverted
14 at trial." Houghton v. South, 965 F.2d 1532, 1536 (9th Cir. 1992) (emphasis in
15 original) (quoting International Shortstop, Inc. v. Rally's, Inc., 939 F.2d 1257, 1264-65
16 (5th Cir. 1991), cert. denied, 502 U.S. 1059 (1992)).

17 General State Law Insurance Principles

18 Ordinary rules of contract interpretation apply to insurance contracts. The
19 fundamental goal of contractual interpretation is to give effect to the mutual intention of
20 the parties. If the contractual language is clear and explicit, it governs. Bank of the
21 West v. Superior Court (Industrial Indemnity Co.), 2 Cal. 4th 1254 (1992). Where
22 exclusions are clear, plain, and conspicuous, they will be enforced. Malcolm v. Farmers
23 New World Life Ins. Co., 4 Cal.App.4th 296, 3045 (1992). If the policy provision is
24 unambiguous, i.e., has only one reasonable construction, it must be interpreted according
25 to this plain meaning. But if a policy provision is ambiguous, the ambiguous terms are
26 resolved in the insureds' favor, consistent with the insureds' reasonable expectations. Id.
27 at 1149 (quoting Safeco Ins. Co. v. Robert S., 26 Cal.4th at p. 761.)

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1 The Court of Appeal succinctly summarized, and distinguished, the duty to defend
2 from the duty to indemnify:

3 [A]n insurer has a duty to defend an insured if it becomes aware of, or if
4 the third party lawsuit pleads, facts giving rise to the potential for
5 coverage under the insuring agreement. This duty, which applies even to
6 claims that are 'groundless, false, or fraudulent, is separate from and
7 broader than the insurer's duty to indemnify. [T]he determination whether
8 the insurer owes a duty to defend usually is made in the first instance by
9 comparing the allegations of the complaint with the terms of the policy.
But whether a particular claim falls within the coverage afforded by a
liability policy is not affected by the form of the legal proceeding [or] the
legal theory asserted by the injured party. The scope of the duty does not
depend on the labels given to the causes of action in the third party
complaint; instead it rests on whether the alleged facts or known extrinsic
facts reveal a possibility that the claim may be covered by the policy.

10 Cunningham v. Universal Underwriters, 98 Cal.App.4th 1141, 1147-48 (2002) (citations
11 and quotations omitted). The duty to defend arises when “any facts stated or fairly
12 inferable in the complaint, or otherwise known or discovered by the insurer, suggest a
13 claim potentially covered by the policy.” Scottsdale Ins. Co. v. MV Transp., 36 Cal. 4th
14 643, 655 (2005).

15 **The Motion**

16 Both parties move for summary adjudication on the issue of whether Fidelity
17 breached the duty to defend Plaintiffs in the underlying state court action. For the
18 reasons set forth below, the court concludes that the facts underlying the state court
19 action give rise to a potential for coverage under the personal injury provision of the
20 Policy.

21 The Policy defined “personal injury” to mean “injury . . . arising out of . . .
22 wrongful eviction of a person or organization from the premises.” (Plaintiffs’ Exh. A).
23 Under California law, a wrongful eviction extends to both actual and constructive
24 evictions. Legarra v. Federated Mut. Ins. Co., 35 CalApp. 4th 1472, 1484 (1995) (“An
25 eviction is the actual or constructive dispossession of a tenant from leased premises.”).
26 Plaintiffs assert that the record establishes that Tenants set forth sufficient facts and
27 allegations to give rise to a constructive eviction which occurs when “the landlord
28 engages in acts that render the premises unfit for occupancy for the purpose for which it

1 was leased, or deprive the tenant of the beneficial enjoyment of the premises.”
2 Cunningham, 98 Cal. App. 4th at 1152. Furthermore, “[a]ny doubt as to whether the
3 facts establish the existence of the defense duty must be resolved in the insured’s favor.”
4 Montrose Chem Corp. v. Superior Ct., 6 Cal.4th 287, 299- 300 (1993).

5 The factual underpinning of Tenants’ claims against Plaintiffs were first brought
6 to Fidelity’s attention in the July 2015 demand letter. The letter outlined that Tenants
7 and Haidinger entered into a lease for the operation of a medical marijuana dispensary;
8 Haidinger represented that he would execute the preliminary CUP, a prerequisite for
9 obtaining the final CUP; Haidinger refused to sign the CUP; Tenants were unable to
10 operate the premises as a medical marijuana dispensary; and Tenants incurred substanti-
11 al expenses in reliance upon the aforementioned representations. Id. The demand letter
12 identified potential claims for intentional misrepresentation, interference with prospec-
13 tive economic advantage, and breach of contract all arising from Haidinger’s refusal to
14 sign the CUP. Fidelity then denied defense of the action, not upon the facts presented,
15 but upon its analysis of those facts in light of claims asserted. (Plaintiffs’ Exh. C). At
16 that time, neither Fidelity nor Plaintiffs expressly addressed the wrongful eviction
17 coverage provision provided for by the Policy.

18 The April 25, 2016 Notice of Termination of Lease provided, in relevant part:

19 [Y]our clients have failed and refused to sign the CUP, making it impossible
20 for Tenants to “use the premises only for a medical marijuana dispensary.”
21 Therefore, your clients have frustrated the express purpose of the Lease,
breached the covenant of quiet enjoyment, and constructively evicted
Tenants from the property.

22 Further, the March 2017 demand letter, the state court complaint, and Black Mountain’s
23 motion for summary judgment provided additional information showing that Haidinger’s
24 refusal to sign the CUP deprived tenants of the ability to operate a medical marijuana
25 dispensary, thus denying Tenants the contemplated beneficial enjoyment of the premises.
26 (Plaintiffs’ Exhs. D, F, G).

27 The above facts strongly “suggest a [constructive eviction] claim potentially
28 covered by the policy.” Scottsdale, 36 Cal. 4th at 655. Therefore, Fidelity’s failure to

1 provide a defense breached the contract of insurance. This conclusion does not mean
2 that Plaintiffs are entitled to summary judgment on their claim for breach of the indem-
3 nity provision of the policy. To the contrary, genuine issues of material fact preclude
4 summary judgment on this cause of action. For example, as noted in Cunningham, “to
5 invoke a constructive eviction defense or remedy, the aggrieved tenants must surrender
6 or vacate within a reasonable time after the landlord's material interference with the
7 lease.” 98 Cal. App.4th at 1153 (quoting Friedman, et al., Cal. Practice Guide: Landlord
8 - Tenant (The Rutter Group 2001), ¶ 7:298, p. 7-61). Here, Tenants allege that Plaintiff
9 interfered with their ability to operate the premises for its designated purpose as early as
10 July 2015, but they did not vacate the premises until May 9, 2016. Whether the delay in
11 vacating the premises by Tenants is reasonable under the circumstances presents a
12 question of fact not appropriate for resolution on this motion for summary judgment (nor
13 is it an issue before the court).

14 Fidelity does not expressly dispute that the underlying facts give rise to a duty to
15 defend. Rather, Fidelity contends there is no duty to defend where coverage turns on a
16 purely legal question. (Motion at p.13:20-21). Here, that legal question appears to be
17 whether, under Cunningham, a constructive trust remedy is even available under the
18 circumstances. This contention misses the mark. Whether Tenants acted within a
19 reasonable amount of time in vacating the premises after Plaintiffs’ interference with
20 their ability to operate a medical marijuana dispensary presents a question of fact, and
21 not an issue of law.¹ See id.

22 Next, Fidelity contends that the court should narrowly construe the Policy term
23 “wrongful eviction” to require that the landlord must expel the tenants through the legal
24 process. (Motion at p.18:19-21). This argument turns well-established landlord-tenant

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26 ¹The authorities cited by Fidelity in support of this argument involve legal issues concerning
27 insurance policy interpretation, and not factual disputes. See Waller v. Truck Ins. Exch., Inc., 11 Cal.
28 4th 1, 24 (1995) (legal question concerning meaning of term “occurrence”); Griffin Dewatering Corp. v.
Northern Ins. Co. of N.Y., 176 Cal. App. 4th 172, 199 (2009) (legal dispute concerning scope of the
“total pollution exclusion”); Mirpad, LLC v. California Ins. Guar. Ass’n, 132 Cal. App. 4th 1058, 1068
(2005) (legal question concerning meaning of term “person” as used in policy); Scottsdale, 36 Cal. 4th at
657 (legal question concerning “advertising injury” coverage).

1 law on its head. As set forth above, California landlord-tenant law recognizes that an
2 eviction may be actual or constructive. Moreover, Fidelity’s contention that the court
3 should narrowly construe the contested provision is contrary to California insurance law.
4 “[T]he coverage of a liability insurance policy must be construed broadly and its
5 exclusions narrowly.” Strubble v. United Services Auto. Assn., 35 Cal.App.3d 498, 506
6 (1973). Accordingly, this argument is not persuasive.

7 Finally, Fidelity contends that Plaintiffs’ claims are barred under the policy
8 exclusions for personal injury, fraud, and willful acts (Exclusions A, D, F, respectively).
9 To demonstrate that an exclusion eliminates the duty to defend, the insurer must provide
10 “conclusive evidence demonstrating that the exclusion applies. . . . Thus, an insurer that
11 wishes to rely on an exclusion has the burden of proving, through conclusive evidence,
12 that the exclusion applies in all possible worlds.” Atlantic Mutual Ins. Co. v. J. Lamb,
13 Inc., 100 Cal.App.4th 1017, 1038-39 (2002). Here, Fidelity sets forth seven allegations
14 from the second amended complaint filed in the underlying state court action and
15 concludes, without analysis or addressing the extensive record before the court, that all
16 exclusions apply. This argument falls short of showing by “conclusive evidence that the
17 exclusion applies in all possible worlds.” Id. Specifically, Fidelity fails to come forward
18 with evidence to show that these exclusions apply under the circumstances -- mere
19 allegations taken from the second amended state court complaint fail to conclusively
20 establish that these exclusions apply.

21 As the court grants summary adjudication in favor of Plaintiffs on the breach of
22 the duty to defend claim, and against Fidelity, the remainder of Fidelity’s motion for
23 summary judgment is denied.

24 In sum, the court grants Plaintiffs’ motion for summary adjudication on the issue

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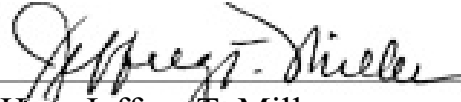
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1 of Fidelity's breach of the duty to defend. The court also denies Fidelity's motion for
2 summary judgment in its entirety.

3 **IT IS SO ORDERED.**

4 DATED: July 26, 2018

5 
6 Hon. Jeffrey T. Miller
United States District Judge

7 cc: All parties

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