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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

ELENA DELGADILLO ET AL.,

Plaintiffs and Appellants,

v.

UNITED STATES LIABILITY
INSURANCE COMPANY ET AL.,

Defendants and Respondents.

A143452

(Alameda County
Super. Ct. No. RG13681917)

Plaintiffs Elena Delgadillo and Jesus Cortes appeal an order of dismissal entered after the trial court sustained the demurrer of defendant United States Liability Insurance Company (USLI) without leave to amend. We shall affirm the judgment.

I. BACKGROUND

Sacramento Lopez brought an action against plaintiffs in 2009 (the Lopez litigation), alleging he had suffered injuries in a fall from the roof of plaintiffs' property in Hayward, where he was working as their employee. Lopez also alleged plaintiffs had violated Labor Code requirements to pay overtime wages and provide meal and rest breaks. Plaintiffs tendered the defense of the Lopez litigation to their business owner's insurance carrier, USLI, which denied plaintiffs' claim.

Plaintiffs' insurance policy (the policy) contained the following exclusions pertinent to this case: "**d. Workers' Compensation And Similar Laws** [¶] Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law. [¶] **e. Employer's Liability**

“Bodily Injury” to: (1) An ‘employee’ of the insured arising out of and in the course of: (a) Employment by the insured; or Performing duties related to the conduct of the insured’s business[.] . . . This exclusion applies: (1) Whether the insured may be liable as an employer or in any other capacity . . .”

Plaintiffs brought this action against USLI, alleging causes of action for breach of contract, bad faith breach of the implied covenant of good faith and fair dealing, fraud and intentional deceit, fraud and negligent misrepresentation, “[d]eceit, [p]romise [m]ade [w]ithout [i]ntent to [p]erform,” and intentional infliction of emotional distress.¹ Their causes of action for breach of contract and breach of the covenant of good faith and fair dealing were based on the theory that USLI had a contractual obligation to defend and indemnify them in the Lopez litigation. The remaining causes of action alleged in addition that USLI, through an agent, misled plaintiffs as to the coverage it would provide.

USLI demurred to the second amended complaint,² primarily on the ground the policy did not cover Lopez’s claims for bodily injury or Labor Code violations. It requested judicial notice of a number of documents, including the verdict form in the underlying Lopez litigation, in which the jury found Lopez was employed by Delgadillo and Cortes at the property at which he was injured, and the judgment entered upon those verdicts.

The trial court sustained the demurrer without leave to amend. It took judicial notice of the verdict form for the negligence claim in the Lopez litigation, which indicated Lopez sustained his injury during the course of his employment by Delgadillo and Cortes. Because the policy explicitly excluded coverage for bodily injury sustained by an employee in the course of employment, the court ruled, plaintiffs could not state a cause of action for breach of contract against USLI. Moreover, the court concluded that

¹ Lopez was also named as a defendant. He is not a party to this appeal.

² The trial court had previously sustained a demurrer to the first amended complaint with leave to amend.

the Labor Code violations did not fall within the terms of policy. Finally, the court reasoned that, absent any potential for coverage, there was no tortious denial of policy benefits that would support the remaining causes of action.

II. DISCUSSION

In reviewing a judgment of dismissal after a trial court sustains a demurrer without leave to amend, we accept as true the facts alleged in the complaint, as well as facts that might be inferred from them. (*Barnett v. Fireman's Fund Ins. Co.* (2001) 90 Cal.App.4th 500, 504-505.) We also consider matters that may be judicially noticed. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) “[T]o the extent the factual allegations conflict with the content of the exhibits to the complaint, we rely on and accept as true the contents of the exhibits and treat as surplusage the pleader’s allegations as to the legal effect of the exhibits.” (*Barnett, supra*, at p. 505.)

When a demurrer is sustained without leave to amend, “we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff. [Citation.]” (*Blank v. Kirwan, supra*, 39 Cal.3d at p. 318.)

Plaintiffs first contend the trial court erroneously took judicial notice of the finding in the underlying Lopez litigation that Lopez was their employee when he was injured. As plaintiffs point out, “While [a court] may take judicial notice of court records and official acts of state agencies (Evid. Code, § 452, subs. (c), (d)), the truth of matters asserted in such documents is not subject to judicial notice. [Citation.]” (*Rea v. Blue Shield of California* (2014) 226 Cal.App.4th 1209, 1223; see also *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1568 [“neither a finding of fact made after a contested adversary hearing nor a finding of fact made after any other type of hearing can be indisputably deemed to have been a correct finding.”].)

We are not persuaded the judgment should be reversed on this ground. The complaint alleged not only that Lopez claimed he suffered injuries at plaintiffs’ property “where he was working as plaintiffs’ employee,” but also that USLI had represented to

plaintiffs that its policy would provide coverage or a defense “to the claims *such as on the job injury* at [plaintiffs’ property].” (Italics added.) Thus, the fact that Lopez was plaintiffs’ employee may reasonably be inferred from the complaint. Indeed, in their opening brief on appeal, plaintiffs contend that their attorney in the Lopez litigation “wrongly” took the position that Lopez was not an employee, and that “[t]he facts however established the employment relationship between Appellants and Lopez.” They also acknowledge explicitly that Lopez “while employed by Appellants suffered an on the job injury” at their property and that “Lopez was an employee.” The trial court properly concluded the policy does not cover Lopez’s personal injuries sustained during the course of his employment.

In the underlying litigation, Lopez also alleged he had been deprived of wages, overtime pay, and meal and rest periods. Plaintiffs contend Lopez’s claims for Labor Code violations fell within the “property damage” portion of the policy and USLI therefore should have defended and indemnified them. This contention is meritless. The portion of the policy upon which plaintiffs rely concerns coverage for the loss of their *own* business income and payroll expenses in the event of physical loss or damage to their property. The “Liability” portion of the policy, on the other hand, provides coverage for “sums that the insured becomes legally obligated to pay as damages because of ‘bodily injury’, ‘property damage’, or ‘personal and advertising injury’ to which this insurance applies.” “Property damage” is defined as “[p]hysical injury to tangible property, including all resulting loss of use of that property,” and “[l]oss of use of tangible property that is not physically injured.” The Labor Code violations Lopez alleged do not fall within this definition, and plaintiffs do not contend otherwise. (See *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 26-27 (*Waller*) [“It is well established that [commercial general liability] policies do not provide coverage for intangible property losses, including economic losses.”].)

The trial court correctly concluded the policy provided no potential for coverage, and therefore USLI had no duty to defend plaintiffs in the Lopez litigation and there was no breach of contract. (See *Waller, supra*, 11 Cal.4th at p. 26.) Plaintiffs suggest no

theory upon which their remaining causes of action for breach of the implied covenant of good faith and fair dealing, fraud, deceit, and intentional infliction of emotional distress may be maintained in the absence of a duty to defend.

III. DISPOSITION

The judgment is affirmed.

Rivera, J.

We concur:

Reardon, J., Acting P.J.

Streeter, J.