IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

JEP MANAGEMENT, INC., et al.	:	August Term 2004
Plaintiffs,	:	No. 4170
v.	:	Commerce Program
FEDERAL INSURANCE COMPANY, et al.	:	Control Nos. 032705, 032738
Defendants.	:	06060531

ORDER and MEMORANDUM

AND NOW, this 8TH day of August 2006, upon consideration of the Motions for Summary Judgment of Defendant Federal Insurance Company ("Federal") and The Graham Company ("Graham"), the responses in opposition, all matters of record, and in accordance with the Memorandum Opinion being contemporaneously filed with this Order, it hereby is ORDERED that said Motions are granted.

Federal's Second Motion for Summary Judgment is dismissed as moot.

BY THE COURT:

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MARK I. BERNSTEIN, J.

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MEMORANDUM OPINION

MARK I. BERNSTEIN, J.

Before the court are the Motions for Summary Judgment of Defendant Federal Insurance Company ("Federal") and The Graham Company ("Graham"). For the reasons fully set forth below, said Motions are granted.[1]

BACKGROUND

This action arises out of the embezzlement of $7 million by an employee of plaintiff Schiller-Pfeiffer, Inc. Plaintiff JEP is the management company for several subsidiaries and affiliates, including Schiller-Pfeiffer. Plaintiffs were insured against employee theft under crime insurance policies issued by Federal, a subsidiary of Chubb Insurance Companies. Graham was plaintiffs' insurance broker.

This case involves two distinct policies of insurance issued on two different policy forms: the Executive Protection Policy ("EP Policy") and the Forefront Portfolio Policy (the "Forefront" Policy"). The EP Policy came into effect on June 1, 1996 and provided $5 million in crime

1 For this reason, Federal's Second Motion for Summary Judgment (Control No. 0606031) is dismissed

coverage. In subsequent years, coverage was continued under the EP Policy through Federal's issuance of annual one-page endorsements amending the policy period; all other terms and conditions remained unchanged until 2002.

In 2002, JEP informed Graham that it wanted to lower its insurance premium payments. To reduce the premiums, the crime coverage limits were reduced from $5 million to $2 million. To effectuate this change, Federal required the EP Policy form to be replaced with the Forefront policy form. The Forefront Policy came into effect on June 1, 2002 and provided similar coverage to that provided by the EP Policy, albeit containing a lower coverage limit of $2 million. All policies were purchased through defendant Graham. Graham had provided JEP with insurance brokerage services pursuant to a service agreement. Since 1992, JEP dealt only with Graham in negotiating and purchasing insurance policies and never directly with the insurance companies. JEP authorized the reduction in coverage limits but was not specifically notified of the change in form.

From November 1995 through August 2002, Stanley Szagola, an employee of Schiller-Pfeiffer, embezzled in excess of $7 million dollars from his employer. Plaintiffs allege that they discovered the loss on July 22, 2002, when their newly hired Chief Financial Officer reviewed the companies' books. On September 18, 2002, Szagola confessed and the loss was reported to Federal, through Graham. After investigation, Federal paid plaintiffs the full $2 million limits of liability under the Forefront Policy, but denied the claim under the EP Policy.

After accepting the $2 million payment, plaintiffs commenced this lawsuit seeking declaratory relief and damages for breach of contract. Plaintiffs claim that they are entitled to the $5 million limits of liability under the EP Policy in addition to the $2 million limits of

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as moot.

liability already received under the Forefront Policy. In the alternative, plaintiffs argue that they are entitled to coverage under the EP Policy instead of the Forefront Policy and are therefore owed an additional $3 million. Plaintiffs further assert claims against Graham for negligence and negligent misrepresentation, claiming that Graham's negligence resulted in the unavailability of the additional coverage. Both defendants have moved for summary judgment as to all claims.

DISCUSSION

A. Plaintiffs' Claims Against Federal

Plaintiffs seek declaratory relief and damages for breach of contract against Federal, claiming they are entitled to coverage under the EP Policy. Federal argues that plaintiffs' claims fail as a matter of law because the Forefront Policy expressly terminated the EP Policy and provided that coverage for the loss must be pursuant to the Forefront Policy, not the EP Policy.

Interpretation of an insurance contract is a matter of law for the court; any ambiguous language must be construed in favor of the insured. Contractual terms are ambiguous only if they are subject to more than one reasonable interpretation when applied to a particular set of facts. Where the policy language is clear and unambiguous, the court must give effect to that language. If the policy language is unambiguous, the language is construed in accordance with its plain meaning and extrinsic evidence of the drafters' intent may not be examined.[2]

The language of the Forefront Policy is clear and unambiguous. Section VII(A)(2) of the

2 *See* Hutchinson v. Sunbeam Coal Corp., 513 Pa. 192, 519 A.2d 385, 390 (1986); White v. Keystone Ins. Co., 2001 Pa. Super. 124, 775 A.2d 812 (2001); Wagner v. Erie Ins. Co., 2002 Pa. Super. 166, 801 A.2d 1226, 1231, *aff'd* 577 Pa. 563, 847 A.2d 1274 (2004); Madison Construction Co. v. The Harleysville Ins. Co., 557 Pa. 595, 735 A.2d 100, 106 (1999); Standard Venetian Blind Co. v. American Empire Ins. Co., 503 Pa. 300, 469 A.2d 563, 566 (1983).

Forefront Policy plainly states that plaintiffs' "prior…policy shall terminate as of the inception date of this Coverage Section and such…policy shall not cover any loss not discovered and noticed to the Company prior to the inception of this Coverage Section." The EP Policy was terminated upon the inception of the Forefront Policy on June 1, 2002. The loss was not discovered prior to July 22, 2002 and not reported to Federal until September 18, 2002. Under the plain language of the Forefront Policy, any coverage for the loss must be under that policy, not the EP Policy.

Plaintiffs seek to recover the $5 million under the EP Policy limits in addition to the $2 million Forefront Policy limits. This is strictly prohibited by Section VII (A)(3) of the Forefront Policy, which clearly states:

> The insured shall neither be entitled to a separate recovery under each policy in force at the time any part of the prior loss was sustained, nor shall the Insured be entitled to recover the sum of the limits of liability of any such policies. The Company's maximum liability for the prior loss shall not exceed the lesser of either the limit of liability of the policy immediately preceding this Coverage Section under which part of the prior loss was sustained or the applicable Limit of Liability as set forth in the Declarations of this Coverage Section.

Federal's liability for the loss cannot exceed "the lesser of" the EP Policy limits and the Forefront Policy limits. Section IX(B) of the Forefront Policy expressly prohibits cumulative recovery:

> Regardless of the number of years this coverage remains in effect and the total premium amounts due or paid, the amount the Company shall pay for any loss shall not be cumulative from year to year or from Policy Period to Policy Period.

Since Federal has paid the Forefront Policy limits, plaintiffs' claim for additional payment under the EP Policy cannot succeed.

Plaintiffs argue the application of the doctrine of reasonable expectations. This equitable doctrine guards against an insurer's use of complex and confusing qualifications and exceptions

to defeat the reasonable expectations of the average layman entering into an insurance transaction. The reasonable expectations doctrine does not apply to unambiguous policy language. The Supreme Court has identified only two applications for the doctrine of reasonable expectations: protecting non-commercial insureds from policy terms which are not readily apparent; and protecting non-commercial insureds from deception by insurance agents.[3] The reasonable expectations doctrine is inapplicable herein. The policy language is clear and unambiguous. Plaintiffs, commercial insureds, were represented by Graham, a sophisticated insurance broker. The reasonable expectations doctrine has never been applied under such circumstances.

Plaintiffs make conflicting arguments with respect to Graham's agency. In their brief, plaintiffs claim that Graham was not their agent. However, in their amended complaint, plaintiffs allege that Graham was their broker and was "actively involved in assisting JEP" with the purchase of insurance and that JEP did so with "Graham's assistance and advice."[4] The record is clear that Graham was authorized to purchase insurance on behalf of JEP and was specifically authorized to reduce plaintiffs' crime coverage limits from $5 million to $2 million. All contact with Federal was through Graham. There is no evidence that Federal created any of plaintiffs' expectations. These two parties never had any direct communication. Any expectations plaintiffs had regarding their coverage could only have been based upon Graham's representations.

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3 Collister v. Nationwide Life Ins. Co., 479 Pa. 579, 388 A.2d 1346 (1978); Williams v. Nationwide Mut. Ins. Co., 2000 Pa. Super. 110, 750 A.2d 881, 886 (2000); Madison, 735 A.2d at 109 n.8 (*citing* Tonkovic v. State Farm Mut. Ins. Co., 513 Pa. 445, 521 A.2d 920 (1987)); Collister, 388 A.2d at 1346; Matcon Diamond v. Penn Nat'l Ins. Co., 2003 Pa. Super. 22, 815 A.2d 1109 (2003).

4 Am. Compl. ¶¶ 8, 9.

Summary judgment is granted in favor of Federal and against Plaintiffs.

B. Plaintiffs' Claims Against Graham

Plaintiffs also assert claims against Graham for negligence and negligent misrepresentation. Plaintiffs must demonstrate that Graham's failure to conform to the standard of professional conduct caused injury. Plaintiffs argue that Graham failed to advise them of all the consequences of reducing their coverage limits and this failure resulted in the unavailability of coverage under the EP Policy.

The letter in which Federal rejected plaintiffs' claim under the EP Policy explicitly says:

> Even if we agree that the loss was discovered on July 22, 2002 (which we do not) written notice was not provided to Federal until well after the 60 day time limitation had expired. As such, no coverage can be provided for this claim under the EP Policy.

The conclusion of late notice is supported by the clear language of the EP Policy, which states:

> Coverage under this [Crime Coverage] section does not apply to:
>
> (I) loss unless discovered and written notice thereof is given to the Company within (1) sixty days following the termination of its entirety of Crime Coverage to the Insured by the Company…or
>
> (J) loss sustained by an insured herein unless discovered and written notice thereof is given to the company within sixty days following termination of the coverage section as to such insured.
>
> (k) loss under any insuring clause which is terminated in its entirety unless discovered and written notice thereof is given to the Company within sixty days following such termination.[5]

There is no dispute for purposes of this summary judgment motion that the loss was discovered on July 22, 2002 but not reported until September 18, 2002. There is no dispute that the loss was "not discovered and noticed" within sixty days of the termination of the EP Policy, or by August 1, 2002. There is no coverage under the EP Policy because plaintiffs did not discover and

provide notice within the time proscribed by the policy which had been in effect the prior year.[6]

Plaintiffs admit that they requested a reduction in coverage from $5 million to $2 million. They argue that Graham did not advise them that the EP Policy form was being replaced with the Forefront Policy form. Plaintiffs contend that this change in form prevented them from recovering the $5 million EP Policy limits. However, plaintiffs are entitled to $2 million in coverage, regardless of which form was used. The result is the same under both policies. Both the Forefront Policy form and the EP Policy form terminate coverage under the prior policy unless the loss is discovered and reported before the new policy comes into effect.[7] Section 12 of the EP Policy form states:

> Any bonds or policies issued by the Company or its affiliates…shall terminate, if not already terminated, as of the inception date of this policy. Such prior bonds or policies shall not cover any loss under the Crime…coverage sections not discovered and notified to the Company prior to the inception date of this policy.

Both the EP Policy and the Forefront Policy form apply the lower of the two policy limits for

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5 EP Policy at 3 and 4.

6 To avoid the clear and unambiguous language of the policy, plaintiffs argue that the EP Policy is an occurrence policy and that there has been no demonstration of prejudice as a result of their untimely notice. "In an 'occurrence' liability insurance policy, the insured event triggering coverage is the 'occurrence' itself. Once the 'occurrence' happens, liability insurance coverage attaches even though the claim may not be made for some time thereafter." Appleman on Insurance § 130.1 (2d ed. 2005). In a 'claims-made' policy, the liability insurance coverage is effective if the negligent or omitted act is discovered and brought to the attention of the insurance company during the period of the policy, no matter when the act occurred." Id. Neither the Forefront nor the EP Policy are occurrence policies. Plaintiffs' purported reliance on the phrase "per occurrence limit" in Graham's coverage proposals is the only "evidence" of such an interpretation. This interpretation is not supported by the policy language. It is clear that coverage under both policies are contingent upon discovery and notice of a loss.

7 Section VII (A)(2) of the Forefront Policy states that plaintiffs' "prior…policy shall terminate as of the inception date of this Coverage Section and such…policy shall not cover any loss not discovered and noticed to the Company prior to the inception of this Coverage Section."

prior losses.[8] Section 15 of the EP Policy provides:

> The liability of the Company with respect to such loss shall not exceed the limit of liability under the coverage in force at the time the loss was sustained, or the limit of liability under the Insurance Clause of this coverage section applicable to the loss, whichever is smaller.

Finally, both policy forms preclude cumulative recovery.[9] Section 15 of the EP Policy form states:

> Regardless of the number of years this coverage shall continue in force, and the number of premiums which shall be payable or paid or any other circumstances whatsoever, the liability of the Company with respect to any loss or losses shall not be cumulative from year to year or from period to period.

Under the unambiguous policy language, it is clear plaintiffs would not have been entitled to $ 5 million in coverage regardless of which form had been used when the limits of liability were reduced from $5 million to $2 million. Plaintiffs have failed to establish any causal link between Graham's conduct and their claimed damages.

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8 Section VII (A)(3) of the Forefront Policy states:

> The insured shall neither be entitled to a separate recovery under each policy in force at the time any part of the prior loss was sustained, nor shall the Insured be entitled to recover the sum of the limits of liability of any such policies. The Company's maximum liability for the prior loss shall not exceed the lesser of either the limit of liability of the policy immediately preceding this Coverage Section under which part of the prior loss was sustained or the applicable Limit of Liability as set forth in the Declarations of this Coverage Section.

9 Section IX (B) of the Forefront Policy states:

> Regardless of the number of years this coverage remains in effect and the total premium amounts due or paid, the amount the Company shall pay for any loss shall not be cumulative from year to year or from Policy Period to Policy Period.

CONCLUSION

Defendants' Motions for Summary Judgment are granted. Federal's Second Motion for Summary Judgment is dismissed as moot. An order consistent with this Opinion hereby is entered.

BY THE COURT:

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MARK I. BERNSTEIN, J.