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

GEMINI INSURANCE COMPANY, Plaintiff, v. MEYER JABARA HOTELS LLC, COLD WASH ZONE, LLC, PRACTICAL NETWORK SECURITY SOLUTIONS, INC., THOMAS LUTHER, LISA STRATTON, and MJ EMPLOYMENT SERVICES, INC., Defendants, v. RISK PLACEMENT SERVICES, INC., ARTHUR J. GALLAGHER RISK MANAGEMENT SERVICES, INC, and ARTHUR J. GALLAGHER & CO., Additional Defendants.	:	FEBRUARY TERM, 2017 No. 2782 Commerce Program Control Numbers: 18112057 18112683 18112686 18112687 2312 EDA 2019

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FIRST JUDICIAL DISTRICT OF PA

Gemini Insurance Company Vs Meyer Jabara Hot-OPFLD
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OPINION

This Opinion is in support of this court's ruling on four (4) summary judgment motions filed by the parties in the captioned matter.

Defendant, Meyer Jabara Hotels, LLC, (hereinafter, "MJH"), and Plaintiff, Gemini Insurance Company, (hereinafter, "Gemini"), have filed cross motions for summary judgment. Arthur J. Gallagher Risk Management Services, a subsidiary of A.J. Gallagher & Sons, Inc., (hereinafter, "AJG"), has also filed a motion for summary judgment against MJH, and MJ Employment Services, Inc., (hereinafter, "MJES"), has filed a motion for summary judgment against Gemini, which is unopposed.

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Background

In 2014, the FBI Investigated Kenneth Kapikian, the former General Manager of the Sheraton University City in Philadelphia, (hereinafter, "Hotel"), and Dennis Gagliardi, the former Chief Engineer. Both individuals were subsequently charged with wire fraud and money laundering. According to the criminal complaint in the matter, they instructed Hotel venders to inflate their invoices to the Hotel and then collected the reimbursements.

Kapikian and Gagliardi allegedly stole approximately 3 million dollars from the Hotel; they pled guilty on or about June 11, 2015.

I. Standard of Review

After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury. [1]

A proper grant of summary judgment depends upon an evidentiary record that either (1) shows the material facts are undisputed or (2) contains insufficient evidence of facts to make out a *prima facie* cause of action or defense, and therefore, there is no issue to be submitted to the jury. As with all summary judgment cases, the court must examine the record in the light most

[1] *McCarthy v. Dan Lepore & Sons Co., Inc.*, 724 A.2d 938, 940 (Pa.Super.,1998), citing Pa. R. Civ. P. 1035.2.

favorable to the non-moving party and resolve all doubts against the moving party as to the existence of a triable issue. [2] In the cases at hand, the record evidence failed to satisfy the elements of

II. Factual and Procedural History.

This case is a coverage action, arising from an underlying criminal matter. MJH is a Florida LLC that manages hotels in multiple states, including the Hotel which is owned by Penn Tower, a subsidiary of the University of Pennsylvania (hereinafter, "the University"). Under the Amended and Restated Hotel Management Agreement between MJH and Penn Tower, MJH had authority with regard to hiring, promoting, supervising and discharging staff at the Hotel, "all of whom shall be employees of MJ Employment Services, Inc." (hereinafter, "MJES"). MJES is a wholly-owned subsidiary of MJH, who provided the employees' paychecks, benefits, and tax forms.

a. The Policy.

The insurance policy at issue is a Professional Liability policy (hereinafter, "the Policy"). Plaintiff Gemini Insurance Company (hereinafter, "Gemini") issued the Policy to MJH for the policy period July 1, 2014 to July 1, 2015. It had limits of liability of $1 million for each claim and a $35,000 deductible.

The Policy was purchased by MJH using the services of its insurance broker, AJG. It covers all claims first made and reported during the policy period or within 60 days thereafter.

The Policy lists MJH as the Named Insured. It also defines "Insured" as, among other things, "the Named Insured as listed on the Declarations Page including any partner, director,

[2] *Id.* citing Pa. R. Civ. P. 1035.2 *Note.*

officer or employee of the Named Insured while rendering Professional Services on behalf of the Named Insured". The Policy also contains the following exclusions –

> "This Policy does not apply to any Claim or Claim Expenses Arising Out Of any actual or alleged: A) Criminal, fraudulent, dishonest or knowingly wrongful act or omission committed by or with the knowledge of any Insured … B) The gaining by any Insured of any personal profit, gain or advantage to which any Insured was not legally entitled."

It also contains a "No Prior Knowledge Condition," under which coverage is barred unless, prior to July 1, 2014, "no Insured knew, nor could have reasonably foreseen, that the Wrongful Acts might result in a Claim."

b. The litigation.

In March, 2014, the University notified MJH via letter that any losses in this case might be subject to indemnification. In December 2015, the University sent MJH a demand letter for $5.4 million in losses in connection with the employees' fraud. MJH tendered the claim to Gemini, who agreed to defend the claim subject to a reservation of rights. In March, 2016, MJH asked Gemini to approve a pending settlement for the claim, including payment of the $1 million coverage limit. Gemini and MJH signed an interim funding and non-waiver agreement, which did not waive any of the parties' claims, rights and defenses. Gemini paid $975,000 toward the settlement of the University's claim against MJH. The Interim Funding Agreement states that Gemini has the right to initiate a coverage action to determine its obligations to fund the instant claim, and that, if it prevails, MJH must refund the $975,000 paid by Gemini. The instant action was filed by Gemini on February 10, 2017.

Discussion.

c. Waiver.

As a threshold matter, MJH argues that Gemini has waived the right to contest coverage because it subrogated some of the claims and recovered confidential amounts from third-party tortfeasors. MJH argues that insurance company's right to subrogation does not exist unless it unqualifiedly pays its policyholder for a loss. However, the fact of subrogation is not itself a waiver of the entire right of Gemini to contest MJH's claim to the money. "The principles of subrogation will allow an insurer who has indemnified an insured for a loss to recover payments made to the insured by the party responsible for that loss to the same extent or amount that the insurer has paid the insured. [emphasis added]"[3] Shockley prevents double recovery for the insurer. If Gemini prevails and MJH must repay the $975,000, it will do so less the amount Gemini has recovered from third-party defendants Luther and Practical Network. Gemini has not waived any and all recovery from MJH.

d. Employment status.

The question of coverage turns on the issue of whether Kapikian and Gagliardi are employees of Defendant MJH, and whether the Criminal Acts Exclusion or the Personal Profit Exclusion applies to them and their conduct.

The Policy states: "This Policy does not apply to any Claim or Claim Expenses Arising Out Of any actual or alleged: A) Criminal, fraudulent, dishonest or knowingly wrongful act or omission committed by or with the knowledge of any Insured … B) The gaining by any Insured of any personal profit, gain or advantage to which any Insured was not legally entitled." Meanwhile, "Insured" is defined by the Policy as "The Named Insured as listed on the Declarations Page, including any former, current or future partner, director, office or employee of the Named Insured while rendering Professional Services on behalf of the Named Insured."

[3] Shockley v. Harleysville Mut. Ins. Co., 381 Pa. Super. 287, 292, 553 A.2d 973, 975 (1988).

Gemini argues that these exclusions apply to the acts of Kapikian and Gagliardi; MJH argues that they do not because Kapikian and Gagliardi were not employees of MJH, but rather of Defendant MJES. As employees of this other entity, they cannot be insureds under the policy, and these exclusions would not apply.

MJH argues that these individuals are employees of MJES: the Agreement between MJH and MJES says that all workers at the Hotel "shall be employees of MJES." MJES was listed as Kapikian and Gagliardi's employer on their W-2 forms, and provided their paychecks. Moreover, Mr. Meyer of MJH gave deposition testimony that MJH had no employees of its own.

In opposition, Gemini argues that because MJH handled the hiring, firing, promotion of employees, and was the party directing their work, MJH is their employer.

This Court has considered both of the aforementioned arguments and has nevertheless concluded that Kapikian and Gagliardi are employees of MJH. An employee is defined by Black's Law Dictionary as –

> "someone who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance."[4]

Both Pennsylvania and Florida courts look at the question of actual "control over the work to be completed and means of performance" when determining the employer / employee relationship.[5]

As noted by Gemini, "whether a company pays the salary of an employee or how that employee is treated for tax purposes is not dispositive for determining the existence (or lack

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[4] EMPLOYEE, Black's Law Dictionary (10th ed. 2014).

[5] Universal Am-Can, Ltd. v. W.C.A.B. (Minteer), 563 Pa. 480, 493, 762 A.2d 328, 334 (2000); see also 4139 Mgmt. Inc. v. Dep't of Labor & Employment, 763 So. 2d 514, 517 (Fla. Dist. Ct. App. 2000)

thereof) of an employer-employee relationship."[6] Nor is the parties' agreement on how to treat the employee's status.[7]

The Court also notes that the funds to pay the employees did not originate with MJES but were transferred to them from MJH' Operating Account. Deposition testimony makes clear that MJES received no compensation and made no profit for the work of its supposed employees. This also militates in favor of finding that MJES is not the employees' actual employer.

It is possible that a person may have two simultaneous employers. "A single individual may stand in the relation of an employee to two or more employers at the same time."[8] The fact that MJES is identified as the employees' employer on their W-2 forms and in the Management Agreements between MJH and MJES, is relevant. At a minimum, MJES would be a joint employer with MJH, who controlled the employees work, hiring, discharge, and promotion. MJH, therefore, is their employer, regardless of whether or not MJES is as well.

e. Professional services.

The Policy defines the Insured as follows:

> "The Named Insured as listed on the Declarations Page, including any former, current or future partner, director, office or employee of the Named Insured while rendering Professional Services on behalf of the Named Insured."

The Named Insured listed on the Declarations Page is MJH; therefore, Kapikian and Gagliardi are Insureds if they are employees of MJH while rendering professional services on its behalf.

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[6] See, e.g., Grimsley v. Manitowoc Co., Inc, 675 F. App'x 118, 121 (3d Cir. 2017) ("[I] is well established under Pennsylvania law that payment of salary alone is not sufficient to establish an employer-employee relationship.")

[7] George v. Nemeth, 426 Pa. 551, 554, 233 A.2d 231, 233 (1967) (" this is not determinative of the matter for it is the actual practice between the parties which is crucial.")

[8] 29 C.F.R. § 791.2 (related to employer liability under the Fair Labor Standards Act).

MJH argues that Kapikian and Gagliardi's criminal activities do not meet the definition of rendering professional services on behalf of MJH. However, this Court finds that they do, and to rule otherwise would render the Criminal Acts Exclusion meaningless. The theft and fraud committed by the employees may not have been in service of MJH, but they used their authority and their time on duty at MJH to have the opportunity to commit their crimes. When they, for example, paid invoices on behalf of the hotel, they were rendering professional services on behalf of MJH; so too were they when they fraudulently inflated those invoices and took kickbacks. As noted by Gemini, this provision does not require the criminal actions to be taken in the Named Insured's *interest*. Such a requirement would mean that a Criminal Acts Exclusion such as this one would be superfluous, as almost any criminal activities committed by an insured would be deemed to not be done while rendering professional services for the named insured.[9]

Because Kapikian and Gagliardi are Insureds under the policy, both the Criminal Acts and Personal Profit Exclusions apply to them, and there can be no coverage under the Policy.

f. Arthur Gallagher's Motion for Summary Judgment is GRANTED.

MJH brought a [cross-claim] against Arthur J. Gallagher Risk Management Services, Inc., and Arthur J. Gallagher & Company (henceforth AJG), the insurance broker who placed the Policy. MJH alleges that, if it is determined MJH is not entitled to coverage under the Gemini policy, then AJG negligently placed the coverage and is therefore liable to MJH for "inadequate" limits of crime policy coverage. MJH argues that AJG had a special duty of care toward MJH, and that AJG should have obtained a "separation of insureds" provision in connection with the

[9] These facts are similar to the facts in a New York case, and that Court's analysis is apt. "if Aptuit's contention is true then any criminal conduct committed by an "insured" would never be deemed a "professional service." Such an interpretation would forego the need for the Criminal Acts Exclusion since hypothetically all criminal conduct could be deemed out of the realm of "professional services" and scope of employment. This is an unreasonable interpretation and likely not to be the intention of the parties at the time of contracting." Aptuit, LLC v Columbia Cas. Co., No. 651289/2012, 2014 WL 1901157, at *1 (N.Y. Sup. Ct. May 08, 2014).

professional liability policy. It also argues that AJG should have recommended to MJH that it purchase a crime policy with a higher limit of liability. In other words, AJG should have known better than MJH what insurance it needed, and how much.

MJH argues that AJG had a special duty of care toward MJH; however, this argument fails for two main reasons. First, MJH is sophisticated business entity. Mr. Meyer has a Juris Doctor, and a Master of Business Administration, and MJH employs a fulltime risk manager. Meyer testified that he, personally, made all final decisions regarding insurance coverage and limits. Moreover, in their written compensation agreement, the parties expressly agreed that "[AJG] would **not** be operating in a fiduciary capacity." (emphasis added.) This agreement between sophisticated business entities defines their relationship as an arms-length one, and overrides any possibility that AJG had a duty to second-guess MJH's coverage decisions. This express agreement overrides any special duty of care potentially owed to MJH, and therefore the Court need not reach the choice of law question brought up by MJH here.

Accordingly, AJG is not liable to MJH for negligence related to insurance placement or advice, and its motion for summary judgment is granted. AJC is dismissed from this action.

g. MJES' Motion for Summary Judgment is granted.

MJES brought this motion asking to be dismissed from the case; as it is unopposed, the Court will grant it.

III. Conclusion.

For the reasons discussed *supra*, Gemini's Motion for Summary Judgment is GRANTED. The hotel claim is excluded from coverage under the Policy, and MJH must repay the $975,000, less Gemini's recovery from third-party subrogees. MJES' Motion for Summary Judgment is Granted, and it is dismissed from the case. AJG's Motion for Summary Judgment is GRANTED

and it is dismissed from the case. MJH's Motion for Summary Judgment is DENIED.

BY THE COURT:

NINA W. PADILLA, J.