

William St. Foot Care, P.C. v Hanover Ins. Group

2009 NY Slip Op 31744(U)

July 20, 2009

Supreme Court, New York County

Docket Number: 111853/2007

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRECEDENT.

HON. CAROL EDMEAD

PART 35

Justice

Index Number : 111853/2007

WILLIAM STREET FOOT CARE, P.C.,

vs.

HANOVER INSURANCE GROUP

SEQUENCE NUMBER : # 001

SUMMARY JUDGMENT

INDEX NO. 111853-07

MOTION DATE 7/14/09

MOTION SEQ. NO. #001

MOTION CAL. NO.

were read on this motion to/for

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

Replying Affidavits

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED JUL 21 2009

COUNTY CLERK'S OFFICE NEW YORK

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendant Hanover Insurance Company pursuant to CPLR §3212 for summary judgment in its favor is granted, and the Complaint is hereby dismissed; and it is further

ORDERED that the plaintiff's cross-motion for summary judgment declaring that the Policy provided coverage for plaintiff under the "Forgery and Alteration" provision of the Policy, and that Hanover must pay plaintiff \$50,000.00, plus interest, costs and disbursements, is denied; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: 7/20/09

HON. CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
WILLIAM STREET FOOT CARE, P.C.,

Plaintiff,

Index No. 111853/2007

-against-

DECISION/ORDER

THE HANOVER INSURANCE GROUP,

Defendant.

FILED
JUL 21 2009
COUNTY CLERK'S OFFICE
NEW YORK

-----X

MEMORANDUM DECISION

In this declaratory judgment action concerning an insurance coverage dispute, defendant Hanover Insurance Company ("Hanover")¹ moves pursuant to CPLR §3212 for summary judgment on the ground that Hanover has paid all sums to which plaintiff is entitled under a certain business insurance policy (the "Policy")² issued to plaintiff, William Street Foot Care, P.C. ("plaintiff"), and no further sums are owed.

In response, plaintiff cross moves for summary judgment declaring that the Policy provided coverage for plaintiff under the "Forgery and Alteration" provision of the Policy, and that Hanover must pay plaintiff \$50,000.00, plus interest, costs and disbursements.

*Factual Background*³

It is alleged that from approximately August 20, 2000 through July 28, 2006, plaintiff's former office secretary Lucy DelValle ("DelValle") forged the signature of plaintiff's principal, Dr. Harvey Katz ("Dr. Katz"), on plaintiff's checks for her personal benefit. Plaintiff alleges that

¹ According to defendant, it is improperly named as Hanover Insurance Group in this action.

² The Policy was effective from March 12, 2006 to March 12, 2007.

³ The Factual Background is taken in large part from Hanover's motion.

from June 2005 through July 2006, DelValle wrote \$74,000 in fraudulent checks.⁴ DelValle's fraud was allegedly discovered on July 28, 2006 and plaintiff sought coverage under the Policy (the "Policy"), for the loss caused by its employee. By letter dated December 20, 2006, Hanover acknowledged that coverage was available under the "Employee Dishonesty" provision of the Policy and paid \$10,000, the limit of liability applicable to that Additional Coverage.

Plaintiff then sought coverage under the "Forgery or Alteration" provision of the Policy, which is subject to a \$50,000 limit of liability. By letter dated February 1, 2007, Hanover disclaimed coverage for DelValle's forgery based on the Dishonesty Exclusion.

Consequently, plaintiff commenced this action for a declaratory judgment declaring that plaintiff is entitled to first party benefits under the additional limits of Coverage for "Forgery and Alteration" as amplified by the Special Broadening Endorsement.

Hanover's Motion

Hanover contends that the Policy provides coverage for "direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss." "Covered Property" includes Buildings and Business Personal Property, as described in the Policy. "Covered Property" does not include "money," except as provided in the Money and Securities Additional Coverage or the Employee Dishonesty Additional Coverage. Although the Money and Securities Additional Coverage provides coverage for loss of "money" and "securities" "while at a bank or savings institution," plaintiff has made no claim under this Additional Coverage. However, Hanover paid plaintiff pursuant to

⁴ On December 12, 2006, DelValle was sentenced to five years probation based on her plea of guilty to two counts: grand larceny in the second degree and forgery in the second degree.

[* 4]
the limits of the Employee Dishonesty Additional Coverage.⁵

The Policy also contains an Additional Coverage for Forgery or Alteration provision:

k. Forgery or Alteration

- (1) We will pay for loss resulting directly from forgery or alteration of, any check, draft, promissory note, bill of exchange or similar written promise of payment in "money", that you or your agent has written, or that was issued by someone who impersonates you or your agent.
- (2) If you are sued for refusing to pay the check, draft, promissory note, bill of exchange or similar written promise of payment in "money", on the basis that it has been forged or altered, and you have our written consent to defend against suit, we will pay for any reasonable legal expenses that you incur in that defense.

However, this Additional Coverage does not apply because the Policy specifically excludes coverage for loss caused by dishonest acts of the insured's employees, such as acts that caused the loss here.⁶ All loss or damage caused by a dishonest or criminal act of an employee of

⁵ The Employee Dishonesty Additional Coverage provides:

p. Employee Dishonesty including ERISA Compliance

(1) We will pay for direct loss of or damage to Business Personal Property and "money" and "securities" resulting from dishonest or criminal acts committed by any of your "employees" acting alone or in collusion with other persons (except you and your partner) with the manifest intent to:

- (a) Cause you to sustain loss or damage; and also
- (b) Obtain financial benefit (other than salaries, commissions, fees, bonuses, promotions, awards, profit sharing, pensions or other employee benefits earned in the normal course of employment) for:
 - (1) Any "employee"; or
 - (2) Any other person or organization.

(2) We will not pay for loss or damage:

(a) Resulting from any dishonest act committed by any of your "employees" (except as provided in paragraph (1))....

(3) The most we will pay for loss or damage in any one "occurrence" is \$10,000 or the amount shown in the Additional Property Coverage Schedule. This Additional Coverage is not subject to the Limits of Insurance for Section I - Property.

* * * *

(Id. at Page 17 of 64.)

⁶ The amount of coverage for loss occasioned by "Forgery and Alteration" was increased by a the Special Broadening Endorsement, Form 391-1022 (02-05), which provides in pertinent part:

Section I - Property A. 5. Additional Coverages, k. Forgery and Alteration, paragraph (3) is replaced by the following:

(3) The most we will pay for any loss, including legal expenses, under this Additional Coverage is

plaintiff is excluded from coverage, except to the extent that a "theft" by an "employee" is covered under the Employee Dishonesty Additional Coverage part. It is undisputed that DelValle's thefts were both dishonest and criminal, and that she was an employee of plaintiff at the time of the thefts. As such, there is no coverage under the Forgery or Alteration provision of the Policy and summary judgment should be entered in Hanover's favor.

New York courts have routinely enforced unambiguous exclusions similar to the Dishonesty Exclusion here. Before the rules governing the construction of ambiguous contracts are triggered, the court must first find ambiguity in the policy. However, here there is no ambiguity since the words in the relevant paragraphs of the Policy have a definite and precise meaning, unattended by danger of misconception in the purpose of the policy itself, and concerning which there is no reasonable basis for a difference of opinion. This court may not make or vary the contract of insurance to accomplish its notions of abstract justice or moral obligation.

Plaintiff's Opposition and Cross-Motion

Plaintiff argues that the Policy clearly and unambiguously provided coverage for DelValle's forgery. The "Forgery and Alteration" provision provides coverage for "loss resulting directly from forgery or alteration of, any check . . . that was issued by someone who impersonates you or your agent." DelValle's acts of impersonating Dr. Katz, an officer of plaintiff, and issuing checks in his name is a loss covered under the Policy. Since this is clearly a covered loss, Hanover bears the burden of demonstrating that the Dishonesty Exclusion applies

\$50,000. This Additional Coverage is not subject to the Limits of Insurance of Section I Property.

to negate coverage for forgery by an employee, and here, the language of the Dishonesty Exclusion, especially when read in conjunction with the coverage clauses, is not clear and does not specifically exclude forgery by an employee.

Plaintiff argues that the test for ambiguity is whether the language in the policy is susceptible to more than one interpretation, and based on the coverage language for "Forgery and Alteration" and the Dishonesty Exclusion language, it is clear that the Policy language is susceptible to more than one interpretation. Dr. Katz paid extra premiums for the increased coverage under the "Forgery and Alteration" provision, relying on the specific language which provides coverage for checks issued by "someone" who impersonates you. "Someone" obviously means "anyone" in this context and was not limited to "someone other than your employee." It was reasonable for plaintiff to believe that it was entitled to coverage under "Forgery and Alteration" because DelValle impersonated Dr. Katz, which is an act specifically referenced in the Policy under the "Forgery and Alteration" coverage. The language used to define coverage under the "Forgery and Alteration" specifies "someone" who impersonates you. It is reasonable for the average insured to believe that "someone" would include an employee, in light of the fact that the Exclusion does not specify "forgery." In addition, the Exclusion, which applies to employees, makes no mention of "forgery" for which there is separate and distinct provision for coverage. Moreover, nowhere in the Policy are "dishonest acts" defined, except that the Exclusion seems to be self-limiting by clarifying which acts are included (theft) and which acts are excepted (destruction).

By excluding coverage under the "Forgery and Alteration" provision, Hanover attempts to extend the definition of "theft" and implies an exclusion where none is specifically stated.

Hanover's letter dated February 1, 2007, also recognized that there is an ambiguity in coverage. In the letter, Hanover states "the coverage for theft is very specific and limited . . ." and "we believe that forgery, when committed by an employee is clearly excluded from coverage" because "theft" is defined as "any act of stealing." The February 1, 2007 letter makes clear that Hanover interprets "theft" to include forgery and it is on this basis that coverage was disclaimed. However, in that same letter Hanover admits that "the language for the coverage of Forgery or Alteration does not specifically state that acts committed by an employee are not covered. . . ."

Hanover's interpretation is unreasonable for several reasons. First, Hanover's interpretation of "theft" is unreasonable because the Exclusion itself seems to limit which acts are excepted from the exclusion, *i.e.*, "destruction by an employee" and which are included, *i.e.*, "theft by employees is not covered." Therefore, it would be unreasonable to expect the insured to know that certain additional acts may be included as "dishonest acts" where the exclusion states acts which are included in the exclusion, *i.e.*, theft, and which acts are excepted from the exclusion, *i.e.*, destruction. Secondly, the Exclusion language does not incorporate "forgery" by reference, nor is "forgery" specifically listed as part of the exclusion. Thirdly, a "dishonest act" is not defined in the Policy.

Therefore, based on the applicable case law, the Dishonesty Exclusion cannot be upheld simply on the basis of Hanover's interpretation. A more reasonable interpretation of the Policy is that, because the Policy provides additional coverage for forgery, for which additional premiums were paid to increase coverage for loss occasioned by the issuance of a check by an impersonator, plaintiff expected to be insured for the loss. Thus, ambiguity exists as to whether the Dishonesty Exclusion negates coverage for forgery by an employee. It is more reasonable to

conclude that Hanover is obligated to provide coverage for the loss occasioned by the forged checks under the "Forgery and Alteration" provision. To adopt Hanover's interpretation would render the increased coverage for forgery and alteration under the "Special Broadening Endorsement" meaningless. Moreover, plaintiff did not have a reasonable expectation that DelValle's impersonation of Dr. Katz was excluded from coverage. Therefore, the Policy does not clearly and unmistakably exclude forgery by an employee and in the absence of a definition for "dishonest acts" which includes "forgery," the ambiguity must be resolved in the favor of plaintiff.

Even assuming the Court enforces the Dishonesty Exclusion, the Court must determine whether the "forgery" or the "theft" was the "efficient cause" of the loss. Plaintiff equates stealing to forgery by excluding coverage in this instance. The Merriam-Webster Online Dictionary defines "stealing" as: to take the property of another wrongfully; "forgery" is defined as: the crime of falsely and fraudulently making or altering a document (as a check). Forgery is not stealing; the two have completely different meanings. If Hanover intended to exclude forgery by an employee, it should have listed it in addition to "theft." It cannot now claim that the two acts are the same. Where two causes lead to a loss, one within and one without coverage, the relevant inquiry is to determine which of the two was the dominant and efficient cause of the loss. It is clear that the "proximate producing cause" of plaintiff's loss was the forgery. The actions taken by DelValle in falsifying the checks (forgery), a covered cause of loss, set the "theft," the excluded cause, in motion; without the forgery, there would be no theft on the facts of this case. Where, as here, there are arguably two causes of loss, the Court must find that the forgery is the proximate cause of loss entitling plaintiff to coverage under the additional coverage

for "Forgery and Alteration."

Hanover's Opposition to Cross-Motion

Plaintiff does not offer an alternative reasonable interpretation of the Dishonesty Exclusion. Plaintiff's argument that the word "someone" used in the Forgery and Alteration provision means "anyone" and is not limited to "someone other than your employee," makes no sense in light of the plain and unambiguous language of both the Dishonesty Exclusion and paragraph (2) of the Employee Dishonesty Addition Coverage provision. The Dishonesty Exclusion excludes "loss or damage caused by or resulting from any of the following: Dishonest or criminal acts by . . . employees." The Employee Dishonesty provision similarly provides that there is no coverage for loss or damage that is the result of a dishonest act of an employee except to the extent provided in paragraph (1) of the Employee Dishonesty Additional Coverage. Plaintiff's interpretation would require the Court to ignore these unambiguous provisions, and render them superfluous in violation of New York law.

Hanover further argues that its February 1, 2007 letter interpreted "theft" to include "forgery," and, therefore, afforded plaintiff coverage under the Employee Dishonesty Additional Coverage. Hanover disclaimed coverage under the Forgery and Alteration provision based on the plain and unambiguous terms of the Dishonesty Exclusion.

Further, simply because the Forgery or Alteration provision does not specifically state that forgeries committed by an employee are not covered does not mean that the Dishonesty Exclusion is inapplicable. The Forgery or Alteration provision is subject to the Dishonesty Exclusion unless otherwise stated; in this instance, the Exclusion "does not apply to acts of destruction by [the insured's] 'employees'" and "'theft' by 'employees' is not covered

except as provided under Employee Dishonesty Additional Coverage." Plaintiff was paid the limits of the Employee Dishonesty Additional Coverage. It is undisputed that the forgeries were criminal acts committed by plaintiff's employee and that these forgeries caused plaintiff's losses. As such, the Dishonesty Exclusion applies.

While plaintiff argues that the Dishonesty Exclusion is ambiguous because "dishonest act" is not defined in the Policy, the Dishonesty Exclusion excludes "loss or damage caused by or resulting from" "criminal acts" by employees and plaintiff's employee pled guilty to grand larceny in the second degree and forgery in the second degree. Even if the Dishonesty Exclusion did not also specifically exclude criminal acts, this Court must apply the generally prevailing meaning of the word "dishonest." Plaintiff cannot, and does not, argue that forgery is not a dishonest act. As such, any argument that the Dishonesty Exclusion is ambiguous because "dishonest act" is not defined in the Policy must be rejected.

Hanover further argues that the Court need not determine whether the "forgery" or the "theft" was the "efficient cause" of the loss in order to determine coverage; Dr. Katz admits in his Affidavit that plaintiff's loss was caused by or resulted from the criminal acts of its employee. Under the Dishonesty Exclusion, there is no coverage afforded under the Policy, except as has already been provided under the Employee Dishonesty Additional Coverage, because plaintiff admits that the loss was caused by or resulted from the criminal acts of its employee.

Plaintiff's Reply in Support of its Cross-Motion

The alleged loss herein involves two causes of loss, one for which there is no coverage "theft," and one for which coverage is afforded, "forgery." As set forth in the Affirmation in

support of the motion, forgery is a separate and distinct loss covered under the Policy and Hanover has failed to show that the language of the Dishonesty Exclusion applies to negate the separate and distinct coverage under the "Forgery and Alteration" provision.

Plaintiff also argues that in the absence of a definition of the term "dishonest act" in the Policy, the Dishonesty Exclusion is ambiguous and cannot be applied to negate coverage under the "Forgery and Alteration" provision.

Hanover's selective definition of "dishonest act" for the purpose of affording coverage under one provision (Employee Dishonesty Additional Coverage), while simultaneously denying coverage under another provision (Forgery and Alteration), evidences the ambiguity of the term "dishonest act." By its own admission, in order to afford coverage under the Employee Dishonesty Additional Coverage, Hanover looked to the language of the exclusion. The relevant terminology, *i.e.*, "theft by employees is not covered" appears in the Dishonesty Exclusion. But for looking at the exclusion, it would seem that Hanover would not have otherwise been able to afford coverage to plaintiff under the Employee Dishonesty Additional Coverage because "theft" is not listed under the Employee Dishonesty Additional Coverage and "dishonest act" is not otherwise defined in the policy. In the same breath, Hanover argues that it disclaimed coverage under the Forgery and Alteration provision based on the "plain and unambiguous" terms of the Dishonesty Exclusion. However, without first interpreting theft to include forgery, Hanover cannot claim that the language of the Dishonesty Exclusion is plain and unambiguous so as to negate coverage under the "Forgery and Alteration" provision. The "Forgery and Alteration" provision covers forgery by "someone," whereas the Dishonesty Exclusion excludes "dishonest acts" by employees. The so-called "plain and unambiguous" language of the Dishonesty

Exclusion does not include forgery as a "dishonest act." Any argument by Hanover that the term "dishonest" should be given a general prevailing definition when it interprets "theft" to include "forgery," when they are two separate and distinct acts, is at the very least disingenuous.

If the Court agrees that DelValle's acts constitute "theft" and are therefore excluded, then this Court must determine the "efficient cause" of the loss, and Hanover fails to offer a reasonable explanation as to why it is not necessary to determine the "efficient cause" of the loss. Hanover has also failed to distinguish the two seminal cases that stand for the proposition that where two causes lead to a loss (one for which coverage is afforded and one for which there is no coverage), the relevant inquiry is to determine the "efficient cause" of the loss.

In this instance, forgery, which is clearly a covered loss under the policy, was the primary and/or "efficient cause" of the loss because without the forgery, DelValle would not have been able to convert plaintiff's funds.

Analysis

"It is well settled that 'the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (*Johnson v CAC Bus. Ventures, Inc.*, 52 AD3d 327, 328 [1st Dept 2008], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). A failure to meet this burden requires that the motion be denied, regardless of the sufficiency of the opposing papers (*id.*). If the proponent makes a *prima facie* showing, the burden shifts to the opposing party to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The court must view

the evidence in the light most favorable to the party opposing the motion, giving it the benefit of every reasonable inference (*Ashland Mgt. Inc. v Altair Invs. NA, LLC*, 59 AD3d 97, 869 NYS2d 465, 467 [1st Dept 2008]).

It is well settled that where the provisions of an insurance policy “are clear and unambiguous, they must be given their plain and ordinary meaning, and courts should refrain from rewriting the agreement” (*United States Fid. & Guar. Co. v Annunziata*, 67 NY2d 229, 232 [1986]). Ambiguities, if any, should be resolved in favor of the insured and against the carrier (*United States Fid. & Guar. Co. v Annunziata, supra*).

“To negate coverage by virtue of an exclusion, an insurer must establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case” (*Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 652 [1993]; *see also, Mazzuocolo v Cinelli*, 245 AD2d 245, 247 [1st Dept 1997]).

The Employee Dishonesty Additional Coverage provides that Hanover will pay for “direct loss of or damage to Business Personal Property and ‘money’ . . . *resulting from dishonest or criminal acts committed by any of your ‘employees’* acting alone or in collusion with other persons (except you and your partner) with the manifest intent to . . . [o]btain financial benefit.” It cannot be contested that DeValle committed a dishonest and criminal act by forging plaintiff’s checks for her own personal, and financial benefit. Thus, plaintiff was paid \$10,000 accordingly.

At issue is whether plaintiff may also recover under the Forgery or Alteration provision of the Policy in light of the Dishonesty Exclusion. The provisions relevant to this inquiry are as follows:

k. Forgery or Alteration

(1) We will pay for loss resulting directly from forgery or alteration of, any check, draft, promissory note, bill of exchange or similar written promise of payment in "money", that you or your agent has written, or that was issued by someone who impersonates you or your agent.

* * * * *

(3) The most we will pay for any loss, including legal expenses, under this Additional Coverage is \$10,000. This Additional Coverage is not subject to the Limits of Insurance of Section I - Property.⁷
(Policy, Businessowners Coverage Form, at Page 13 of 64).

* * * * *

B. Exclusions

* * * * *

We will not pay for loss or damage caused by or resulting from any of the following:

* * * * *

d. Dishonesty

Dishonest or criminal acts by you, anyone else with an interest in the property, or any of your or their partners, "members", officers, "managers", "employees", directors, trustees, authorized representatives or anyone to whom you entrust the property for any purpose:

(1) Acting alone or in collusion with others;

(2) Whether or not occurring during the hours of employment.

This exclusion does not apply to acts of destruction by your "employees"; but "theft" by "employees" is not covered except as provided under Employee Dishonesty Additional Coverage.

(Policy, Businessowners Coverage Form, at Pages 31, 34 of 64).

Dr. Katz attests that on or about July 20, 2007, he became aware that DelValle forged his name to several checks owned by plaintiff for her own personal use, resulting in a loss of more than \$74,000.00. Clearly, the acts of DelValle in "impersonating" Dr. Katz fall within the Forgery and Alteration provision of the Policy.

However, the Dishonesty Exclusion in the Policy unambiguously excludes all loss or

⁷ The Limits of Insurance for this Additional Coverage were amended to \$50,000 (The Businessowners Property Special Broadening Endorsement, at Page 1 of 6).

damage caused by a dishonest or criminal act of an employee, except to the extent that a “theft” by an “employee” of the insured is covered under the Employee Dishonesty Additional Coverage provision. The phrase “ but ‘theft’ by "employees" is not covered except as provided under Employee Dishonesty Additional Coverage” clarifies that a theft by an employee (or by plaintiff), which is a dishonest or criminal act, is excluded under this Exclusion, except to the extent that such act is covered under the Employee Dishonesty Additional Coverage provision. Clearly, the Employee Dishonesty Additional Coverage provision broadly covers “dishonest” acts undertaken by plaintiff’s employees, and such a broad coverage provision would necessarily include forgery, since such an act is dishonest, even according any layman’s terms (*see also, Commercial Union Assur. Co., PLC v Oak Park Marina, Inc.*, 198 F3d 55 [2d Cir 1999][noting definition of dishonest from Webster's Third International Dictionary’s (1961) as “lack of truth, honesty, probity, or trustworthiness,” or “an inclination to mislead, lie, cheat, or defraud” and from Funk & Wagnalls, *New Standard Dictionary of the English Language* (1942) “[f]raud or violation of trust”]). Therefore, a reading of both the Employee Dishonesty Additional Coverage and the Dishonesty Exclusion indicates that any dishonest or criminal act (*i.e.*, forgery) undertaken by plaintiff’s employee is excluded from coverage, except as provided under the Employee Dishonesty Additional Coverage provision.

That the word “dishonest” is not defined in the Policy does not render the Dishonesty Exclusion ambiguous (*see, e.g., Cougar Sport, Inc. v Hartford Ins. Co. of Midwest*, 190 Misc 2d 91, 737 NYS2d 770 [Sup Ct New York County 2000][where the word “entrust” was not a defined term in the insurance policy, court stated that it must be “given its ordinary meaning, such as the average policyholder of ordinary intelligence, as well as the insurer, would attach to

it,” and cannot be “deemed to have been used as [a] word[] of art with legalistic implications”). Moreover, it cannot be disputed that the acts undertaken by DeValle were criminal; DeValle received five years probation for pleading guilty to second degree grand larceny and second degree forgery. Further, the record clearly establishes that DeValle caused her employer, the plaintiff, the loss at issue by forging numerous checks for her benefit. Therefore, coverage under the Forgery or Alteration provision of the Policy is excluded by the Policy's Dishonesty Exclusion.

To permit plaintiff to recover for an employee's forgery under the Employee Dishonesty Additional Coverage provision, *and* under the Forgery and Alteration Provision would render the Dishonesty Exclusion meaningless, especially when the Dishonesty Exclusion expressly limits the plaintiff's recovery for an employee's dishonest and criminal acts to the limits afforded under the Employee Dishonesty Additional Coverage.

Further, contrary to plaintiff's contention, Hanover's interpretation does not “render the increased coverage for forgery and alteration under the "Special Broadening Endorsement" meaningless”; it simply renders such increased coverage inapplicable to the circumstances herein. In the event the forgery was undertaken by someone *other than* Dr. Katz, or “anyone else with an interest in the property,” or Dr. Katz's “partners, ‘members’, officers, ‘managers’, ‘employees’, directors, trustees, authorized representatives or anyone to whom you entrust the property for any purpose,” the Dishonesty Exclusion at issue would be applicable. However, to the extent the forgery is undertaken by any of the persons enumerated in the Exclusion, such as DeValle, the Exclusion applies. It cannot be overlooked that “dishonest acts” (including forgeries) by employees, is covered under the Employee Dishonesty Additional Coverage and

that plaintiff was paid pursuant to this provision of the Policy. Unfortunately, the limit of this provision was \$10,000.

The Court notes that even accepting plaintiff's definition of forgery and theft, no ambiguity is created among any of the Employee Dishonesty Additional Coverage, Forgery and Alteration, and the Dishonesty Exclusion provisions. While stealing may be defined as the taking of the property of another wrongfully, and forgery may be defined as the crime of falsely and fraudulently making or altering a check, and forgery is not stealing, forgery is a means by which stealing can be accomplished, and both are dishonest acts. Quite simply, DeValle's forgery, a dishonest act, is the type of act at which the Employee Dishonesty Additional Coverage provision is aimed, and the very act for which the Forgery and Alteration provision is not intended to cover by virtue of the Exclusion, since DeValle was plaintiff's employee.

Therefore, inasmuch as the dishonest and criminal act of forgery was committed by an employee of the plaintiff, the forgery was excluded from coverage, and summary judgment in Hanover's favor is warranted (*see e.g., Breed v Insurance Co. of N.A.*, 46 NY2d 351, 413 NYS2d 352 [1978]) [policy's exclusion for theft "of property. . . by any tenant of the described premises" was clear and unambiguous and barred coverage for the plaintiffs' loss of personal property stolen by their tenant, and rejecting plaintiffs' argument that the exclusion was ambiguous]; *Hoffman Bros. v Commercial Union Assur. Co., Ltd. of London, Eng.*, 221 AD 167, 222 NYS 641 [1st Dept 1927][holding that a hotel porter engaged by insured's president to carry cases of samples was under president's supervision and direction, and thus an "employee, servant, or messenger" of insured within exception of policy covering loss of such goods except from theft or other act of dishonest character by insured, employee, servant or messenger; therefore, insurer

was not liable for loss resulting when porter did not return cases]; *Commercial Union Assur. Co. v. Oak Park Marina, Inc.*, 198 F3d 55 [2d Cir 1999] [holding that the Dishonesty Exclusion abrogates any coverage arising from Personal Injury Endorsement where insureds videotaped female patrons in restrooms and changing areas]).

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendant Hanover Insurance Company pursuant to CPLR §3212 for summary judgment in its favor is granted, and the Complaint is hereby dismissed; and it is further


ORDERED that the plaintiff's cross-motion for summary judgment declaring that the Policy provided coverage for plaintiff under the "Forgery and Alteration" provision of the Policy, and that Hanover must pay plaintiff \$50,000.00, plus interest, costs and disbursements, is denied; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

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This constitutes the decision and order of the Court.

Dated: July 20, 2009


Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDM EAD

FILED
JUL 21 2009
COUNTY CLERK'S OFFICE
NEW YORK