

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA**

FAIR, INC.	:	
	:	CIVIL TRIAL DIVISION
Appellant/Plaintiff	:	
	:	JANUARY TERM, 2006
v.	:	No. 3273
	:	
ASSURANCE COMPANY OF AMERICA	:	Superior Court Docket No.
	:	1459 EDA 2007
Appellee/Defendant	:	

OPINION

PROCEDURAL HISTORY

Plaintiff FAIR, Inc., appeals from the Court’s Order, dated May 14, 2007, wherein the Court granted the Motion for Summary Judgment of Defendant Assurance Company of America and dismissed Plaintiff’s Complaint with prejudice.

FACTUAL BACKGROUND

Plaintiff FAIR, Inc. (“FAIR”), is a nonprofit corporation in Philadelphia that provides services to senior citizens. (Complaint, ¶ 1). At all times relevant to this matter, it held a corporate insurance policy¹ with Assurance Company of America (“Assurance”). (Answer, ¶ 2). This policy provided coverage up to \$50,000.00 for each occurrence of employee dishonesty. (Answer, Exhibit 1, § “Precision Portfolio Policy Commercial Property Declarations”). To successfully collect on a claimed loss due to employee dishonesty under this policy, the insured Plaintiff was required to notify Assurance “as

¹ Policy No. PPS 36391069. See Answer, Exh. 1.

soon as possible” with “a detailed, sworn proof of loss within 120 days” of discovery of the loss and “[c]ooperate with [Assurance] in the investigation and settlement of any claim.” (Answer, Exhibit 1, § “Commercial Crime Coverage Form,” at 4).

FAIR alleges in its Complaint that two of its board members, Theresa Bucher and Joseph T. Michalski, inappropriately used \$110,000.00 of FAIR’s funds from 2002 to 2004. (Complaint, ¶ 4). Mr. Michalski was FAIR’s Executive Director. (Plaintiff’s Motion for Reconsideration, Exh. C, 126). Ms. Bucher was FAIR’s Treasurer. (*Id.*, Exh. C, 169). For these actions, Ms. Bucher and Mr. Michalski were fired. (*Id.*, at ¶ 5). FAIR discovered this alleged loss in May, 2004. (*Id.*, at ¶ 5). FAIR “made demand of payment” pursuant to the Commercial Crime Coverage Form section of its insurance policy with Assurance. (*Id.*, at ¶ 7). When FAIR reported the loss to Assurance in June, 2004, FAIR did not include a sworn proof of loss that Assurance contends would conform to the policy. (Defendant’s Motion for Summary Judgment, ¶ 5). When Assurance did not pay the claim, FAIR instituted the present action on June 15, 2006². (*See* Docket). FAIR alleges that Assurance “has refused to render the required payment” and “has breached its insurance policy with FAIR.” (Complaint, ¶¶ 11, 12). FAIR seeks “payment in the amount of \$110,000” and costs. (Complaint, 2).

During pre-trial discovery, Assurance served written interrogatories upon FAIR in which Assurance sought a proof of loss document that complied with the language in the policy. (*See* Defendant’s Motion for Summary Judgment, Exh. C). The interrogatories included a request for a copy of the required sworn proof of loss and were mailed August 9, 2006. When FAIR did not timely answer the interrogatories, Assurance sent two

² By way of background, the acting attorney on behalf of Plaintiff/Appellant FAIR is Alan Gold, Esquire. Mr. Gold is also the acting President of FAIR, Inc. (Verification of Complaint).

follow-up letters, on September 18 and 20, 2006, requesting a copy of the sworn proof of loss and threatening to file a motion to compel. There is no indication in the record that FAIR ever responded to any of these requests for a copy of the sworn proof of loss.

Assurance filed its Motion for Summary Judgment on November 8, 2006. (*See* Docket). In its Motion for Summary Judgment, Assurance argues, *inter alia*, that FAIR failed to meet the required conditions for payment under the insurance policy because it did not provide to Assurance “a sworn Proof of Loss within 120 days of discovery of the loss.” (Defendant’s Motion for Summary Judgment, ¶ 11). As evidence, Assurance attaches copies of its unanswered discovery requests for a sworn proof of loss. (*Id.*, Exhs. C, D, E).

FAIR requested, and received, an extension of time to file its Answer to the motion. (*See* FAIR’s Reply Brief in Support of Its Petition to Vacate/Motion for Reconsideration, Exh. A). FAIR’s new deadline to file its Answer was December 22, 2006. (*Id.*) However, FAIR never responded to Assurance’s Motion within the new deadline imposed. As a result, the trial Court granted Assurance’s Motion for Summary Judgment on December 19, 2006, ordering FAIR’s Complaint to be dismissed and noting that the motion had not been contested. (*See* Docket). The Court received FAIR’s Answer to the Motion for Summary Judgment on December 28, 2006, almost a week after the extended deadline granted to Plaintiff. FAIR then filed a Motion for Reconsideration of the December 19 Order on January 5, 2007. (*See* Docket). In its Motion for Reconsideration, FAIR cited unavoidable holiday-related delays in filing its Answer to the Motion for Summary Judgment and a communication from the judge’s chambers extending the filing deadline. (FAIR’s Reply Brief in Support of Its Petition to

Vacate/Motion for Reconsideration, 1). On February 1, 2007, the trial Court vacated the December 19 Order, to review FAIR's Answer. (*See* Docket).

On April 26, 2007, after reviewing FAIR's Answer to Assurance's Motion for Summary Judgment, the trial Court ordered FAIR to give the court, within ten days, a copy of the conforming "sworn Proof of Loss" that FAIR asserted it had provided to Assurance. (Order of April 26, 2007). The Court noted that FAIR had "failed to attach a copy of said 'sworn Proof of Loss' to its response" to Assurance's Motion for Summary Judgment. (*Id.*). Two weeks later, on May 10, FAIR submitted what it styled the "proof of claim" that it allegedly had sent to Assurance "[o]n August 19, 2005." (FAIR's Second Supplemental Memorandum of Law in Opposition to Assurance's Motion for Summary Judgment, at 2). On May 14, 2007, the trial Court found that this submission failed to constitute a production of "a 'sworn proof of loss,' which would satisfy the requirements of the insurance contract of the parties" and granted Assurance's Motion for Summary Judgment, thereby dismissing FAIR's Complaint. (Order of May 14, 2007). FAIR subsequently filed its Notice of Appeal and issued their Statement of Matters accordingly.

The sole issue on appeal is whether the trial Court erred in granting the Motion for Summary Judgment of Defendant Assurance Company of America, upon finding that Plaintiff failed to produce a sworn proof of loss that would satisfy the requirements of the insurance contract between the parties.

LEGAL ANALYSIS

A trial court may grant summary judgment as a matter of law when it finds "no genuine issue of any material fact" in dispute, and when "an adverse party who will bear

the burden of proof at trial has failed to produce evidence of facts essential to [its] cause of action or defense.” Pa. R.C.P. 1035.2. When a motion for summary judgment has been made by the party that does not bear the burden of proof at trial, the nonmoving party must produce “evidence showing the existence of the facts essential to the cause of action or defense.” Pa. R.C.P. 1035.2 advisory committee’s note.

The trial Court must review the record “in a light most favoring the non-movant giving that party the benefit of credibility determinations and any inferences deducible from the evidence.” *Porter v. Joy Realty, Inc.*, 872 A.2d 846, 849, 2006 PA Super 129, *5 (Pa.Super. 2005), citing *Griffin v. Central Sprinkler Corporation*, 823 A.2d 191, 199 (Pa.Super. 2003). If there remains “an issue of fact,” then summary judgment should be granted against the non-movant “only when the non-moving party has failed to adduce evidence from which a factfinder could find in his/her favor.” *Porter*, 872 A.2d at 848.

“The interpretation of a contract of insurance is a matter of law for the courts to decide.” *Cresswell v. Nat’l Mut. Cas. Ins. Co.*, 820 A.2d 172, 177-178, 2003 PA Super 90, *15 (Pa.Super. 2003), citing *Paylor v. Hartford Ins. Co.*, 536 Pa. 583, 586 (1994). Further, “an insured may not complain that his reasonable expectations were frustrated by policy limitations that are clear and unambiguous.” *Cresswell*, 820 A.2d at 178.

If the trial Court grants summary judgment, the decision should be reversed “only if the trial court has committed an error of law or abused its discretion.” *Bartlett v. Bradford Publ’g, Inc.*, 885 A.2d 562, 566, 2005 PA Super 350, *10 (Pa.Super. 2005), citing *Weber v. Lancaster Newspapers, Inc.*, 878 A.2d 63, 71 (Pa. Super. 2005). The trial Court should exercise its discretion in granting summary judgment only “after hearing and consideration.” *Bartlett*, 885 A.2d at 566, citing *Gutteridge v. A.P. Green Servs. Inc.*,

804 A.2d 643, 651 (Pa. Super. 2002). The party choosing to appeal a grant of summary judgment “bears a heavy burden” in persuading the appellate court to draw an opposite conclusion. *Bartlett*, 885 A.2d at 566, *citing Paden v. Baker Concrete Constr., Inc.*, 540 Pa. 409, 412 (Pa. 1995). Even if the appellate court would have ruled differently upon the same facts, a different conclusion by the appellate court does not necessarily indicate an abuse of discretion by the trial court. *See Paden*, 540 Pa. at 414.

Section “C” of FAIR’s insurance policy that dealt with employee dishonesty and the insured’s responsibilities in the event of an alleged loss states:

C. Duties In The Event Of Loss

...

After you discover a loss or a situation that may result in a loss of, or loss from damage to, covered property, you must:

1. Notify us as soon as possible.

...

3. Give us a detailed, sworn proof of loss within 120 days.

...

4. Cooperate with us in the investigation and settlement of any claim.

(Defendant’s Answer, Exhibit 1, § “Commercial Crime Coverage Form,” at 4).

Assurance contends that FAIR has failed to comply with these policy directives, in particular the requirement to produce “a detailed, sworn proof of loss,” and thus, as a matter of law, it should prevail in this matter. FAIR asserts that it has, indeed, submitted the required documentation. Contract interpretation is a matter of law that this Court may decide. *Cresswell*, 820 A.2d at 177-78. This Court finds that FAIR did not deliver a “sworn proof of loss” in compliance with the policy.

The purpose of a provision for notice and proofs of loss is to allow the insurer to form an intelligent estimate of its rights and liabilities, to afford it an opportunity for

investigation, and to prevent fraud and imposition upon it. *Albert v. Mutual Ben. Health & Acci. Ass'n*, 350 Pa. 268, 38 A.2d 321, 325 (1944).

In the event of an alleged occurrence of employee dishonesty, FAIR's insurance policy with Assurance required FAIR to submit "a detailed, sworn proof of loss." (Defendant's Answer, Exh. 1, § "Commercial Crime Coverage Form," at 4). The Commercial Crime Coverage Form does not explicitly set forth what would constitute a conforming sworn proof of loss that the insured must submit to Assurance within 120 days of the discovery of the loss. However, where production of a "sworn proof of loss" is required in two other sections in the policy, language surrounding the term is informative as to what Assurance means by a "sworn proof of loss" in the Commercial Crime Coverage Form. In the Building and Personal Property Coverage section, the policy instructs: "Send us a signed sworn proof of loss containing the information we request to investigate the claim. . . . We will supply you with the necessary forms." (*Id.*, Exh. 1, § "Building and Personal Property Coverage Form," at 19). In the Standard Fire Policy section, the policy instructs: "[W]ithin sixty days after the loss . . . the insured shall render . . . a proof of loss, signed and sworn to by the insured, stating the knowledge and belief of the insured as to [various aspects of the claimed loss]." (*Id.*, Exh. 1., § "Standard Fire Policy Provisions," at 2). This clear, unambiguous language in the policy suggests that FAIR should reasonably have expected that the document detailing the type of alleged loss and describing how the loss allegedly occurred should have been signed and sworn by a representative of FAIR.

While FAIR never asserts that it complied with the 120-day requirement, FAIR does assert repeatedly that it has submitted a conforming sworn proof of loss to

Assurance. (Complaint, ¶ 10; Plaintiff's Second Supplemental Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment, 1; FAIR's Reply Brief in Support of Its Petition to Vacate/Motion for Reconsideration, 2). As evidence, it has presented what it calls, at various points in the record, a "proof of claim" or "sworn statement of proof of loss." (See, e.g., Plaintiff's Second Supplemental Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment, at 1, 2). This document, in two pages, appears to consist of a brief explanation of the alleged employee dishonesty, setting forth, *inter alia*, the amount of the alleged loss and the year, 2004, in which the loss was discovered. (*Id.*, at Exh. A). FAIR states that it sent this document to Assurance, and that it has also sent what it asserts is "the equivalent to the sworn proof of loss," i.e., "lengthy statements transcribed by a court reporter from the two employees who engaged in the dishonest acts and an audit by a certified public accountant firm showing the amount stolen." (Plaintiff's Answer to Assurance's Motion for Summary Judgment, ¶ 9). FAIR attached a letter from an accounting firm, copies of checks, copies of an accounting software printout, and a partial transcript of approximately 150 pages of an "Emergency Board Meeting" to its Answer to Assurance's Motion for Summary Judgment. (*Id.*) While the attachments are detailed and voluminous, none of these documents is sworn or signed by a FAIR representative. The board meeting transcript is "certif[ied]" only by the court reporter who took the statement in shorthand; the letter from the accounting firm is signed. (*Id.*, Exh. C, 209, Exh. D).

The two-page document that FAIR refers to as its "proof of claim" (in distinction to the many pages of other documentation) is not signed, dated, or sworn before any authority. It does not include any supplemental documentation to indicate when it was

provided to Assurance, such as certified mail receipts, fax transmission records, or a copy of the transmittal letter. (Plaintiff's Second Supplemental Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment). While FAIR avers that it submitted a "verification" with this "proof of claim," it has not provided a copy of that verification. (*Id.*, at 2). FAIR appears to assert that its many verifications submitted to Assurance and to this Court constitute evidence that it has submitted a conforming sworn proof of loss to Assurance. Simply put, FAIR's verifications are not evidence to support the allegations contained therein. Both Assurance and this Court have requested a copy of the conforming sworn proof of loss that FAIR asserts it has sent to Assurance, and FAIR has failed to do so.

FAIR mentions having submitted its two-page "proof of claim" document with a form that Assurance provided: "This is a copy of what was submitted. It is not on the exact form that was used. That form was filled out. It comes right off the computer." (*Id.*, at 1). FAIR has not provided a copy of the form that it asserts it filled out and submitted to Assurance. Moreover, FAIR states only that it "filled out" the form, not that it swore any form it sent to Assurance. (*Id.*) As a matter of law, because the two-page document that FAIR submits as its "proof of claim" is not sworn, dated, or signed, and because FAIR has not produced documentation tending to prove that any form it submitted to Assurance with the document was sworn, the document does not conform to Assurance's policy requirement of "a detailed, sworn proof of loss."

Even if this document were sufficient to constitute a conforming sworn proof of loss, denial of the claim would still be permissible because FAIR submitted the document well beyond the deadline set forth in the policy. Under the policy, the insured is required

to “[g]ive [Assurance] a detailed, sworn proof of loss within 120 days.” (Defendant’s Answer, Exh. 1, § “Commercial Crime Coverage Form,” at 4). FAIR asserts that, after reporting the alleged loss in June, 2004,³ it submitted its “proof of claim” to Assurance over one year later, on August 19, 2005. (Plaintiff’s Second Supplemental Memorandum of Law in Opposition to Defendant’s Motion for Summary Judgment, at 1). Taking this assertion in the light most favorable to FAIR, did not comply with the terms of Assurance’s Commercial Crime Coverage Form. Thus, FAIR’s non-compliance prohibited Assurance from recognizing the loss under the terms of the policy.

At the eleventh hour, Plaintiff attempts to raise issues of fact by stating baldly that Assurance did receive “the required sworn proof of loss,” but that Assurance must have lost it. (Plaintiff’s Answer to Assurance’s Motion for Summary Judgment, ¶ 9). In addition, FAIR was requested repeatedly, both during discovery and upon an Order of this Court, to provide copies of a proof of loss that would conform to the policy. Yet, FAIR has never provided any written verification to its claim that it timely provided a conforming sworn proof of loss.

Because FAIR has not “adduce[d] evidence from which a fact finder could find in [its] favor,” *Porter v. Joy Realty, Inc.*, 872 A.2d 846, 848, this Court cannot reasonably conclude that Plaintiff’s assertion that Defendant lost the document presents a genuine, issue of fact.

Additionally, Plaintiff also cannot prove that it has any insurable interest in the property allegedly stolen and has suffered any “loss,” which is covered pursuant to the terms of its policy with Assurance.

³ Admitted by Assurance. Answer, ¶ 7, Defendant’s Motion for Summary Judgment, ¶ 5.

In Pennsylvania, to have an insurable interest, an insured must have “an expectation of economic benefit from the preservation of property or an expectation of loss from its destruction.” *Seals, Inc. v. Tioga County Grange Mutual Insurance Company*, 519 A.2d 951, 359 Pa. Super. 606, 619 (1986). Under the policy with Assurance, Plaintiff was required to sustain a “loss” from employee theft in order to have coverage under the policy. Specifically, the Commercial Crime Coverage Form contains language which states:

We will pay for the following for which a limit is shown in the Declarations:

A. Employee Dishonesty – *Loss of, and direct loss from damage to, ‘money,’ ‘security’ and ‘property other than money and securities’ resulting from employee dishonestly.*

Employee dishonesty means dishonest acts committed by an ‘employee’ acting along or in collusion with other persons, except you or a partner, with the manifest intent to:

1. *Cause you to sustain loss; and also*
2. *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:*
 - a. The ‘employee;’ or
 - b. Any person or organization intended by the ‘employee’ to receive the benefit. (emphasis added).

(Defendant’s Answer, Exh. 1, § “Commercial Crime Coverage Form,” at 4).

Based on Plaintiff’s description of its claim, the Plaintiff’s Executive Director used money from state grants to pay staff bonuses, travel expenses and country club dues. (Complaint, ¶4.). This type of claim is specifically excluded from coverage for employee theft because they cannot be classified as a compensable “loss” under the Commercial Crime Coverage Form. Executive Director, Joe Michalski, stated that any state grant

money that was not spent by Plaintiff “*would have been returned to the state.*”

(Deposition of Joe Michalski pgs. 56-60). (emphasis added). Mr. Michalski further explained the circumstances in his deposition:

Initially, we had the \$300,000 budget that I inherited my first year here. We went through that period where we had the overage and we were coming down to the end of the year. Money not spent would have to be returned to the state...

At that point in time, we decided we, acting in the way nonprofits do, spend the money down rather than give the money back. I believe that was something that our board actually expressed, don't send any money back. (Deposition of Joe Michalski pg. 57).

Mr. Michalski's deposition testimony clearly establishes that the funds used were state grant funds which Plaintiff chose to spend rather than return back to the state. In light of these facts, it appears that Plaintiff would not be able represent a sworn proof of loss, substantiating a loss of funds which they were permanently entitled. Also, Plaintiff has not alleged that any demands were made by the state to return the misappropriated funds and therefore Plaintiff cannot show that it has suffered a loss according to the Commercial Crime Coverage Form of the policy.

Therefore, this Court has committed no error in granting Defendant Assurance's Motion for Summary Judgment and dismissing Plaintiff FAIR's Complaint.

CONCLUSION

For the foregoing reasons, the Court believes that it properly granted Defendant Assurance's Motion for Summary Judgment and properly dismissed Plaintiff FAIR's Complaint.

BY THE COURT:

10/23/07

Date

ALLAN L. TERESHKO, J.

cc:
Alan S. Gold, Esq. for Appellant
William J. Schmidt, Esq. for Appellee