ORITANI SAV. & LOAN v. FIDELITY & DEPOSIT CO.

821 F. Supp. 286 (1991) | Cited 0 times | D. New Jersey | October 3, 1991

OPINION

This is a declaratory judgment action in which the plaintiff,Oritani Savings & Loan Corporation, ("Oritani"), seeks a rulingthat the defendant, Fidelity & Deposit Company of Maryland,("Fidelity"), is obligated to indemnify it under a Savings andLoan Blanket Bond. Presently before the Court is a motion byFidelity for partial summary judgment dismissing the Third Countof plaintiff Oritani's Amended Complaint, or in the alternativeseeking leave to file a Third-Party Complaint against John Rowe.I will decide this matter on the papers without oral argument aspermitted by Federal Rule of Civil Procedure 78.

Procedural History

The parties have twice previously appeared before this Court.On July 9, 1990, the Court denied Fidelity's motion for summaryjudgment, holding, inter alia, that Oritani's complaint could besaid to have asserted a claim under Insuring Agreement (A) andthat as a question of fact existed as to whether InsuringAgreement (A) provided coverage in the matter, summary judgmentwas inappropriate.[1] Oritani Savings & Loan Association v.Fidelity & Deposit Company of Maryland, 741 F. Supp. 515, 524(D.N.J. 1990.) The parties again appeared before the Court inOctober, 1990 on Fidelity's motion for reconsideration of thisCourt's June, 1990 decision denying their motion for summaryjudgment, and on the Oritani Cross-Motions for summary judgmentand leave to amend the Complaint to unambiguously assert a claimunder Insuring Agreement (A) of the bond. Fidelity asserted threegrounds in support of its motion for reconsideration, including,that the Court had erred in finding that a question of factexists as to whether coverage is afforded under InsuringAgreement (A) of the blanket bond. Fidelity contended that theCourt had misapplied the case of National Newark & Essex Bank v.American Insurance Co., 76 N.J. 64, 385 A.2d 1216 (1978) ininterpreting Insuring Agreement (A) of the Oritani bond becausethe language in National Newark differs from that of InsuringAgreement (A). Specifically, the bond in National Newark lackedthe definition of "Dishonest and Fraudulent Acts" present inInsuring Agreement (A) of the Oritani bond. This Court rejectedFidelity's first two grounds for reconsideration, and about thecontention that the Court misapplied National Newark, concludedthat:

In light of the difficulty of the issue, the absence of controlling authorities, and the fact that it is wholly unnecessary for me to decide it, (since I have already decided that there is coverage under section (B)), I decline to rule on this issue at this time.

Oritani, 744 F. Supp. at 1316. Consequently, the Court deniedFidelity's motion for reconsideration, granted Oritani's motionfor partial summary judgment, and granted Oritani's motion forleave to amend. Oritani Savings and Loan Association v. Fidelity& Deposit Company of Maryland, 744 F. Supp. 1311 (D.N.J. 1990).

Presently, the Court has once again been asked to considerFidelity's motion for summary judgment holding that no coverageis afforded under Insuring Agreement (A) of the blanket bond. Inlight of what counsel for Fidelity have correctly pointed out tobe the misapplication of National Newark & Essex Bank v.American Insurance Co., in my prior opinion (See Oritani,supra, 741 F. Supp. at 524), and for the reasons set forth below,I find that summary judgment in favor of Fidelity, the defendant,is appropriate. I have no need to discuss the factual backgroundout of which these claims arise, as ithas been completely set forth in this Court's July 1990 opinion.See Oritani, supra, 741 F. Supp. at 517-519.

Fidelity's Motion for Partial Summary Judgment

Fidelity, the defendant, is moving for partial summary judgmenton Count Three of the plaintiff's Amended Complaint, in which theplaintiff seeks recovery under Insuring Agreement (A). The issueto be decided is whether the "Dishonest or Fraudulent Acts"clause of this blanket bond, including its definition ofdishonest and fraudulent acts, covers the loss resulting from anact by an employee which complies with all company policies andwas undertaken without the intent to cause loss to the bank or tofinancially benefit himself. The clause, contained in InsuringAgreement (A), provides:

Loss resulting directly from dishonest or fraudulent acts of anEmployee committed alone or in collusion with others.

Dishonest or fraudulent acts as used in this Insuring Agreementshall mean only dishonest or fraudulent acts committed by suchEmployee with the manifest intent

(a) to cause the Insured to sustain such loss, and

(b) to obtain financial benefit for the Employee or for any other person or organization intended by the Employee to receive such benefit, other than salaries, commissions, fees, bonuses, promotions, awards, profit sharing, pensions or other employee benefits earned in the normal course of employment.

See Brief in Support of Defendant's Motion for Partial SummaryJudgment, Exhibit F.

Fidelity contends that Insuring Agreement (A) only covers thatspecific loss which the employee dishonestly or fraudulentlyintended to cause his employer, and then only if, in causing thatloss, the employee had the subjective intent to cause that lossby his deliberate fraudulent or dishonest

conduct with thedeliberate intent of gaining a benefit for himself or for someoneelse whom he intended should receive the benefit. The defendantfurther argues that as Oritani's admissions establish that JohnRowe can be accused of no more than negligence or poor judgment,that he followed all company procedures, and that he did notintend to cause Oritani loss or to benefit himself, the loss isnot covered by the bond as a matter of law.

Oritani, the plaintiff, contends that an issue of fact existsas to whether the plaintiff is entitled to coverage underInsuring Agreement (A). Oritani argues that the "manifest intent"to cause loss to the Insured, and gain to the employee or a thirdparty required under the bond encompasses both actions taken bythe employee with the subjective intent to act dishonestly orfraudulently and cause loss, and those actions which, thoughtaken without the subjective intent to act dishonestly and causea loss, are nonetheless sufficiently reckless or wanton aboutcausing a loss that intent may be inferred. Oritani furtherargues that a fact issue exists as to whether Mr. Rowe's conductwas sufficiently reckless to warrant coverage under the bond.

A. Standard of Review

Rule 56 of the Federal Rules of Civil Procedure provides that"judgment . . . shall be rendered forthwith if the pleadings,depositions, answers to the interrogatories, and admissions onfile, together with the affidavits, if any, show that there is nogenuine issue as to any material fact and that the moving partyis entitled to judgment as a matter of law." Fed.R.Civ.Pro.56(c). Put differently, "summary judgment may be granted if themovant shows that there exists no genuine issues of material factthat would permit a reasonable jury to find for the nonmovingparty." Miller v. Indiana Hospital, 843 F.2d 139, 143 (3rd Cir.1988), cert. denied, 488 U.S. 870, 109 S.Ct. 178, 102 L.Ed.2d 147(1988). A fact is material if it influences the outcome under thegoverning law. Anderson v. Liberty Lobby, Inc. 477 U.S. 242,248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

The moving party has the initial burden of production; theymust make a prima facie showing that they are entitled to summaryjudgment. Celotex Corp. v. Catrett, 477 U.S. 317, 327, 106S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986); Peters Twp. SchoolDist. v. Hartford Acc. & Indemn., 833 F.2d 32, 34 (3d Cir.1987). Once such a showing is made, theburden switches and the nonmoving party must show the movingparty is not entitled to summary judgment. In opposing summaryjudgment, the nonmoving party cannot rely upon the allegations ofhis pleadings; he must come forward with evidence supporting aclaim that there is a material fact in dispute to be resolved bythe trier of fact. Matsushita Elec. Indus. v. Zenith RadioCorp., 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538(1986); First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253,289, 88 S.Ct. 1575, 1592, 20 L.Ed.2d 569 (1968). All inferencesto be drawn from the facts should be resolved in favor of thenonmoving party. Tigg Corp. v. Dow Corning Corp., 822 F.2d 358,361 (3d Cir. 1987). The burden of persuasion is stringent andremains on the moving party. If there remains any doubt as towhether a trial is necessary, summary judgment should not begranted. See Celotex Corp., 477 U.S. at 330-33, 106 S.Ct. at2556-58; Adickes v. S.H. Kress & Co., 398 U.S. 144, 157-61, 90S.Ct. 1598, 1608-10, 26 L.Ed.2d 142 (1970).

Because jurisdiction in this case is founded on diversity ofcitizenship, I am bound to apply New Jersey law to the presentcontroversy. See Erie Railroad Co. v. Tompkins, 304 U.S. 64,78, 58 S.Ct. 817, 822, 82 L.Ed. 1188 (1938); Wilson v.Asten-Hill Manufacturing Co., 791 F.2d 30, 32 (3d Cir. 1986).Under New Jersey law, the construction of contracts is a questionof law for the court. Northeast Custom Homes, Inc. v. Howell,230 N.J. Super. 296, 301, 553 A.2d 387 (Law Div. 1988).Ultimately, at trial, the Court must instruct the jury as to whatcoverage the policy provides. Davis v. Equitable Life Assur.Soc., 90 N.J. Super. 328, 331, 217 A.2d 459 (App. Div. 1966).However, ordinarily the issue of whether the employee's act wasdishonest within the bond coverage is for the jury to decideunless the facts reasonably permit of but a single conclusion.Mortgage Corp. of N.J. v. Aetna Cas. & Surety Co., 19 N.J. 30,38, 115 A.2d 43 (1955).

The precise language contained in the "Dishonest and FraudulentActs" clause of the Oritani bond has apparently never before beeninterpreted by any court in the state of New Jersey.[2] Thus,under Erie Railroad Co. v. Tompkins, supra, I must predict howthe New Jersey State Supreme Court would rule on this issue ifpresented with it. Aloe Coal Co. v. Clark Equipment Co.,816 F.2d 110, 117 (3rd Cir.), cert. denied, 484 U.S. 853, 108 S.Ct.156, 98 L.Ed.2d 111 (1987). In forecasting how the state SupremeCourt would rule, dicta or lower state court decisions are"indicia of how the state's highest court might decide."Pennsylvania Glass Sand v. Caterpillar Tractor Co.,652 F.2d 1165, 1167 (3rd Cir. 1981); McKenna v. Ortho PharmaceuticalCorp., 622 F.2d 657, 663 (3rd Cir.), cert. denied, 449 U.S. 976,101 S.Ct. 387, 66 L.Ed.2d 237 (1980). In the absence of lowercourt opinions, "[t]he policies underlying the applicable legaldoctrines, the doctrinal trends indicated by these policies, andthe decisions of other courts may also inform our analysis. Inaddition, we may consult treatises, the Restatement, and theworks of scholarly commentators." Pennsylvania Glass, 652 F.2dat 1167. See also McKenna, supra at 662; Aloe Coal, supra, at117; McNeilab, Inc. v. North River Ins. Co., 645 F. Supp. 525,532 & n. 9 (D.N.J. 1986), aff'd, 831 F.2d 287 (3d Cir. 1987).

As there are no lower court decisions interpreting this preciselanguage I must look to New Jersey policies concerning insuranceand cases in other jurisdictions interpreting identical languagein order to predict what the New Jersey Supreme Court woulddecide. Under New Jersey law, insurance contracts are generallyconsidered to be "contracts of adhesion, prepared unilaterally bythe insurer, and have always been subjected to careful judicialscrutiny to avoid injury to the public." Sparks v. St. Paul Ins.Co., 100 N.J. 325, 335, 495 A.2d 406 (1985). It has long beenthe policy in New Jersey that

[i]f the controlling language [of the policy] will support two meanings, one favorable to the insurer, and the other favorable to the insured, the interpretation sustaining coverage must be applied. Courts are bound to protect the insured to the full extent that any fair interpretation will allow. . . . [D]oubts as to the existence of coverage must be resolved in favor of the insured.

Mazzilli v. Accident & Cas. Ins. Co., 35 N.J. 1, 7-8,170 A.2d 800 (1961); Kopp v. Newark Ins. Co., 204 N.J. Super. 415, 420,499 A.2d 235 (App. Div. 1985). This settled rule of law thatdoubts and ambiguities must be resolved in favor of coverageextends to fidelity bonds issued to banks. Fidelity & DepositCo.

of Md. v. Hudson United Bank, 653 F.2d 766, 772 n. 8 (3dCir. 1981). Moreover, even if the contract language is notnecessarily ambiguous, the insurance contract should beinterpreted in accordance with the reasonable expectations of theinsured. See Sparks, supra, 100 N.J. at 336-38, 495 A.2d 406;Meier v. New Jersey Life Ins. Co., 101 N.J. 597, 612,503 A.2d 862 (1986) (courts will enforce only the restrictions and theterms in an insurance contract that are consistent with theobjectively reasonable expectations of the average insured). Seealso Perrine v. Prudential Ins. Co., 56 N.J. 120, 126-7,265 A.2d 521 (1970); Gerhardt v. Continental Ins. Co., 48 N.J. 291,297-300, 225 A.2d 328 (1966); Killeen Trucking v. Great Am.Surplus Lines Ins. Co., 211 N.J. Super. 712, 716-17, 512 A.2d 590(App. Div. 1986).

B. Discussion

Plaintiff, Oritani, relies on this New Jersey policy ofconstruing ambiguities in favor of coverage, and argues that thephrase "manifest intent" in Insuring Agreement (A) is susceptibleof two interpretations. Oritani, based on a discussiondistinguishing "motive" from "intent", contends that the bond'srequisite "manifest intent" to cause loss could be interpreted tomean that coverage extends both to cases where the employeeintended to cause loss to the insured, and to those situationswhere, though the employee had no subjective intent to cause lossto the insured, it was sufficiently objectively foreseeable thatloss would result from his conduct that his behavior rose to thelevel of recklessness. I am unpersuaded by this argument,however, because I feel the plaintiff takes the phrase "manifestintent" out of context and ignores the rest of the definition offraudulent or dishonest acts. The Insuring Agreement states:

Dishonest or fraudulent acts as used in this Insuring Agreement shall mean only dishonest or fraudulent acts committed by such Employee with the manifest intent

(a) to cause the Insured to sustain such loss, and

(b) to obtain financial benefit for the Employee or for any other person . . .

I feel that it unduly strains the language of the InsuringAgreement to construe the definition to include acts undertakenby the employee with no dishonest motive or intent to cause lossto the insured and to secure gain for himself. Thus I see noambiguity in the controlling language of the bond. It seems clearthat the provision was meant to cover only those actions taken byan employee with some degree of dishonest intent to secure abenefit for himself or another and cause a loss to the insured.In the absence of an ambiguity, the New Jersey policy set forthin Mazzilli and Kopp, supra, is inapplicable. See Mazzilli,35 N.J. at 7-8, 170 A.2d 800; Kopp, 204 N.J.Super. at 470,499 A.2d 235. Moreover, as Oritani cannot reasonably expect torecover under an Insuring Agreement providing coverage for"Dishonest or Fraudulent Acts" when they admit that the employeein question acted with a "pureheart," followed all company policies, and had no intention tocause the company a loss or to secure a gain for himself, theSparks line of cases does not apply. See Oritani OppositionBrief, p.

8; Plaintiff's Answers to Defendant's Second Demand forAdmissions; Sparks, supra, 100 N.J. at 336-38, 495 A.2d 406;Meier, supra, 101 N.J. at 612, 503 A.2d 862.

Other jurisdictions, interpreting identical language definingdishonest and fraudulent acts in similar blanket bonds, havefound that coverage under the bond requires a showing that theemployee not only committed a dishonest act, but that he did sowith the subjective intent: 1) to cause his employer loss and 2)to incur a benefit for himself or confer it on a third party.While such precedent is clearly not binding on me, it ispersuasive. In Glusband v. Fittin Cunningham & Lauzon, Inc.,892 F.2d 208 (2d Cir. 1989), it was held that an investmentadviser's purchase of naked call options which the courtcharacterized as "reckless and imprudent" and which resulted inlarge losses for the employer, was not covered under the bondbecause the employee lacked the requisite manifest intent tocause loss to his employer and to benefit himself. Id. at 210.See Leucadia, Inc. v. Reliance Ins. Co., 864 F.2d 964, 972 (2dCir. 1988), cert. denied, 490 U.S. 1107, 109 S.Ct. 3160, 104L.Ed.2d 1023 (1989), (holding an employee's authorization ofloans to uncreditworthy borrowers was not covered by the bondbecause the employee lacked the requisite manifest intent tocause loss to his employer and to secure a gain for himself). InMunicipal Securities v. Ins. Co. of North America, 829 F.2d 7(6th Cir. 1987), the court held that a trader's violation ofinventory limits in an effort to cover up large trading lossesthat would otherwise have threatened her job security, wasundertaken without the required intent to cause loss to theemployer and thus was not covered under the bond. The Courtexplained:

Ms. Hargrave's [the trader's] manifest intent was to make money. She intended to violate her standing orders, to be sure, but not for the purpose of causing a huge loss. Ms. Hargrave's deposition testimony established without contradiction that her purpose was to eradicate the losses, not to increase them.

Id. at 9. These cases illustrate that other jurisdictions havenot found the same language ambiguous, and that it hasuniversally been interpreted to exclude reckless or negligentacts from coverage; I find them very persuasive.

As I find that Insuring Agreement (A) unambiguously covers onlythose dishonest or fraudulent acts undertaken by employees withthe subjective intent both to cause loss to the insured and tosecure a gain for themselves or a third party; and as theplaintiff, Oritani, has admitted that John Rowe, the employee inquestion, acted with a "pure heart" and without the intent tocause the company loss or to benefit himself or another, I findthat Fidelity has met their burden by proving that no genuineissues of material fact exist. See Celotex, supra, 477 U.S. at327, 106 S.Ct. at 2554. Accordingly, the bond does not cover Mr.Rowe's actions and Fidelity is entitled to summary judgment as amatter of law.

As I have found that partial summary judgment in favor of thedefendant is warranted, the relief the defendant sought in thealternative, to file a third party complaint against John Rowe,is rendered moot.

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Conclusion

For all of the above stated reasons, I will grant thedefendant's motion for partial summary judgment dismissing CountThree of the plaintiff's Amended Complaint. The defendant'smotion in the alternative, to file a third-party complaintagainst John Rowe is denied.

1. In this opinion, I also held that Oritani is entitled tocoverage under Insuring Agreement (B) of the blanket bond;however, I declined to enter summary judgment in favor ofOritani, because Oritani had not moved for such relief andadditional defenses may have been asserted by Fidelity. SeeOritani, 741 F. Supp. at 524. Subsequently, Oritani did move forsummary judgment asserting that coverage existed under InsuringAgreement (B) of the bond and that Fidelity had advanced nomeritorious defenses; Fidelity advanced six affirmative defensesin opposition. As I found Fidelity's defenses meritless I enteredsummary judgment in favor of Oritani under Insuring Agreement (B)of the bond, in the amount of $146,750.00. See Oritani, 744F. Supp. at 1318.

2. In Oritani Savings and Loan v. Fidelity and Deposit Co.,741 F. Supp. 515 (D.N.J. 1990), this court, relying on NationalNewark, supra, denied Fidelity's motion for summary judgmentthat no coverage is provided for Oritani's claim under InsuringAgreement (A), holding that an issue of fact existed as towhether the acts of the employee in question were dishonestwithin the meaning of the bond and thus covered by it. In itsbrief in support of its motion for reconsideration, Fidelitycorrectly pointed out that the language of the bond under whichOritani receives coverage differs from that considered inNational Newark, in that Insuring Agreement (A) of the Oritanibond defines "Dishonest and Fraudulent Acts." Thus Fidelityargued that National Newark, supra, had been misapplied andthat the construction of the language in the Oritani bond was acase of first impression in New Jersey. However, as this Courtfound that deciding this difficult issue in the absence ofcontrolling authority was unnecessary, it declined to do so atthat time. 744 F. Supp. at 1316. However, as the defendant,Fidelity has again moved for summary judgment, dismissing CountThree of the plaintiff's Amended Complaint as no coverage existsunder Insuring Agreement (A) of the bond, and as I now find thatNational Newark was previously misapplied, I must considerFidelity's motion for summary judgment anew, apparently withoutbinding precedent from the New Jersey Supreme Court.