Dan Tait, Inc. v Farm Family Cas. Ins. Co.

2018 NY Slip Op 28205 [60 Misc 3d 886]

July 2, 2018

Platkin, J.

Supreme Court, Albany County

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[*1]

Dan Tait, Inc., Plaintiff,
v
Farm Family Casualty Insurance Company, Defendant.

Supreme Court, Albany County, July 2, 2018

APPEARANCES OF COUNSEL

O'Connor, O'Connor, Bresee & First, P.C., Albany (*Dianne C. Bresee* of counsel), for defendant.

Lippes Mathias Wexler Friedman LLP, Albany (*Conor E. Brownell* of counsel), for plaintiff.

{**60 Misc 3d at 887} OPINION OF THE COURT

Richard M. Platkin, J.

Plaintiff Dan Tait, Inc. commenced this commercial action seeking to [*2]recover additional funds pursuant to the employee dishonesty provisions of a business insurance policy issued by defendant Farm Family Casualty Insurance Company. Prior to the taking of any discovery, Farm Family moves pursuant to CPLR 3212 for summary judgment dismissing the complaint. Dan Tait opposes the motion and cross-moves for summary judgment on its claim for breach of the insurance contract.[FN1]

The issue raised by the motions is whether the numerous dishonest acts of the insured's employee over multiple policy{**60 Misc 3d at 888} periods, which included several types of theft and embezzlement, constitute one "occurrence" under the employee dishonesty coverage. This issue has been litigated frequently around the country, but the parties have not cited, and the court's own

research does not disclose, any reported decisions of the New York courts that speak directly to the issue.

Based upon the particular language of the Farm Family policy, including a clause that aggregates multiple incidents of employee dishonesty into one "occurrence" and robust anti-stacking language, the court concludes that the series of dishonest acts committed by the insured's employee constitutes a single "occurrence," and the insured can recover no more than the per-occurrence limit of any one policy.

Background

Dan Tait is a corporation engaged in the contracting and building material supply business (*see* Bresee aff, exhibit A [complaint] ¶ 1). At pertinent times, Dan Tait was covered by a select business package policy, policy No. 3113X0108, issued by Farm Family. The initial policy period was from November 27, 2012, through November 27, 2013, and the policy was renewed on an annual basis through November 27, 2017 (*see* King aff ¶ 2). The policy includes employee dishonesty coverage, which insures Dan Tait against dishonest or criminal acts committed by its employees (*see* King aff ¶ 3; exhibits 1-5).[FN2]

Between 2012 through 2017, Dan Tait's former bookkeeper, Matthew Young, stole approximately $500,000 from the corporation by (1) making unauthorized purchases with company credit cards; (2) making unauthorized withdrawals from the company's line of credit; and (3) taking company inventory for personal use (*see* Tait aff ¶ 3; exhibit 4).

After discovering Young's dishonesty in or around May 2017,[FN3] Dan Tait submitted a claim for its losses to Farm Family (*see* King aff ¶ 4; Tait aff ¶ 7). Farm Family deemed Young's course of dishonest acts committed over multiple policy periods to constitute one "occurrence" under the language of the policy (King {**60 Misc 3d at 889}aff, exhibits 1-5 at 25-26 [policy] § I [G][*3][3]), and it provided coverage in the amount of $15,000, representing the limit of the employee dishonesty coverage for one policy period (*see* King aff ¶¶ 4-6; Tait aff ¶ 9; complaint ¶¶ 7-14).

Discussion

The policy includes "Employee Dishonesty" coverage (policy § I [G] [3]). Under this coverage, Farm Family agreed to indemnify Dan Tait for the direct loss of business property or cash "resulting from dishonest acts committed by [Dan Tait's] employees acting alone or in collusion with other persons" (*id.* § I [G] [3] [a]). "The most [Farm Family] will pay for loss or damage in any one

occurrence is" $15,000, as shown in the declarations pages of the policy (*id.* § I [G] [3] [c]). The coverage also includes language aggregating multiple incidents into one "occurrence": "All loss or damage . . . [c]aused by one or more persons; or . . . [i]nvolving a single act or series of acts . . . is considered one occurrence" under the policy (*id.* § I [G] [3] [d]).

Other provisions of the policy address losses that take place over a number of policy years. If a loss is covered partly by a particular policy and also is covered "[p]artly by any prior . . . terminated insurance that [Farm Family] had issued . . . the most [Farm Family] will pay is the larger of the amount recoverable under th[e] policy or the prior insurance" (*id.* § I [G] [3] [e]). Further, the policy covers only "loss or damage [that the insured] sustain[s] through acts committed or events occurring during the Policy Period," and "[r]egardless of the number of years [the policy] remains in force or the number of premiums paid, no Limit of Insurance cumulates from year to year or period to period" (*id.*).

Based on the foregoing policy language, Farm Family argues that the series of dishonest acts committed by Young constitutes a single occurrence. Dan Tait responds that the court should employ the "unfortunate event" test for determining the meaning of an "occurrence" under the policy, and application of this test results in the conclusion that Young's separate and distinct acts of theft committed over a multi-year period constitute multiple occurrences. Alternatively, Dan Tait maintains that the meaning of the term "occurrence" is ambiguous because the policy does not specify whether "a single act or series of acts" is limited to one policy period or whether it encompasses multiple policy periods.{**60 Misc 3d at 890}

A. Occurrence

An insurance policy is a contract, and the court must therefore be "guided by basic principles of contract interpretation which instruct that a contract should be construed to give effect to the parties' intent as gleaned from the four corners of the document itself, provided that its terms are clear and unambiguous" (*Elmira Teachers' Assn. v Elmira City School Dist.*, 53 AD3d 757, 759 [3d Dept 2008], *lvs denied* 11 NY3d 709 [2008]; *see White v Continental Cas. Co.*, 9 NY3d 264, 267 [2007]). To the extent that the parties' intentions cannot be clearly discerned from the written contract of insurance, the policy "must be interpreted according to common speech and consistent with the reasonable expectations of the average insured," and any ambiguity must be construed "in favor of the insured" (*Cragg v Allstate Indem. Corp.*, 17 NY3d 118, 122 [2011]; *see Barnhardt v Hudson Val. Dist. Council of Carpenters Benefit Funds*, 114 AD2d 701, 702-703 [3d Dept 1985]). The court should refrain from placing undue emphasis upon any particular word or phrase, or reading the

policy in a manner that renders any portion thereof meaningless (*see Burlington Ins. Co. v NYC Tr. Auth.*, 29 NY3d 313, 322 [2017]; *South [*4]Rd. Assoc., LLC v International Bus. Machs. Corp.*, 4 NY3d 272, 277 [2005]; *Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 221-222 [2002]).

[1] Applying these principles, the court agrees with Farm Family that the threshold inquiry here is whether the losses claimed by Dan Tait "[i]nvolv[ed] a . . . series of acts" by Young (*see* policy § I [G] [3] [d]). In reaching this conclusion, the court necessarily rejects Dan Tait's reliance on the "unfortunate event" test—a common-law test developed by the Court of Appeals for "resolving whether a set of circumstances amounts to one accident or occurrence, or multiple accidents or occurrences, for purposes of resolving how much coverage is available under a third-party liability insurance policy" (*Appalachian Ins. Co. v General Elec. Co.*, 8 NY3d 162, 170 [2007]).

The unfortunate-event test has its genesis in *Arthur A. Johnson Corp. v Indemnity Ins. Co. of N. Am.* (7 NY2d 222, 224-226 [1959]), in which the Court of Appeals was faced with the question of whether collapses of two separate walls of adjacent buildings at separate times were two "accidents" within the meaning of a third-party insurance policy. The Court of Appeals rejected both "the sole-proximate-cause approach, which focuses on whether the injuries or losses can be traced{**60 Misc 3d at 891} to a single, originating cause," and "the one-accident-per-person approach, which depends on the number of individual claimants seeking recovery," and instead adopted the "unfortunate-event approach, which is based not solely on the cause but on the nature of the incident giving rise to damages" (*Appalachian*, 8 NY3d at 170-171; *see Arthur A. Johnson Corp.*, 7 NY2d at 227-230). Application of the unfortunate-event test requires consideration of "whether there is a close temporal and spatial relationship between the incidents giving rise to injury or loss, and whether the incidents can be viewed as part of the same causal continuum, without intervening agents or factors" (*Appalachian*, 8 NY3d at 171-172). "Generally, the issue of what constitutes an occurrence [is] a legal question for courts to resolve" (*Roman Catholic Diocese of Brooklyn v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 21 NY3d 139, 148 [2013] [citation omitted]).

In maintaining that Young's numerous acts of theft committed over several years constitute multiple occurrences under the unfortunate-event test, Dan Tait elides over at least one important limitation in the common-law analytical framework developed by the Court of Appeals: the unfortunate-event test applies only in the absence of policy language that speaks to the issue of the aggregation of separate incidents into one "occurrence" or "accident."

It is black-letter law that courts resolving an insurance coverage dispute must " 'first look to the

language of the policy' " (*id.*, quoting *Consolidated Edison*, 98 NY2d at 221). Thus, the unfortunate-event test is applied only where the language of the policy is silent on the issue of aggregation: " [A]bsent policy language indicating an intent to aggregate separate incidents into a single occurrence, the unfortunate event test should be applied to determine how occurrences are categorized for insurance coverage purposes" (*id.*; *see Appalachian*, 8 NY3d at 173). The court therefore concludes that it would run counter to settled principles of New York law to apply the common-law definition of "occurrence" to an insurance policy that speaks directly to the issue of aggregation.

Here, of course, the policy does include language demonstrating a clear intent to aggregate into a single "occurrence" the losses caused by an employee "[i]nvolving a single act [*5]or series of acts" (policy § I [G] [3] [d]). The court therefore agrees with Farm Family that all losses resulting from Young's "series of [dishonest] acts" over a multi-year period (*see* Tait aff ¶ 3; {**60 Misc 3d at 892}exhibit 4) must be considered to be "one occurrence" under the plain language of the policy.[FN4] Indeed, while arguing in favor of multiple occurrences, Dan Tait does not contend that its losses arose from anything other than a "series of [dishonest] acts" committed by Young.

Dan Tait does argue that the term "occurrence" is rendered ambiguous by the phrase "a single act or a series of acts" and, thus, should be read as permitting coverage for "each of Mr. Young's methods of theft" (Tait aff ¶ 10; *see American Commerce Ins. Brokers, Inc. v Minnesota Mut. Fire and Cas. Co.*, 551 NW2d 224, 231 [Minn 1996] [construing "series of related acts"]). The court does not find this argument or the reasoning of *American Commerce* to be persuasive. As a federal district court held in rejecting a similar argument concerning similar policy language:

> "The phrase 'series of acts' clearly refers to a sequence of loss inducing acts. . . . Although 'series' does impose a relatedness condition between the multiple acts upon which an 'occurrence' is based, those 'acts' are related in that they were committed by an employee (or employees) and that they caused loss, not that they caused loss in any particular way. Other courts interpreting the same definition of 'occurrence' have rejected the very argument [plaintiff insured] now makes" (*APMC Hotel Mgt., LLC v Fidelity & Deposit Co. of Md.*, 2011 WL 5525966, *5, 2011 US Dist LEXIS 131638, *14-15 [D Nev, Nov. 10, 2011, No. 2:09-cv-2100-LDG-VCF] [collecting authorities]).

[2] Thus, while the "series of [dishonest] acts" committed by Young involved several different methods of theft—unauthorized withdrawals from Dan Tait's credit line, unauthorized purchases with Dan Tait's credit cards, and unauthorized taking of Dan Tait's inventory and property for his personal use (*see* Tait aff ¶ 3; exhibit 4)—the clear and unambiguous language of the policy requires these theft incidents to be aggregated into one "occurrence."

{**60 Misc 3d at 893}As observed by Farm Family, numerous courts from other jurisdictions have reached the same conclusion when confronted with similar arguments and similar policy language.[FN5] Nonetheless, given the variations in policy language, governing law, and the arguments made by the litigants, the court decides this case based on settled principles of New York insurance and contract law, but simply observes that the great weight of authority favors Farm Family's position regarding aggregation.[FN6]

Having concluded that the parties' dispute regarding the term "occurrence" must be resolved by reference to the policy language intended to govern the aggregation of multiple incidents into one occurrence, the court declines to follow *Dataflow, Inc. v Peerless Ins. Co.* (2014 WL 4881534, *6, 2014 US Dist LEXIS 138042, *15-17 [ND NY, Sept. 30, 2014, No. 3:11-cv-1127 (LEK/DEP)], *reconsideration denied* 2015 WL 6023675, 2015 US Dist LEXIS 140181 [ND NY, Oct. 15, 2015, No.{**60 Misc 3d at 894} 3:11-cv-1127 (LEK/DEP)]).[FN7] In construing similar policy language, the federal district court in *Dataflow* reasoned that, while the "New York courts have not previously construed the meaning of a 'series of related acts' for the purposes of employee dishonesty insurance coverage . . . , New York has adopted an 'unfortunate events' test for determining the meaning of an occurrence in other contexts" (2014 WL 4881534, *6, 2014 US Dist LEXIS 138042, *15). The *Dataflow* court ultimately denied summary judgment to both sides, concluding that the parties had presented "insufficient evidence by which to judge whether or not [the dishonest employee's] actions satisfied the elements of the 'unfortunate events' test, and therefore were related enough to constitute one or multiple occurrences" (2014 WL 4881534,[*6]*7, 2014 US Dist LEXIS 138042, *17).[FN8]

Based on the foregoing, the court concludes that Young's series of thefts from Dan Tait constitutes "one occurrence" under the policy and, therefore, is subject to the $15,000 limit applicable to losses arising from employee dishonesty.

B. Anti-Stacking

Dan Tait further contends that even if the series of dishonest acts committed by Young is deemed to be one occurrence, the company's total losses may be allocated among the various policies that were in effect at the time of the losses. In particular, Dan Tait argues that the policy language is, "at best, ambiguous as to whether, when there are multiple contracts of insurance . . . , a single 'occurrence' which causes damage under two separate contracts of insurance, can support separate claims by the insured under each separate policy" (plaintiff's mem of law at 8).

In addition to the aggregation language discussed previously, Farm Family relies on the "anti-stacking" provisions of the policy, which read as follows:{**60 Misc 3d at 895}

> "If any loss is covered: (1) Partly by this insurance; and (2) Partly by any prior cancellation or terminated insurance that we or any affiliate had issued to you or any predecessor in interest; the most we will pay is the larger of the amount recoverable under this insurance or the prior insurance. We will pay only for loss or damage you sustain through acts committed or events occurring during the Policy Period. Regardless of the number of years this policy remains in force or the number of premiums paid, no Limit of Insurance cumulates from year to year or period to period" (policy § I [G] [3] [e]).

Farm Family also relies upon a decision of the Appellate Division, Third Department construing virtually identical anti-stacking language (*see Shared-Interest Mgt. v CNA Fin. Ins. Group*, 283 AD2d 136, 137-140 [3d Dept 2001, Mercure, J.], *appeal dismissed* 97 NY2d 701 [2002]).

In *Shared-Interest*, the insured had a renewable crime insurance policy issued by Firemen's Insurance Company of Newark for the period of June 8, 1993, to June 8, 1996, and by CNA Financial Insurance Group, Firemen's successor by merger, for the period of June 8, 1996, to June 8, 1999 (*see* 283 AD2d at 137). The acts of the dishonest employee were committed between April 7, 1994, and April 28, 1997, and, after receiving the full $100,000 policy limit from Firemen's, the insured sought indemnity from CNA for losses incurred during the effectiveness of the CNA policy (*see id.* at 138).

The Third Department held in favor of CNA, holding that the insured was covered by one continuous policy of insurance, notwithstanding the merger of Firemen's and CNA (*see id.* at 138-139). While therefore "not necessary for [its] determination," the Third Department went on [*7]to explain that, even if the Firemen's and CNA policies "were to be treated as two entirely separate policies," the insured's attempt to "stack" the policy limits to cover the losses arising from one occurrence under two policies would run afoul of "the unambiguous antistacking provisions" and "still preclude the double recovery sought by [the insured]" (*id.* at 140).

While acknowledging that the Third Department would have denied the insured a recovery under multiple policies for the losses arising from one occurrence, Dan Tait urges this court not to follow the *Shared-Interest* dicta and instead follow the reasoning employed in *Dataflow*, which determined that "the {**60 Misc 3d at 896}coverage limitations apply on a per-contract basis, rather than singly over the entire course of an occurrence spanning multiple policy periods and insurance contracts" (2014 WL 4881534, *7, 2014 US Dist LEXIS 138042, *20).

[3] The court finds Justice Mercure's analysis in *Shared-Interest* to be highly persuasive and declines Dan Tait's invitation to disregard the Third Department's guidance. As in *Shared-Interest*, the clear and unambiguous language of the policy provides that if a loss is covered partly by a particular policy and "[p]artly by any prior . . . terminated insurance that [Farm Family] had issued . . . the most [Farm Family] will pay is the larger of the amount recoverable" under either policy (policy § I [G] [3] [e]; *see Shared-Interest*, 283 AD2d at 137-138). This limitation, which prevents the insured from obtaining more than the full limit of any one policy, is wholly consistent with the "policy's clear overall intent to preclude a stacking of coverage" (*Shared-Interest*, 283 AD2d at 140), which can be seen in the language providing that "no Limit of Insurance cumulates from year to year or period to period" (policy § I [G] [3] [e]; *see Shared-Interest*, 283 AD2d at 138).

Notably, in rejecting the insured's attempt to obtain a recovery in excess of the per-occurrence, per-policy limit, the Third Department expressly declined to follow *Spartan Iron & Metal Corp. v Liberty Ins. Corp.* (6 Fed Appx 176 [4th Cir 2001]), which held the term "occurrence" to be ambiguous under South Carolina law because it did not "affirmatively indicate whether a series of acts includes acts occurring outside the policy term"—the very argument presented by Dan Tait here (*id.* at 178). And even if the term "occurrence," standing alone, were found to suffer from an ambiguity as to acts outside of the policy term, the insurance policies here and in *Shared-Interest* contain robust anti-stacking language that evinces a "clear overall intent to preclude a stacking of coverage from year to year or period to period" (283 AD2d at 140). Further, in allowing the stacking of insurance policies, the federal district court in *Dataflow* followed *Spartan Iron*, but did not refer to *Shared-Interest* (*see Dataflow*, 2014 WL 4881534, *7, 2014 US Dist LEXIS 138042, *18-20).

Based on the foregoing, the court concludes that Dan Tait cannot recover an amount in excess of $15,000, representing "the larger of the amount recoverable under" any one of the insurance policies that were in effect during the multi-year period in which Young's dishonest acts were committed (policy § I [G] [3] [e]).{**60 Misc 3d at 897}

Conclusion

Based on all of the foregoing, it is ordered that defendant's motion for summary judgment is granted, and plaintiff's cross motion for summary judgment is denied; and it is further ordered that the complaint is dismissed.

Footnotes

Footnote 1: Both sides agree that the underlying facts are not in dispute and that the case is ripe for summary adjudication.

Footnote 2: Prior to the issuance of the policy on November 27, 2012, Dan Tait was covered under a contractor's advantage special policy, also issued by Farm Family, for the policy period of November 27, 2011, to November 27, 2012 (*see* King aff ¶ 2 n 1; exhibit 6). That policy did not provide coverage for employee dishonesty (*see id.*).

Footnote 3: When confronted, Young admitted to the embezzlement and committed suicide shortly thereafter (*see* Tait aff ¶ 4).

Footnote 4: The court does not, however, agree with Farm Family that *Shared-Interest Mgt. v CNA Fin. Ins. Group* (283 AD2d 136 [3d Dept 2001], *appeal dismissed* 97 NY2d 701 [2002]) is controlling on this point. In particular, *Shared-Interest* concerned different policy language, and the Appellate Division's decision did not address the "series of acts" language in that policy (*see id.*).

Footnote 5:*See e.g. Superstition Crushing, LLC v Travelers Cas. & Sur. Co. of Am.*, 360 Fed Appx 844, 846 (9th Cir 2009); *Madison Materials Co., Inc. v St. Paul Fire & Mar. Ins. Co.*, 523 F3d 541, 543-544 (5th Cir 2008), *cert denied* 555 US 1048 (2008); *Business Interiors, Inc. v Aetna Cas. & Sur. Co.*, 751 F2d 361, 363 (10th Cir 1984); *Beckley Mech., Inc. v Erie Ins. Co.*, 2009 WL 973358, *3-4, 2009 US Dist LEXIS 30881, *6-11 (SD W Va, Apr. 9, 2009, No. 5:07-CV-00652), *affd* 374 Fed Appx 381 (4th Cir 2010); *Wausau Bus. Ins. Co. v United States Motels Mgt., Inc.*, 341 F Supp 2d 1180, 1183-1184 (D Colo 2004); *Diamond Transp. Sys., Inc. v Travelers Indem. Co.*, 817 F Supp 710, 712 (ND Ill 1993); *Employers Mut. Cas. Co. v DGG & CAR, Inc.*, 218 Ariz 262, 264-265, 183 P3d 513, 515-516 (2008); *Sherman & Hemstreet, Inc. v Cincinnati Ins. Co.*, 277 Ga 734, 737, 594 SE2d 648, 651 (2004); *Christ Lutheran Church By & Through Matthews v State Farm Fire & Cas. Co.*, 122 NC App 614, 616-618, 471 SE2d 124, 125-126 (1996), *affd* 344 NC 732, 477 SE2d 33 (1996).

Footnote 6: The cited case law also reveals that employee dishonesty losses commonly take the form of a series of dishonest acts, rather than one-time events. In this connection, the court observes that the ability of insurers to limit their financial exposure to massive employee dishonesty losses through the use of appropriate aggregation language allows some measure of dishonesty protection to be provided to insureds at little or no cost. Here, for example, the dishonesty coverage was provided to policyholders as part of the extra extension endorsement and, therefore, Dan Tait did not pay an additional premium for the coverage (*see* Phillips aff ¶¶ 3-4). Further, Dan Tait had the option of purchasing coverage for dishonesty losses in excess of the $15,000 basic limit (*id.*). Thus, permitting Dan Tait to receive up to $15,000 for each of the separate acts of theft committed by Young would not only run counter to the plain language of the policy, but would also upset settled reliance interests and result in an unjustified windfall (*see American Commerce*, 551 NW2d at 230 [finding $563

annual premium "incommensurate" with potential for insured to recover up to $10,000 for each of the 155 occurrences of embezzlement]).

Footnote 7: The New York State courts are not bound by the holdings of the lower federal courts (*see generally People v Kin Kan*, 78 NY2d 54, 59-60 [1991]; *People v Joyner*, 303 AD2d 421, 421 [2d Dept 2003], *lv denied* 100 NY2d 563 [2003]), particularly as to issues of New York law.

Footnote 8: In denying reconsideration, the district court acknowledged applying the unfortunate-event test rather than the policy language:

> "the policy language—a 'series of related acts'—did not compel the Court to abandon New York's test for determining whether acts are related and that there was no reason to believe that New York courts would adopt the test that they have rejected in other contexts specifically for employee dishonesty" (*Dataflow*, 2015 WL 6023675, *3, 2015 US Dist LEXIS 140181, *8 [some internal quotation marks and citation omitted]).