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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-o

UNION HILL SUPREMO PHARMACY,

Plaintiff-Appellant,

v.

FRANKLIN MUTUAL INSURANCE

COMPANY,

Defendant-Respondent.

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March 4, 2015

Argued January 13, 2015 –  
Decided

Before Judges Reisner and  
Higbee.

On appeal from the Superior  
Court of New Jersey, Law  
Division, Monmouth County,  
Docket No. L-705-13.

Oscar A. Escobar, Jr., argued  
the cause for the appellant (Rajan  
& Rajan, LLP, attorneys; Mahesh  
Rajan, of counsel; Mr. Escobar  
and Suketa K. Shah, on the brief).

Anthony P. Pasquarelli argued  
the cause for the respondent  
(Sweet Pasquarelli, P.C.,  
attorneys; Mr. Pasquarelli, of  
counsel; Kenneth C. Ho, on the  
brief).

PER CURIAM

Plaintiff, Union Hill Supremo Pharmacy (Union Hill), appeals from an April 16, 2014, amended Law Division order granting summary judgment in favor of defendant, Franklin Mutual Insurance Company. The trial court found that defendant properly disclaimed coverage under an exclusionary clause in plaintiff's policy, which limited coverage for criminal, dishonest, or fraudulent acts committed by "employees." The court also rejected various arguments by plaintiff that the term "employee," under the exclusionary language of the policy was ambiguous, and that ambiguity should have been resolved against defendant. We find no issue of material fact or ambiguity in the terms of plaintiff's policy, and therefore affirm the decision of the trial court.

We view the facts and all reasonable inferences therefrom in the light most favorable to the party against whom summary judgment was entered. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). On June 17, 2012, plaintiff was robbed by three men, who have been subsequently arrested, charged, and prosecuted by the U.S. Attorney's Office. The crime took place while the store was closed, and resulted in the loss of approximately \$300,000 worth of merchandise.

The commission of the crime was facilitated by plaintiff's former employee, Ms. Yusofova, who worked at Union Hill for approximately twelve to eighteen months. Ms. Yusofova worked part-time as a technician's assistant, where she was responsible for assisting with prescriptions, entering patient information, and performing other clerical duties. By Ms. Yusofova's own admission, she obtained and supplied the security code and a copy of the pharmacy key to the men who perpetrated the crime. She had acquired the security code on her day off, when she observed a pharmacist punch in the numbers, and surreptitiously copied the key.

As a result of the crime, plaintiff submitted a claim to the defendant insurance company for the full value of its loss. Defendant disclaimed coverage under "**PART I E • LOSSES NOT INSURED**" of plaintiff's insurance policy, which stated, in pertinent part:

### **3. DISAPPEARANCE OR DISHONESTY EXCLUSION**

The unexplained or mysterious disappearance of property inducing *money* and *securities*, or shortages disclosed on taking inventory. Acts of appropriation, pilferage or shoplifting. Criminal,

dishonest, or fraudulent acts by,  
or instigated by, *you or your*  
directors, employees, officers,  
partners, or trustees or other  
*insureds*, or by anyone given  
possession of property, other  
than a Bailee for hire.

[Underline added.]

Defining the term "employee," the "**COMMON GLOSSARY**" attached to the  
Businessowner Policy issued to plaintiff read:

***Employee***

*Employee* means a person  
employed by *you* and includes a  
*leased worker*. *Employee* does  
not include a *temporary worker*  
or independent contractor.

....

***Leased Worker***

*Leased Worker* means a person  
who is leased to *you* by a labor  
leasing firm under an agreement  
between *you* and such firm to  
perform duties related to the  
conduct of your  
business/operations.

*Leased worker* does not  
include a *temporary worker*.

....

### ***Temporary Worker***

*Temporary worker* means a person who is furnished to *you* as a substitute for a permanent *employee* on leave or to meet seasonal or other short-term workload conditions.

*Temporary worker* does not include a *leased worker*.

Defendant did, however, find that plaintiff was entitled to \$20,000 under its supplemental policy, which read:

#### **11. EMPLOYEE DISHONESTY COVERAGE**

A. Coverage is extended to cover, up to the applicable limit [of \$20,000] shown in in the Declarations Supplement, *your* loss of *money, securities* and other business personal property because of dishonest or fraudulent acts involving *your* employees (whether acting alone or in collusion with others). A series of similar or related acts is one occurrence.

[Underline added.]

We review a motion for summary judgment de novo under the same legal standard applied by the trial court. Coyne v. N.J. Dep't of Transp., [182 N.J. 481](#), 491 (2005). Thus,

we are to determine "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue[s] in favor of the non-moving party." Brill, *supra*, 142 N.J. at 540; *see* R. 4:46-2(c).

Plaintiff argues that summary judgment was inappropriate because there was a genuine issue of material fact regarding the term "employee." Specifically, plaintiff maintains the insurance policy was vague and ambiguous in its definition of the term "employee," and it should therefore be construed in plaintiff's favor. Plaintiff contends that as a part-time, hourly employee, Ms. Yusofova should not be considered an "employee" under the terms of the policy, especially for criminal actions taken during non-working hours.<sup>1</sup>

Contrary to plaintiff's argument, interpretation of an insurance contract is a question of law. Polarome Int'l, Inc. v. Greenwich Ins. Co., 404 N.J. Super. 241, 260 (App. Div. 2008), *certif. denied*, 199 N.J. 133 (2009). When interpreting such a contract, courts "examine the plain language of the policy and, if the terms are clear, they 'are to be given their plain, ordinary meaning.'" Pizzullo v. N.J. Mfrs. Ins. Co., 196 N.J. 251, 270 (2008) (quoting Zacarias v. Allstate Ins. Co., 168 N.J. 590, 595 (2001)). When an ambiguity exists, however, the same must be resolved against the insurer. Di Orio v. New Jersey Mfrs. Ins. Co., 79 N.J. 257, 269 (1979).

As a rule, "an insured bears the burden of establishing that a claim is within the basic policy terms." Cobra Products, Inc. v. Federal Ins. Co., 317 N.J. Super. 392, 401 (1998) (citing Diamond Shamrock Chemicals v. Aetna, 258 N.J. Super. 167, 216 (App. Div. 1992), *certif. denied*, 134 N.J. 481 (1993)). "The insurer has the burden of establishing

application of an exclusion." Cobra, supra, 317 N.J. Super. at 401 (citing Hartford Acc. & Indem. Co. v. Aetna Life & Cas. Ins. Co., 98 N.J. 18, 26 (1984)). "[I]f the words used in an exclusionary clause are clear and unambiguous, 'a court should not engage in a strained construction to support the imposition of liability.'" Longobardi v. Chubb Ins. Co. of N.J., 121 N.J. 530, 537 (1990).

Here, the plain language of plaintiff's policy includes Ms. Yusofova as an "employee" of its business. Ms. Yusofova worked at Union Hill as an employee. She was not a leased worker; she was not hired from an agency. She was not a temporary worker; she was neither substituted for another employee, nor did she work seasonally or on a short-term basis. In that respect, there was no indication that her employment at the pharmacy had any particular end date. Instead, as defendant itself notes, Ms. Yusofova was "part-time," and nowhere in the policy does it say "part-time" employees are exempt from the **DISAPPEARANCE OR DISHONESTY EXCLUSION**. Here, the word "employee" is not "so confusing that the average policyholder cannot make out the boundaries of coverage." See Lee v. General Accident Ins. Co., 337 N.J. Super. 509, 513 (App. Div. 2001).

With regard to plaintiff's argument that the exclusion is ambiguous and should only apply to someone who is acting during working hours, we disagree. Plaintiff cites to Del Vecchio v. Old Reliable Fire Insurance Co., 132 N.J. Super. 589 (Law Div. 1975), in support of its position. In Del Vecchio, where an off-duty employee forcibly entered a warehouse and committed theft when the building was closed, the Law Division found an exclusionary clause not clearly applicable to times other than the "normal work day." Id. at 591, 596. Yet, in Cobra, supra, we held that "Del Vecchio, is not controlling on us

and to the extent it is inconsistent with [Cobra], we reject it." 317 N.J. Super. at 405. In Cobra, we dismissed a similar argument to that of plaintiff, where employees placed merchandise near dumpsters during working hours, and later picked them up after their shifts were over. See id. at 399.

We are also not persuaded that Ms. Yusofova only committed the criminal acts during non-working hours, unrelated to her employment. By her own admission, she surreptitiously obtained the key and pharmacy combination, and passed them on to the three men who ultimately committed the crime. To acquire those necessary tools, she used her knowledge as an employee of the pharmacy. Clearly, she knew where and how to learn the code and to find a spare key to copy. Her involvement falls squarely under the express language of the exclusionary clause of plaintiff's policy.

Affirmed.



<sup>1</sup> Plaintiff also advances arguments (1) that Ms. Yusofova was not "directly" involved in the theft, and therefore her actions fall outside the scope of the dishonesty exclusion, and (2) that she acted outside the scope of her employment, and therefore coverage should not be barred. These arguments are without merit and do not warrant further discussion in this opinion. R. 2:11-3 (e) (1)(E).

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