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United States District Court,
S.D. Texas, Houston Division.

Apache Corporation, Plaintiff,
v.
Great American Insurance Company, Defendant.

CIVIL ACTION NO. 4:14–CV–237
|
Signed 08/07/2015

Attorneys and Law Firms

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MEMORANDUM AND ORDER

The Honorable Alfred H. Bennett, United States District Judge

*1 Before the Court are the parties cross motions for summary judgment. Great American Insurance Company ("Defendant") filed Defendant's Motion for Summary Judgment (Doc. # 14) on January 23, 2015. Apache Corporation (Plaintiff) then filed Plaintiff Apache Oil Corporation's Motion for Summary Judgement and Response to Defendant's Motion for Summary Judgment (Doc. # 16) on February 2, 2015, to which Defendant filed a response (Doc. # 17) on February 13, 2015. After considering the parties filings and oral arguments, Plaintiff's Motion for Summary Judgment is GRANTED, and Defendant's Motion for Summary Judgment is DENIED.

I. Background

a. The Policy

Plaintiff's purchased a Crime Protection Policy, policy number SAA 2687737 0900 ("the Policy") from Defendant which was effective from October 1, 2012 to October 1, 2013. [1] The Policy was an insurance policy meant to insure against several types of risk. One such category of risks the policy covered was "computer fraud." The computer fraud coverage was for $10 million in coverage above a $1 million deductible per occurrence. The Computer Fraud section, or Section B.5 of the Policy read as follows (emphasis added):

[1]   1 The facts are detailed in Plaintiff and Defendant's Motions, Documents 16 and 14 respectively.

5. Computer Fraud

We will pay for loss of, and loss from damage to, money, securities and other property *resulting directly from* the use of any computer to fraudulently cause a transfer of that property from inside the premises or banking premises:

 a) to a person (other than a messenger) outside those premises; or

 b) to a place outside those premises.

b. Undisputed Facts

On March 27, 2013, Steph Fraser, an Apache North Seas accounts payable employee, received a call from an individual claiming to be Emily Hebditch. Ms. Hebditch was an employee of Petrofac Facilities Management Limited ("Petrofac"), a vendor who did work for Apache. The caller, allegedly Ms. Hebditch, requested that Petrofac be allowed to change its account information where payment is sent for services rendered.

Ms. Fraser informed "Ms. Hebditch" that such a request must come on Petrofac letterhead. So the caller hung up and thereafter, on or about April 2, 2013, Apache Accounts Payable received an email with an attachment on Petrofrac letterhead requesting the change in account information. The submission was routed to Muriel Kelman, an Apache employee, to verify the request. Ms. Kelman called the number on the letterhead to verify the information in the aforementioned email. As soon as this information had been verified, Ms. Kelman entered the change request on Apache's Sharepoint site where

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it was approved by Susan Grieg, the Apache North Sea Financial Accounting Manager. Thereafter payments began to the "new" Petrofac account.

In total, $2.4 million were wrongly directed to the fraudulent account. Several months after the change, Plaintiff was contacted by Petrofac about several delinquent bills as it had not received any recent payments. This inquiry ultimately lead to an investigation that discovered the fraudulent activity. Plaintiff filed a claim under the Policy seeking $1.4 million in damages, the total loss minus the $1 million deductible.

II. Summary Judgment

 *2 The inquiry for this Court is whether the fraudulent activity outlined above was covered by the Policy Plaintiff purchased from Defendant, specifically, did the loss to Apache result directly from computer fraud?

Summary judgment is proper only if the pleadings, depositions, answer to interrogatories, and admissions on file, together with any affidavits filed in support of the motion, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(a); *Am. Home Assur. Co. v. Cat Tech L.L.C.,* 660 F.3d 216, 224 (5th Cir.2011) (citing *Nat'l Union Fire Ins. Co. v. Pugent Plastics Corp.,* 532 F.3d 398, 404 (5th Cir.2008)). The moving party bears the burden of demonstrating that there is no evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986); *Pioneer Exploration, L.L.C. v. Steadfast Ins. Co.,* 767 F.3d 503, 511 (5th Cir.2014). Where both parties file motions for summary judgment, the Court evaluates each motion independently, construes all facts and considers all evidence in the light most favorable to the nonmoving party. *Janvey v. Golf Channel,* 780 F.3d 641, 643 (5th Cir.2015). Although the case is before the Court on cross-motions for summary judgment, genuine issues of material fact can preclude summary judgment in favor of either party. *See Amerisure Ins. Co. v. Navigators Ins. Co.,* 611 F.3d 299, 312 (5th Cir.2010).

The parties agree that this issue is ripe for summary judgment. The material facts of the case outlined above are agreed upon by the parties so there are no material disputes. Thus, a legal determination is needed to decide whether the fraud in question is covered by the Policy.

III. Analysis

a. Choice of Law

Plaintiff filed this lawsuit in state court in Harris County, Texas. Defendant subsequently removed based on diversity jurisdiction. Because the Court's jurisdiction is based on diversity, state law applies. *Am. Int'l Specialty Lines Ins. Co. v. Canal Indem. Co.,* 352 F3d 245, 260 (5th Cir.2003).

b. Summary of Law

The present case turns on the meaning of the phrase "loss ... resulting directly from [computer fraud]."

A Court's primary concern when construing an insurance contract is to give effect to the intentions of the parties as expressed by the policy language. *Citibank Texas, N.A. v. Progressive Cas. Ins. Co.,* 2006 WL 3751301, at *3 (N.D.Tex. December 21, 2006) (overturned for other reasons) (citing *Ideal Lease Serv., Inc. v. Amoco Prod. Co.,* 662 S.W.2d 951, 953 (Tex.1983)). The terms used in the policy are given their plain, ordinary meaning unless the policy itself shows that the parties intended the terms to have a different, technical meaning. *Id.* (citing *Puckett v. U.S. Fire Ins. Co.,* 678 S.W.2d 936, 938 (Tex.1984)). Further, "[u]nder Texas law, the maxims of contract interpretation regarding insurance policies operate squarely in favor of the insured." *National American Ins. Co. v. Breaux,* 368 F.Supp.2d 604, 612 (E.D.Tex. Jan. 6, 2005) (citing *Lubbock County Hosp. Dist. V. National Union Fire Ins. Co.*, 143 F.3d 239, 242 (5th Cir.1998)); *see also National Union Fire Ins. Co. v. Kasler Corp.*, 906 F.2d 196, 198 (5th Cir.1990).

 *3 The Fifth Circuit held in *First National Bank of Louisville v. Lustig,* "A loss is directly caused by the dishonest or fraudulent act within the meaning of [policy] where the [insured] can demonstrate that it would not have [disbursed the funds] in the absence of the fraud." 961 F.2d 1162 (5th Cir.1992). The Fifth Circuit's holding as to meaning of "resulting directly from" here is synonymous to a "cause in fact." The Texas Supreme Court has held that a "cause in fact" is "established when the act or omission [in question] was a substantial factor in bringing about the injuries, and without it, the harm would not

have occurred." *Transcontinental Ins. Co. v. Crump,* 330 S.W.3d 211, 221–23 (Tex.2010).

c. Application

In the present case, Plaintiff argues that the fraudulent email sent by the fraudsters in this case was computer fraud and directly caused the fraudulent transfer of funds. Plaintiff argues that despite the intervening steps—the confirmation phone call and supervisor clearance—that took place after receiving the email, the fraudulent email was still a "substantial factor" in bringing about the injury. This Court agrees. These potentially intervening acts do not remove the loss from the protection afforded by the computer fraud coverage of the Policy. That is to say, despite the human involvement that followed the fraud, the loss still resulted directly from computer fraud, i.e. the email directing Apache to disburse payments to a fraudulent account.

As to the "human factor" steps that followed, one Northern District Court of Texas has reasoned, corporations can act "only through its human officers and employees." *Citibank Texas, N.A. v. Progressive Casualty Ins. Co.,* No. 3:06–cv–0395–H, 2006 WL 3751301, at *7 (N.D.Tex. Dec. 21, 2006) (overturned for other reasons). Just because there is human involvement between the fraud and the loss does not necessarily mean the loss did not occur as a direct result of the fraud.

Defendant argues that because of the human intervention that took place between the fraudulent email that was received and the loss to Plaintiff, the language "resulting directly from" removes the loss in this case from coverage under the Policy. But as stated above, corporations can act only through its actors. To adopt Defendant's reading would be to limit the scope of the policy to the point of almost non-existence. That is, if anytime some employee interaction took place between the fraud and the loss, or anytime fraud was perpetrated anyway other than a direct "hacking," the insurance company could be relieved

of paying under the Policy. Such a policy or provision would be rendered almost pointless. If Defendant had intended to cover only "hacking," the Policy could have been written in such a way to reflect this. However, the Policy as written is not that narrow.

Defendant argued during oral arguments that the position this Court is adopting, to not allow human intervention to cut the causation, is a slippery slope. The example used by Defendant was if a fraudulent email was sent to arrange a meeting at which fraud occurred, would the incident still be covered by a computer fraud policy similar to the one outlined above. The hypothetical, though not the facts of this case, raise the issue of at what point can the loss no longer be considered to have resulted directly from the fraudulent email.

The question is one of the quality or severity of the intervening acts. In the present case, it is this Court's determination that the intervening steps of the confirmation phone call and supervisory approval do not rise to the level of negating the email as being a "substantial factor" in bringing about the loss. *See Transcontinental,* 330 S.W.3d 221. The email was a cause in fact, or "substantial factor," and according to the Fifth Circuit's holding in *First Nat. Bank of Louisville,* this is sufficient to allow coverage under the "directly resulted from" policy language.

IV. Conclusion
 *4 This court holds that Plaintiff's loss resulted directly from computer fraud. Accordingly, Plaintiff's Motion for Summary Judgment is GRANTED and Defendant's Motion for Summary Judgement is DENIED.

It is so ORDERED.

All Citations

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