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United States District Court,
C.D. California.

TAYLOR AND LIEBERMAN, an Accountancy Corporation., Plaintiff,
v.
FEDERAL INSURANCE COMPANY, a corporation, Defendant.

No. CV 14–3608 RSWL (SHx).
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Signed June 18, 2015.

Attorneys and Law Firms

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ORDER Re: Cross Motions for Summary Judgment on) all Claims and Partial Summary Judgment on Some Claims

RONALD S.W. LEW, Senior District Judge.

***1** The instant cross-motions for summary judgment arise from Plaintiff Taylor and Lieberman's ("Plaintiff" or "T & L") Motion for Partial Summary Judgment [22] and Defendant Federal Insurance Company's ("Defendant" or "FIC") Motion for Summary Judgment [23]. The Court, having reviewed all papers submitted pertaining to this Motion and having considered all arguments presented to the Court, **NOW FINDS AND RULES AS FOLLOWS:**

The Court **GRANTS** Defendant's Motion for Summary Judgment [23] in its entirety. The Court **DENIES** [22] Plaintiff's Motion for Summary Judgment in its entirety.

I. UNCONTROVERTED FACTS

This action stems from Plaintiff's claim against Defendant for breach of an insurance coverage contract. Both Plaintiff and Defendant agree that this case is appropriate for summary judgment, and that because this is a case of contract interpretation it must therefore be decided as a matter of law. The uncontroverted facts in this cross motion for summary judgment are as follows. Plaintiff Taylor & Lieberman is an accounting firm that performs services such as business management, account oversight, and tax planning and preparation various clients, including the client that was the victim of the fraudulent activity that led to this litigation {"Client"). Parties' Joint Stipulation of Uncontroverted Facts, 2:1–3. Part of Plaintiff's business management responsibilities included managing Client's financial accounts by issuing payments, transferring funds, having Power of Attorney (held by Edward Lieberman as the Principal) over funds, writing checks and wiring transfers. *Id.* at 2:4–8. Plaintiff purchased a Forefront Portfolio Policy ("the Policy") from Defendant Federal Insurance Company prior to the incident at issue. *Id.* at 2:9–11. The Policy was in effect from June 29, 2011 to June 29, 2012 no lapse in payments. *Id.*

The dispute arises from a perpetrator fraudulently taking hold of Client's email account and sending wire payment instructions via that email address to the email account of Plaintiff's employee, Ms. Miller, on or about June 4, 2012. *Id.* at 2:14–22. The requested wire transfer was to an account at Maybank in Malaysia in the amount of $94,280.00. *Id.* The email sent to Ms. Miller's email account was signed with Client's name typed at the end of the email. *Id.* Ms. Miller believed the instructions to be from Client, so she requested the transfer and sent a confirmation email to Client. *Id.*

Ms. Miller subsequently received another email from the same Client's email address on June 5, 2012, requesting that additional funds in the amount of $98,485.90 be wired to the United Overseas Bank in Singapore. *Id.* at 2:25–3:3. This email was also signed with Client's name typed at the bottom. *Id.* The wire transfer was once again completed, and a confirmation was sent to Client's email address. *Id.*

Ms. Miller received a third email request for the wiring of $128,101.00, purportedly from Client, but from a different

email address. *Id.* at 3:6–10. The email instructed Ms. Miller to wire the funds to Hong Leong Bank in Malaysia. *Id.* Ms. Miller was tipped off by the different email address, and placed a call to Client to confirm. *Id.* It was at this time that the fraudulent scheme was discovered, and the third transfer was not completed. *Id.*

***2** Plaintiff immediately tried to recover the first two transfers, and was able to get $93,331.98 back from the first transfer. *Id.* at 3:12–16. Plaintiff was unable to recover anything from the second transfer. *Id.* Thus, Plaintiff's add up to $99,433.92 after Client withdrew its funds ($948.02 that were unrecoverable from the first transfer, plus $98,485.90 from the second transfer). *Id.*

On June 11, 2012, Plaintiff tendered this loss under the crime coverage of the Policy. *Id.* at 3:1719. On June 13, 2012, Defendant determined that coverage was not afforded for this loss and denied the claim. *Id.*

II. DISCUSSION

A. *Legal Standard*

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a). A genuine issue of material fact is one in which the evidence is such that a reasonable fact-finder could return a verdict for the non-moving party. *Anderson v. Liberty Lobby,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The evidence, and any inferences based on underlying facts, must be viewed in a light most favorable to the opposing party. *Diaz v. American Tel. & Tel.,* 752 F.2d 1356, 1358 n. 1 (9th Cir.1985).

Where the moving party does not have the burden of proof at trial on a dispositive issue, the moving party may meet its burden for summary judgment by showing an "absence of evidence" to support the non-moving party's case. *Celotex v. Catrett,* 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

The non-moving party, on the other hand, is required by Federal Rule of Civil Procedure 56(e) to go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial. *Id.* at 324. Conclusory allegations unsupported by factual allegations, however, are insufficient to create a triable issue of fact so as to preclude summary judgment. *Hansen v. United States,* 7 F.3d 137, 138 (9th Cir.1993) (citing *Marks v. Dep't of Justice,* 578 F.2d 261, 263 (9th Cir.1978)). A non-moving party who has the burden of proof at trial must present enough evidence that a "fair-minded jury could return a verdict for the [opposing party] on the evidence presented." *Anderson,* 477 U.S. at 255. In ruling on a motion for summary judgment, the Court's function is not to weigh the evidence, but only to determine if a genuine issue of material fact exists. *Id.*

B. *Analysis*

Plaintiff, as the insured, has the burden of proving coverage under the Policy. *FDIC v. New Hampshire Ins. Co.,* 953 F.2d 478, 483–485 (9th Cir.1992). Plaintiff argues that Defendant breached their contract because the Policy should have been honored under each of three different sections. Pl.'s Mot. 1:15–17. These sections are as follows: Forgery Coverage (Coverage D), because the email constitutes a forged signature (Mot.1:23–27); Computer Fraud Coverage (Coverage E), because the email sent to Plaintiff constitutes a computer violation (Mot.1:28–2:2); and Funds Transfer Coverage (Coverage F), because Plaintiff is a financial institution per a policy covering "fraudulent written electronic instructions issued to a financial institution" (Mot.2:7–8).

***3** The relevant coverage provisions, stated in full, are as follows:

- Forgery Coverage: "The Company shall pay the **Parent Corporation** for direct loss sustained by an **Insured** resulting from **Forgery** or alteration of a **Financial Instrument** committed by a **Third Party."** Parties Stipulation of Facts Ex. B at 37 (emphasis in original).

- Computer Fraud Coverage: "The **Company** shall pay the **Parent Corporation** for direct loss sustained by an **Insured** resulting from **Computer Fraud** committed by a Third Party." Parties Stipulation of Facts Ex. B at 37 (emphasis in original).

- Funds Transfer Fraud Coverage: The **Company** shall pay the **Parent Corporation** for direct loss sustained by an **Insured** resulting from **Funds Transfer Fraud** committed by a **Third Party .** Parties Stipulation of Facts Ex. B at 37. (emphasis in original).

Each of the bold terms is further defined in the Policy. Accordingly, each potential basis for coverage requires extensive analysis to determine whether or not it applies to the unique facts presented by the fraudulent activity. While the Court is skeptical about Plaintiff's right to coverage under each of the above provisions, it is unnecessary for the Court to perform this full analysis. Each of the three provisions above applies only to "direct loss sustained by an Insured." For the reasons discussed below, Plaintiff's losses do not, as a matter of law, constitute direct loss.

To summarize, Defendant argues that Plaintiff does not show that it suffered a direct loss because the e-mails did not immediately and without intervening cause result in a loss. Def.'s Mot. 2:24–28. In fact, argues Defendant, Plaintiff's loss only occurred after the bank was unable to recover all of the lost funds and the Client demanded payment from Plaintiff. *Id.* In essence, Plaintiff is attempting to recover for a third-party loss.

A common use interpretation of direct loss provides that a loss is not direct unless it follows immediately and without intervening space, time, agency, or instrumentality. *Tooling, Mfg. & Techs. Ass'n v. Hartford Fire Ins. Co.,* 693 F.3d 665, 674 (6th Cir.2012) (hereinafter "TMA"). This principle has resulted in differing approaches among the circuit courts, but most courts, including those in this Circuit, have indicated that *liability policies* may require an insurer to discharge an obligation of the insured to a third party for some act of the insured or its employee, while *indemnity policies* may not.[1] *See id.; see also Vons Companies, Inc. v. Fed. Ins. Co.,* 57 F.Supp.2d 933, 943 (C.D.Cal.1998) *aff'd,* 212 F.3d 489 (9th Cir.2000); *Simon Mktg. v. Gulf Ins.,* 149 Cal.App.4th 616, 623, 57 Cal.Rptr.3d 49 (2007); *Valley Cmty. Bank v. Progressive Cas. Ins. Co.,* 854 F.Supp.2d 697, 709 (N.D.Cal.2012); *Citizens Bank & Trust Co. v. St. Paul Mercury Ins. Co.,* No. CV305–167, 2007 WL 4973847, at *3–5 (S.D.Ga. Sept.14, 2007); *Fireman's Fund Ins. Co. v. Special Olympics Int'l, Inc.,* 249 F.Supp.2d 19, 27 (D.Mass.) *aff'd on other grounds,* 346 F.3d 259 (1st Cir.2003); *Lynch Props., Inc. v. Potomac Ins. Co. of Ill.,* 140 F.3d 622, 629 (5th Cir.1998); *Direct Mort. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA,* 625 F.Supp.2d 1171, 1176 (D.Utah 2008); *Tri City Nat. Bank v. Fed. Ins. Co.,* 2004 WI App 12, at *801–02, 268 Wis.2d 785, 674 N.W.2d 617 (2003).

[1] Many of these cases differentiate between "employee fidelity" policies, which constitute indemnity provisions that exclude third party liability, and liability policies which include third party liability. *See Armbrust Int'l, Ltd. v. Travelers Cas. & Sur. Co. of Am.,* No. C.A. 04–212 ML, 2006 WL 1207659, at *8 (D.R.I. May 1, 2006) ("The policies cover injury to the insured, not a third party, a fact which significantly differentiates them from liability policies, which, as a rule, indemnify an insured against losses to a third party."). While the provisions at issue here are not employee fidelity policies, they are, for reasons discussed above, sufficiently similar that the case law is persuasive.

***4** The Court concludes that the policies at issue in the instant case should be analyzed similarly to indemnity policies that do not provide third-party coverage instead of liability policies that do provide third party coverage, and that as such, Plaintiff has not suffered a "direct loss." A reading of the Policy indicates that the parties contracted to have liability coverage for certain events and indemnity-type coverage for other events. The liability coverage sections of the Policy are expressly delineated as such and are separated in an entirely different document than the provisions of the Policy that Plaintiff claims cover its losses in this case. *See* Parties' Stipulation of Facts Ex. B at 13–26, 35–49. Further, the section that contains the relevant provisions of the Policy, when read in combination with the other provisions in that section, more likely contemplates fraudulent violations against Plaintiff that result in a "direct loss" of Plaintiff's own money-not fraudulent violations upon which Plaintiff relies that result in a loss of a client's money, which Plaintiff wants Defendant to reimburse. For example, the section of the Policy in question also contains coverage for employee theft, which is similar in nature to the "employee fidelity" policies that have been comprehensively examined in the long list of cases cited above. In response to this line of argument, Plaintiff contends that its power of attorney over Client's funds was tantamount to a bailee or trustee power over the funds, and cites *Vons,* 57 F.Supp.2d at 941, for the proposition that such a power means that a direct loss occurs when the funds are the subject of fraud. Pl.'s Opp'n at 21:16–28. Defendant refutes this argument, contending that Plaintiff was not a bailee or trustee of the funds because they were held not with Plaintiff but in a separate City National bank account, and because the Power of Attorney was not granted to Plaintiff but instead to an individual representative of Plaintiff. Def.'s Reply at

18:2419:7 (citing *Alberts v. Am. Cas. Co.,* 88 Cal.App.2d 891, 898–899, 200 P.2d 37 (1948) and *Aetna Cas. Sur. Co. v. Kidder, Peabody & Co.,* 246 A.D.2d 202, 676 N.Y.S.2d 559 (N.Y.App.Div.1998). The Court finds Defendant's reasoning more persuasive. If the funds had been held in an account owned or attributed to Plaintiff, such as an escrow account (*see Fidelity Nat'l. v. Nat'l Union,* 2014 WL 4909103, at *10 (S.D.Cal. Sept.30, 2014)) and a hacker had entered into Plaintiff's computer system and been able to withdraw funds such that Plaintiff's accounts were immediately depleted, then Plaintiff would be correct in asserting coverage from the Policy. Here, however, a series of far more remote circumstances occurred: Client gave Plaintiff power of attorney over Client's money held in Client's own account; a perpetrator of fraud motivated Plaintiff's agent to use the power of attorney to transfer funds out of Client's account; Plaintiff discovered this fraud and attempted to recover the funds; Client requested repayment of the lost funds and Plaintiff obliged; Plaintiff now requests Defendant indemnify it for the losses that were transferred from Client to Plaintiff. These are not the circumstances that dictated the results in *Vons* or *Fidelity,* and they are not the circumstances appear to be within the contemplation of the Policy. *See Pestmaster Servs., Inc. v. Travelers Cas. & Sur. Co. of Am.,* No. CV 13–5039–JFW MRWX, 2014 WL 3844627, at *8–10 (C.D.Cal. July 17, 2014) (no direct loss where a third party obtained insured's approval to initiate electronic funds transfers from insured's account and then misused the transferred funds). Accordingly, Plaintiff has failed to meet its burden to show it is entitled to coverage under the Policy.

III. CONCLUSION

***5** For the foregoing reasons, Defendant's Motion for Summary Judgment shall be granted in its entirety, and Plaintiff's Motion for Summary Judgment shall be denied in its entirety.

IT IS SO ORDERED.

All Citations

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