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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

PNS JEWELRY, INC., Plaintiff and Appellant, v. PENN-AMERICA INSURANCE COMPANY, Defendant and Respondent.	B212348 (Los Angeles County Super. Ct. No. BC365430)

APPEAL from a judgment of the Superior Court of Los Angeles County. Irving Feffer, Judge. Affirmed.

Law Offices of Michael L. Cohen and Michael L. Cohen; The Arkin Law Firm and Sharon J. Arkin for Plaintiff and Appellant.

Sarrail, Lynch & Hall, Lynch and Shupe and Linda J. Lynch for Defendant and Respondent.

PNS Jewelry, Inc. ("PNS") appeals from summary judgment entered in favor of Penn-America Insurance Company ("insurer"). PNS argues summary judgment must be reversed because the "voluntary parting" exclusion in its insurance policy with insurer is neither conspicuous nor plain and clear. We disagree and affirm.

Background

The parties stipulated to the following facts for purposes of summary judgment.

PNS is a jewelry wholesaler. Insurer issued a Commercial Property and Liability insurance policy (the "policy") to PNS. While the policy was in effect, an owner of PNS delivered property[1] to an individual posing as an employee of Dunbar Armored Transport, an armored car company with which PNS had contracted to transport the property out of state. When the PNS owner delivered the property to the imposter, the owner did not know he was being duped. The imposter did not threaten or force the owner to turn over the property and the property was never recovered. PNS sought recovery under the policy for that property. The parties also stipulated that the policy attached to the stipulation was the relevant policy for purposes of summary judgment.

Insurer denied coverage, citing the policy's "voluntary parting" exclusion. Under that provision, the policy excludes loss or damage caused directly or indirectly by "[v]oluntary parting with any property by [PNS] or anyone else to whom you have entrusted the property if induced to do so by any fraudulent scheme, trick, device or false pretense."

Following insurer's denial of coverage, PNS sued insurer for breach of contract and breach of the implied covenant of good faith and fair dealing.[2] PNS filed a motion for summary adjudication against insurer and insurer filed a cross-motion for summary

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[1] In his declaration in support of PNS's motion for summary adjudication, the owner stated the property was jewelry and watches worth more than 1.5 million dollars.

[2] Although PNS sued others in addition to insurer, this appeal involves only PNS's claims against insurer and, in particular, the trial court's order granting insurer's motion for summary judgment.

judgment. The trial court granted insurer's motion for summary judgment and entered judgment accordingly.

Discussion

1. Standard of Review

Because the material facts are not in dispute, interpretation of the policy presents a question of law, which we review de novo under well-settled rules of contract interpretation. (*E.M.M.I. Inc. v. Zurich American Ins. Co.* (2004) 32 Cal.4th 465, 470.) Whether policy language is ambiguous is a question of law that we determine de novo. (*GGIS Insurance Services, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1493, 1507.)

2. Applicable Legal Principles

"[I]n interpreting an insurance policy, we seek to discern the mutual intention of the parties and, where possible, to infer this intent from the terms of the policy." (*Haynes v. Farmers Ins. Exchange* (2004) 32 Cal.4th 1198, 1204 (*Haynes*).) "When interpreting a policy provision, we give its words their ordinary and popular sense except where they are used by the parties in a technical or other special sense." (*Ibid.*)

Insurance policy exclusions are strictly construed. (*E.M.M.I. Inc. v. Zurich American Ins. Co.*, *supra*, 32 Cal.4th at p. 471.) They must be (a) conspicuous and (b) plain and clear. "[T]o be enforceable, any provision that takes away or limits coverage reasonably expected by an insured must be 'conspicuous, plain and clear.'" (*Haynes, supra*, 32 Cal.4th at p. 1204.) "[A]ny such limitation must be placed and printed so that it will attract the reader's attention. Such a provision also must be stated precisely and understandably, in words that are part of the working vocabulary of the average layperson." (*Ibid.*) "This rule applies with particular force when the coverage portion of the insurance policy would lead an insured to reasonably expect coverage for the claim purportedly excluded." (*MacKinnin v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, 648.)

3. The "voluntary parting" exclusion

The policy excludes loss or damage caused directly or indirectly by "[v]oluntary parting with any property by [PNS] or anyone else to whom you have entrusted the property if induced to do so by any fraudulent scheme, trick, device or false pretense."

This type of exclusion has been referred to as a "theft by trickery" exclusion. (*EOTT Energy Corp. v. Storebrand International Ins. Co.* (1996) 45 Cal.App.4th 565, 569, fn. 2.) It is not an uncommon exclusion in insurance policies. (See, e.g., Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2009) ¶ 6:350, p. 6B-66 [noting that "all risk" commercial property insurance policies cover theft loss, but often exclude loss or damage resulting from "the insured voluntarily parting with title or possession of any property if induced to do so by fraudulent scheme, trick, device or false pretense"].) In fact, the record reveals PNS had a jeweler's block policy with Assurance Company of America containing an almost identical exclusion.

4. Conspicuous

PNS argues the voluntary parting exclusion is unenforceable because it is not conspicuous. We disagree.

Courts have held coverage exclusions not conspicuous in a variety of circumstances, including, for example, when an exclusion has been "hidden," placed on an "overcrowded page" or in a "dense pack" format that readers could easily overlook. (See *Cal-Farm Ins. Co. v. TAC Exterminators, Inc.* (1985) 172 Cal.App.3d 564, 577.) Similarly, a limitation on liability is not conspicuous when it is illogically found under the heading "Other Insurance," is surrounded by unrelated clauses, and when the policy's first page does not alert the reader to the limitation on liability, but instead implies no such limitation. (*Haynes, supra,* 32 Cal.4th at p. 1208; *Jauregui v. Mid-Century Ins. Co.* (1991) 1 Cal.App.4th 1544, 1549.)

On the other hand, courts have held exclusions conspicuous when, for example, the exclusion stands out as a separate paragraph, is not hidden in fine print and is not placed in an unusual part of the policy (*Venoco, Inc. v. Gulf Underwriters Ins. Co.* (2009) 175 Cal.App.4th 750, 759); and when the exclusion is in a separate section labeled

"exclusions" and is printed in the same font as the rest of the policy (*National Ins. Underwriters v. Carter* (1976) 17 Cal.3d 380, 384-385; *GGIS Ins. Services, Inc. v. Superior Court, supra,* 168 Cal.App.4th at p. 1508; *Cal-Farm Ins. Co. v. TAC Exterminators, Inc., supra*, 172 Cal.App.3d at p. 578).

Here, the voluntary parting exclusion is included in a list under the bold heading "Exclusions." Although this heading is only slightly bolded, it is the same as the other headings on the page and, in any event, a policy provision need not be in bold print to be conspicuous. (*Venoco, Inc. v. Gulf Underwriters Insurance Co., supra,* 175 Cal.App.4th at p. 759.) The list of exclusions is found on the "CAUSES OF LOSS – SPECIAL FORM," which lists first "A. Covered Causes Of Loss" and then, immediately after, "B. Exclusions," followed four pages later by "C. Limitations." It is obvious this form describes both the causes of loss the policy covers and those the policy does not cover. The voluntary parting exclusion is not buried or hidden in a section addressing a multitude of unrelated issues. It is printed in the same size font as the rest of the policy's forms and endorsements.

In relation to the complex commercial property and general liability insurance policy of which it is a part, the list of exclusions (which is about four pages long) is not unduly long or complex. In fact, it is fairly straightforward and presented in an outline format. The exclusions are organized in four separate categories, and, within each category, each exclusion begins on a new line and is labeled in alphabetical order. (See *American Star Ins. Co. v. Insurance Company of the West* (1991) 232 Cal.App.3d 1320, 1326-1327.) Further, consistent with the policy's other forms or endorsements, the CAUSES OF LOSS form indicates on the bottom right corner of each page that it consists of eight pages. Thus, the reader knows when the form begins and when it ends. "[I]n any event, exclusion clauses do not fail merely because of the density of verbiage." (*Cal-Farm Ins. Co. v. TAC Exterminators, Inc., supra*, 172 Cal.App.3d at p. 578.)

The exclusion at issue here is not similar to the limitation on liability our Supreme Court addressed in *Haynes, supra,* 32 Cal.4th at p. 1198. There, the Supreme Court considered an automobile insurance policy and found the purported limitation on

permissive users' liability *not* conspicuous. (*Id.* at pp. 1202, 1212.) Particularly troublesome was the fact that the policy's declarations page stated specific policy limits that seemed to include permissive users, but later, in endorsement S9064, the policy stated that those same limits did not apply to permissive users. (*Id.* at p. 1208.) Endorsement S9064 stated the permissive user limitation was added to the "Limits of Liability" section (which made sense) as well as the "Other Insurance" section (which did not make sense because the limitation "'has nothing to do with insurance from any other source'"). (*Id.* at pp. 1208, 1222.) In addition, the permissive user limitation on endorsement S9064 was not bolded, italicized or distinguished in any way and was surrounded by language having nothing to do with exclusions or limitations on liability. (*Id.* at pp. 1207, 1208, 1222.)

Even if, as the trial court noted, the policy could be simplified or improved, that does not mean the policy is unenforceable as a matter of law. Certainly, many (if not most) insurance policies could be simplified, but that is not the test for determining whether their provisions are enforceable. We conclude the voluntary parting exclusion is conspicuous.

5. Plain and Clear

PNS also argues the voluntary parting exclusion is unenforceable because it is not plain and clear. Again, we disagree.

According to PNS, the voluntary parting exclusion is internally inconsistent. PNS insists the term "voluntary" as used in the exclusion means the insured acted with full knowledge of the facts and consequences of its actions. Under PNS's interpretation, no insured can voluntarily turn over its property if induced to do so by fraud or deceit because, by necessity, the insured would not know all the facts and consequences of doing so.

Courts will not strain to create an ambiguity where none exists. (*GGIS Ins. Services, Inc. v. Superior Court, supra*, 168 Cal.App.4th at p. 1507.) By its plain terms, the voluntary parting exclusion excludes from coverage instances when the insured (or anyone to whom the insured has entrusted property covered by the policy) is tricked into

parting with covered property. The word "voluntary" applies to the insured's "parting" with the property—i.e., when the insured purposely parts with the property without force. That is what happened here. An owner of PNS deliberately handed over covered property to an individual. Although the owner was tricked into doing so because the individual was impersonating a courier who was expected to pick up the property, the owner physically and purposely handed over the property to the impersonator.

Freedman v. Queen Ins. Company of America (1961) 56 Cal.2d 454 does not help PNS because the exclusion language at issue there is different than that at issue here. (See *id.* at p. 456 [quoting relevant portion of insurance policy].) Moreover, *Freedman* indicates that "insurance policies may be so written as to exclude from coverage a loss occurring by reason of a fraudulent scheme, trick, device or false pretense." (*Id.* at p. 458.) We conclude the policy here plainly and clearly excludes such causes of loss.

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

JOHNSON, J.