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Third Circuit Affirms Summary Judgment for National Union on Issue of Employee's "Manifest Intent"

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In an opinion marked "not precedential" and not reported in the Federal Reporter pursuant to its Internal Operating Procedures, the Third Circuit Court of Appeals has affirmed the entry of summary judgment in favor of National Union on the grounds that the FDIC failed to show that the employee in question acted with the requisite "manifest intent" to obtain a financial benefit for himself or a third party. Fed. Deposit Ins. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., No. 01-2524, 2003 WL 262502, at *3 (3d Cir. N.J. Feb. 6, 2003) ("FDIC v. National Union").

In FDIC v. National Union, the Federal Deposit Insurance Corporation ("FDIC"), as successor to the Resolution Trust Corporation as Receiver for City Federal Savings Bank ("City Federal"), made a claim under a financial institution bond provided by National Union Fire Insurance Company of Pittsburgh, PA ("National Union"). National Union's bond included the "manifest intent: (a) to cause the insured to sustain a loss; and (b) to obtain financial benefit for the employee or another person or entity" language in its fidelity insuring agreement. Id. at *1. The loss for which the FDIC sought coverage arose from City Federal's financing of a large scale waterfront construction project in Jersey City, New Jersey, known as the Port Liberte Project (the "Project").

City Federal became insolvent when the Port Liberte Partners defaulted on all of City Federal's loans to the Port Liberte Partners in connection with the Project. City Federal filed a proof of loss with National Union and claimed that the loans made to the Port Liberte Partners

were made on the advice of George E. Mikula, an executive vice president of City Federal. City Federal also contended that Mikula concealed critical information about the Project and that had the City Federal Board of Directors known of this information, they would not have approved the loans. National Union denied the claim.

The FDIC, as Receiver for City Federal, sued National Union for breach of contract and sought declaratory relief on City Federal's \$19,009,729 claim under National Union's bond. The FDIC alleged that Mikula intentionally concealed reports and appraisals and caused City Federal to make the loans on which the Port Liberte Partners then defaulted. The FDIC claimed that Mikula knew of losses sustained by a co-lender on the Project but did not disclose such information to the City Federal Board. The FDIC also asserted that Mikula knew, but did not disclose to the City Federal Board, that both internal and external appraisals showed that the Project was no longer economically feasible. The FDIC argued that, although Mikula did not benefit from the loan transaction, he concealed this information for the benefit of the Port Liberte Partners or the subcontractors working on the project. Id. at *1-2.

The United States District Court for the District of New Jersey granted summary judgment in favor of National Union based on the Third Circuit's decision in Resolution Trust Corp. v. Fidelity & Deposit Co. of Maryland, 205 F.3d 615 (3d Cir. 2000) ("RTC v. F&D"). The District Court held that the FDIC had failed to make an initial evidentiary showing of the requisite manifest intent as required under the bond. The FDIC appealed.

The Third Circuit began its analysis by agreeing with the FDIC that the District Court “erred by adding a requirement to the National Union bond that the financial benefit obtained by a third party must be an ‘improper’ benefit.” *Id.* at *2. Nonetheless, after analyzing the facts of this case in light of its decision in *RTC v. F&D*, the Third Circuit affirmed the summary judgment for National Union because under the standard set forth in *RTC v. F&D*, the FDIC failed to show that Mikula had the requisite “manifest intent.” *Id.*

Pointing out that in *RTC v. F&D* it analyzed bond language “virtually identical” to the National Union bond at issue, the Third Circuit again set forth the elements that it determined must be present for a loss to constitute a covered event under the bond. As stated by the Third Circuit, the following elements must be present:

- (1) the insured must incur a loss;
- (2) the loss must have “result[ed] directly” from dishonest or fraudulent acts of an employee or employees;
- (3) the employees must have committed the acts with the “manifest intent” to cause the insured to suffer the loss sustained . . . ; and
- (4) the employee must have committed the acts with the “manifest intent” to obtain a financial benefit for the employee or a third party, and the financial benefit obtained must not be of the type covered by the exclusionary clause.

Id. at *2 (quoting *RTC v. F&D*, 205 F.3d at 636). As framed by the Third Circuit, the issue on appeal was whether the FDIC showed that “Mikula acted with both the specific intent to cause City Federal a loss and with the specific intent to obtain a financial benefit for himself or a third party.” *Id.*

Recognizing that, while it is generally difficult to resolve summarily a question of intent that is material to a cause of action, the appellate court noted that notwithstanding such difficulty plaintiff “must still make a sufficient initial evidentiary showing of the requisite intent to survive the motion for summary judgment.” *Id.* at *2 (citing *Coolspring Stone Supply, Inc. v. American States Life Ins. Co.*, 10 F.3d 144, 148 (3d Cir. 1993)). Quoting from its decision in *RTC v. F&D*, the Third Circuit noted that “the term ‘manifest intent’ requires the insured to demonstrate that it was the offending employee’s purpose or desire to obtain financial benefit for himself or a third party, and to cause the insured to sustain a loss.” *Id.* at *2 (quoting *RTC v. F&D*, 205 F.3d at 644).

In analyzing the facts before it in a light most favorable to City Federal, the Third Circuit concluded that the “record facts fall short of a threshold showing that Mikula had the ‘manifest intent’ to cause City Federal a loss and to benefit a third party.” The Third Circuit summarily concluded that:

First, most of the facts that Mikula allegedly concealed from the Board were well known by many other City Federal executives. Second, these allegedly concealed

facts did not definitively show that the Project was a failure. Instead, they showed simply that the Project had problems. Third, Mikula did not have authority to disburse loan funds, but rather made recommendations to the Board. And finally, although some of the loan proceeds were paid directly to subcontractors for work already completed, this was to assuage the subcontractors, who were threatening to leave the job.

Id. at *2 (emphasis added). The Third Circuit held that because the undisputed evidence showed that Mikula and others did not have the “manifest intent” to obtain the financial benefit for themselves or for a third party, the District Court did not err in entering summary judgment for National Union on this issue.

The Third Circuit’s affirmance of the District Court’s grant of summary judgment in favor of the fidelity bond carrier on this issue is significant in light of the speculation that arose following the Third Circuit’s decision in *RTC v. F&D* concerning the ability of a fidelity carrier to obtain summary judgment on a “manifest intent” issue. In *RTC v. F&D*, the Third Circuit affirmed the trial court’s denial of the fidelity bond carrier’s motion for summary judgment on the issue of whether the employee acted with the requisite “manifest intent” and held that summary judgment was improper because, among other reasons, the court found that “the circumstances present[ed] a genuine issue of material fact concerning [the employees’] manifest intent to cause City Federal to sustain the . . . loss.” *RTC v. F&D*, 205 F.3d at 652.

The ruling in *RTC v. F&D* led to the speculation and, indeed, the argument by insured/obligee counsel that it would be unlikely that a federal trial court sitting in the Third Circuit (particularly a court applying New Jersey law, as was the case in *RTC v. F&D*) would grant a fidelity carrier summary judgment on a “manifest intent” issue. The trial court’s recognition in the course of granting summary judgment for National Union that the financial institution bond language “is narrowly tailored” and involves “specific language” that places the burden upon the insured to prove the requisite “manifest intent,” and the Third Circuit’s affirmation of that recognition and decision by the trial court, demonstrate that the argument that a fidelity carrier can obtain summary judgment on a “manifest intent” issue is alive and well in the Third Circuit. ■



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