STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0411

Amit Y. Sela,
Appellant,

vs.

The St. Paul Travelers Companies, Inc.,
Respondent.

Filed February 26, 2008
Affirmed
Shumaker, Judge

Hennepin County District Court
File No. 27-CV-06-7864

Erik F. Hansen, Christopher R. Jones, J. Robert Keena, Hellmuth & Johnson, P.L.L.C., 10400 Viking Drive, Suite 500, Eden Prairie, MN 55344 (for appellant)

Thomas J. Vollbrecht, Scott H. Ikeda, Faegre & Benson LLP, 2200 Wells Fargo Center, 90 South Seventh Street, Minneapolis, MN 55402-3901 (for respondent)

Considered and decided by Shumaker, Presiding Judge; Klaphake, Judge; and Worke, Judge.

U N P U B L I S H E D O P I N I O N

SHUMAKER, Judge

After being defrauded of his money, appellant sought insurance benefits under a policy of crime insurance that covered robbery through "obviously unlawful" acts. The district court ruled that the fraudulent conduct was not "obviously unlawful," and granted

summary judgment to the insurer. Claiming that the court's interpretation of the term "obviously" was incorrect, appellant brought this appeal. On de novo review, the district court did not err in its interpretation of the insurance policy, and we affirm.

FACTS

In this insurance-coverage lawsuit, we are asked to decide whether the district court misinterpreted and misapplied a policy provision when it granted summary judgment to the insurer. The material facts are not in dispute.

Appellant Amit Sela met Thomas von Behren in 2003. While visiting Sela in Sela's home, von Behren said that he was a dealer in houses in foreclosure; that he had a special relationship with various lenders; and that he bought houses very cheaply, renovated them, and resold them for a large profit. When Sela declined von Behren's invitation to invest in the business, von Behren asked for loans to him personally and to his business, Fiteck L.L.C. Von Behren promised a high-interest return to Sela, and he made representations that the loans would be secured by deeds or other collateral.

Sela made numerous loans totaling $3,321,000 to von Behren or Fiteck from November 2003 to August 2004. Most of the loans were repaid with substantial interest, but three of them, in the aggregate sum of $641,000, were not satisfied, and the purported security for each of the loans was illusory. Sela claims that his losses are covered by insurance under a commercial crime policy written by respondent The St. Paul Travelers Companies, Inc. His contention is that von Behren obtained the loans through deceit and various false representations about his intention to repay them and about the nature and

validity of the collateral used to secure the loans. This conduct, Sela alleges, is considered to be robbery as defined by the insurance policy.

The policy defines "robbery" as "the taking of property from the care and custody of a person by one who has: (1) [c]aused or threatened to cause that person bodily harm; or (2) [c]ommitted an obviously unlawful act witnessed by that person."

After Sela had made all the loans, he learned that von Behren's scheme was fraudulent and that he had been convicted of crimes for a similar scheme. Travelers does not dispute that von Behren defrauded Sela but rather contends that von Behren's acts did not constitute robbery as that term is defined in the insurance policy. The district court agreed and granted Traveler's motion for summary judgment.

D E C I S I O N

Sela claims that von Behren's conduct fits the insurance-policy definition of "robbery" because he committed "obviously unlawful" acts when he obtained Sela's money deceitfully. He contends that the district court erred by reading the policy provision to require that unlawful acts be obvious at the time they are committed, rather than at some point later, because the policy contains no timeframe for knowledge of the unlawfulness of the acts. He urges that the district court's grant of Traveler's summary-judgment motion and the denial of his cross-motion for summary judgment be reversed. Such relief would then have the effect of awarding summary judgment to Sela on his reading of the policy. In the alternative, he argues that, if we find the policy language ambiguous, a remand is appropriate for a resolution of the ambiguity by the trier of fact.

When we review an appeal from summary judgment, we must determine whether there are genuine issues of material fact for trial and whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). The district court interpreted the parties' insurance contract and based its ruling on that interpretation. The interpretation of an insurance policy is a legal question that this court reviews de novo. *Travelers Indem. Co. v. Bloomington Steel & Supply Co.*, 718 N.W.2d 888, 894 (Minn. 2006).

"Provisions in an insurance policy are to be interpreted according to both 'plain, ordinary sense' and 'what a reasonable person in the position of the insured would have understood the words to mean.'" *Farmers Home Mut. Ins. Co. v. Lill*, 332 N.W.2d 635, 637 (Minn. 1983) (quoting *Canadian Universal Ins. Co. v. Fire Watch, Inc.*, 258 N.W.2d 570, 572 (Minn. 1977)). If policy language is ambiguous, it is to be construed against the insurer as the drafter of the contract. *Progressive Specialty Ins. Co. v. Widness*, 635 N.W.2d 516, 518 (Minn. 2001). On the other hand, if the policy language is clear and unambiguous, we must give it its usual and accepted meaning. *State Farm Auto. Mut. Ins. Co. v. Tenn. Farmers Mut. Ins. Co.*, 645 N.W.2d 169, 175 (Minn. App. 2002).

Although Travelers contends that there was no "taking" of property and, therefore, there can be no coverage, the district court did not rule on that issue. Rather, it held that von Behren's acts were not "obviously unlawful" and said:

> Sela's actions in repeatedly entering into short-term, high-fee loans with von Behren were voluntary in nature and despite not receiving payment on a few of the loans, Sela continued to enter into multiple loans with von Behren. Sela has failed to establish that he was aware that these transactions were

> anything other than voluntary loans. The fact that Sela made voluntary high-risk unsecured loans with a shady party does not convert von Behren's lack of repayment on a few of the loans into a robbery within the meaning of this insurance policy.

What we know from the uncontroverted facts is that Sela was not aware of any unlawfulness in von Behren's conduct as the loans were being made, but rather he discovered the deceit in hindsight through information from the state attorney general. He claims that, looking back, the unlawfulness was obvious, and that satisfies the coverage provision in the policy because the policy does not require that the unlawfulness be "obvious" at any particular time. We agree with the district court that the issue turns on the meaning of the word "obviously."

The policy defines "robbery" but does not define "obviously." When a word in a contract has no special definition or technical meaning, it is to be understood in its ordinary sense. *Smith v. St. Paul Fire & Marine Ins. Co.*, 353 N.W.2d 130, 132 (Minn. 1984). The word "obvious," of which "obviously" is the adverbial form, has a clear standard lexical meaning: "Easily perceived or understood; quite apparent; . . . [e]asily seen through because of a lack of subtlety; transparent." *The American Heritage Dictionary* 1250 (3d ed. 1992). Similarly, Webster's dictionary defines the term "obvious" as "easy to see or understand; plain; evident." *Webster's New World College Dictionary* 997 (4th ed. 2002).

Applying these ordinary definitions to the uncontroverted facts, it is clear that there was nothing "obviously unlawful" about von Behren's conduct. The notion that obviousness can come in hindsight contradicts the meaning of the term "obviously."

Sela's consistent conduct demonstrates that he saw nothing obviously unlawful about von Behren's acts. The only reasonable conclusion compelled by the undisputed facts is that Sela did not willingly allow von Behren to cheat him out of large sums of money and it simply was not obvious that fraud was occurring. Obviousness requires immediate clarity and transparency.

Not only does Sela's interpretation contradict the ordinary meaning of "obvious," but if we were to adopt his definition we would be imposing on the policy language an absurd construction. As with all contracts, "[t]he cardinal rule" of interpretation "is to ascertain the intention of the parties and to give effect to that intention if it can be done consistently with legal principles." *Downing v. Indep. Sch. Dist. No. 9*, 207 Minn. 292, 298, 291 N.W. 613, 616 (1940) (quotation omitted). Under Sela's approach, we would be forced to hold that, despite using the qualifier "obviously" without any special policy definition, the insurer intended also to cover acts that only additional and subsequent evidence demonstrated were unlawful, thus contradicting the very language it chose to use.

The policy language at issue shows that there is coverage for immediately apparent unlawful acts, and we find nothing ambiguous about the word used to convey that understanding. A word is ambiguous if it is capable of having more than one reasonable meaning. *Collins Truck Lines, Inc. v. Metro. Waste Control Comm'n*, 274 N.W.2d 123, 126 (Minn. 1979). Sela attempts to supply an ambiguity in the meaning of "obviously" by noting that there is no requirement in the policy as to when the unlawfulness must become obvious. But the timing requirement inheres in the ordinary

definition of the word. An act's unlawful character cannot be obvious and not obvious at the same time. An "obviously unlawful" act is one that is clearly unlawful as it is being committed. An unlawful act that is not obviously unlawful—the type committed by von Behren—is one that has the appearance of legality but is later discovered to have been unlawful.

Finally, noting that the policy contains no "cognizance" requirement, that is, a requirement that the insured know the larcenous nature of the act during its commission, Sela argues that the unlawfulness of von Behren's conduct was in fact obvious while the conduct was occurring. He points out that von Behren gave no banking or business references, was not bonded or insured, and never suggested that Sela visit the properties he allegedly was selling. Sela also indicates that he never investigated to confirm anything von Behren told him about his business venture. However, von Behren "explained his business model to [Sela]," "showed [Sela] a list of 50 houses" he was in the process of acquiring, revealed the name of at least one lender he claimed to have a special relationship with, revealed the names of his business partners, signed promissory notes, gave him confessions of judgment signed by a business partner, signed personal guarantees of the loans made to Fiteck, signed a collateral agreement requiring "original security instruments to secure 100% of any outstanding loans," gave to Sela various deeds to hold as security, and repaid most of the loans with substantial interest just as he promised to do. Arguably, as is true of most instances of fraud, von Behren's scheme had the appearance of legitimacy, an appearance that was solidified by the satisfaction of many of the loans. There was nothing "obviously unlawful" about von Behren's conduct.

There was no "robbery" of Sela as that term is defined in the insurance policy and hence no coverage of the loans on which von Behren and Fiteck defaulted.

Affirmed.