

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

GRAY AND ASSOCIATES, LLC	:	
	:	
v.	:	
	:	Civil Action No. CCB-07-2216
TRAVELERS CASUALTY AND	:	
SURETY COMPANY OF AMERICA	:	
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**MEMORANDUM**

Now pending before the court is a motion to dismiss the complaint or, in the alternative, for summary judgment filed by defendant Travelers Casualty and Surety Company of America (“Travelers”) against plaintiff Gray and Associates, LLC (“Gray”). Gray, serving as limited receiver for Homemaxx Title & Escrow, LLC (“Homemaxx”), filed this action seeking to recover under the terms of a commercial crime policy with employee dishonesty coverage issued by Travelers to Homemaxx. Travelers argues that because Gray did not discover the loss attributed to employee dishonesty until well after the discovery deadline specified in the policy, it is entitled to dismissal or, in the alternative, summary judgment. The motions have been briefed fully, and no hearing is necessary. For the reasons stated below, the court will grant the defendant’s motion, which will be construed as one for summary judgment.

**BACKGROUND**

Homemaxx performed real estate settlement transactions in Maryland, including as an agent for First American Title Insurance Company (“First American”). (Pl.’s Opp. Mem. at 1.) Relevant to this lawsuit, Daniel Fink Jr. was listed as the resident agent for Homemaxx and appears to have been solely responsible for the day-to-day operations of the company. (*Id.*) The

only other individual apparently associated with Homemaxx was J. Scott Morse, the sole member of Homemaxx. (*Id.* at Ex.1, Gray Aff. at ¶ 9.)

Homemaxx purchased from Travelers a commercial crime insurance policy, which provided coverage from September 23, 2002 to September 23, 2003. According to the policy's terms, Travelers agreed to "pay only for covered loss discovered no later than one year from the end of the policy period." (Def.'s Mem. at Ex. 2, Commercial Crime Insurance Policy at ¶ 4.) This one year discovery "tail" would give Homemaxx until September 23, 2004 to discover a crime triggering insurance coverage.

From the period of October 17, 2002 until May 2, 2003, Fink appears to have stolen large sums of money from Homemaxx's escrow accounts, which resulted in Homemaxx's failure to pay off certain mortgages and record various real estate instruments. (Pl.'s Opp Mem. at 2.) First American, relying on Homemaxx as its agent, suffered significant harm from this theft and nonfeasance. On August 31, 2004, First American submitted a letter to Travelers seeking to recover on the fidelity insurance issued by Travelers in favor of Homemaxx. (*Id.* at Ex. 4, First American Letter.) First American specifically identified Fink as the wrongdoer and noted that, despite demand, Homemaxx failed to replenish the escrow funds or cure the resulting title defects. (*Id.*) Travelers responded to First American by letter on September 16, 2004, stating that the policy between Travelers and Homemaxx was not a third party contract, thereby precluding consideration of First American's claim on the fidelity bond. (*Id.* at Ex. 5, Travelers Letter.) The Travelers letter appears to have been copied to Homemaxx. (*Id.*)

By the end of the additional one year discovery period permitted by the policy, ending on September 23, 2004, Homemaxx does not appear to have filed a claim or notice of a claim with

Travelers. First American, fearing further irreparable harm, successfully petitioned the Circuit Court for Baltimore County to appoint a limited receiver for Homemaxx on December 23, 2004. (*Id.* at Ex. 6, Receivership Order.) The Circuit Court’s Order appointed Gray as the limited receiver and specifically “authorized, empowered and directed [Gray] to make any and all claims of Homemaxx [] on its insurance policies and bonds including without limitation the errors and omissions policy and the fidelity and surety bonds.” (*Id.*)

Despite the court order issued in December 2004, it was not until May of 2007 that Gray reported to Travelers covered losses attributed to Fink’s theft. (*Id.* at Ex. 7, Second Proof of Loss at ¶ 2.) The Second Proof of Loss<sup>1</sup> form submitted by Gray to Travelers in 2007 stated that the “insured,” meaning Gray as the limited receiver for Homemaxx, “learned of [the] loss” in January 2006.<sup>2</sup> Gray subsequently filed suit in state court against Travelers to enforce the policy on July 6, 2007 and Travelers removed the case to this court on August 21, 2007.

According to Gray, in addition to having been appointed receiver after the discovery deadline in December 2004, it was unable to discover the loss attributed to Fink’s theft until 2006, because “it ha[d] not had access to all of Homemaxx’s information and records.” (*Id.* at 7.) Gray further argues that its filing of the claim in 2007 with Travelers was not untimely, because it is possible that Homemaxx, or Travelers, might have discovered Fink’s theft before the policy’s discovery tail ended on September 23, 2004. Gray thus argues that it should be

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<sup>1</sup> Gray’s First Proof of Loss form apparently asserted a claim for losses that occurred after the applicable policy period. (Def.’s Mem. at 3 n.2.) The Second Proof of Loss, however, identifies misconduct that occurred during policy coverage. (*Id.*)

<sup>2</sup> Additionally, when Gray formally submitted its Second Proof of Loss form to Travelers in May 2007 with an attached cover letter, it referred to the losses caused by Fink’s theft as “recently discovered.” (Def.’s Mem. at Ex. 3, Proof of Loss Cover Letter.)

entitled to discovery concerning what Travelers or Homemaxx knew in 2004. Finally, Gray asserts that because Travelers had actual notice of the theft pursuant to First American's August 2004 letter, the policy's discovery provision was satisfied.

### **STANDARD OF REVIEW**

“The purpose of a Rule 12(b)(6) motion is to test the sufficiency of a complaint; importantly, a Rule 12(b)(6) motion does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses.” *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999) (internal quotation marks and alterations omitted). When ruling on such a motion, the court must “accept the well-pled allegations of the complaint as true,” and “construe the facts and reasonable inferences derived therefrom in the light most favorable to the plaintiff.” *Ibarra v. United States*, 120 F.3d 472, 474 (4th Cir. 1997). To survive a motion to dismiss, a complaint must “in light of the nature of the action . . . sufficiently allege[] each element of the cause of action so as to inform the opposing party of the claim and its general basis.” *Chao v. Rivendell Woods, Inc.*, 415 F.3d 342, 348 (4th Cir. 2005). Following the Supreme Court's ruling in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007), “[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).” “Once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.” *Id.* at 1969 (quoted in *Goodman v. Praxair*, 494 F.3d 458, 466 (4th Cir. 2007)). Moreover, the “plaintiff's obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Id.* at 1964-65. Exhibits attached to the pleadings are considered part of the complaint. *See*

Fed. R. Civ. P. 10(c).

However, where, as here, matters outside the pleadings are considered by the court, a defendant's motion to dismiss will be treated as one for summary judgment under Rule 56. *See* Fed. R. Civ. P. 12(b), (c). Rule 56(c) provides that summary judgment:

shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The Supreme Court has clarified this does not mean that any factual dispute will defeat the motion:

By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.

*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original).

“The party opposing a properly supported motion for summary judgment ‘may not rest upon the mere allegations or denials of [his] pleadings,’ but rather must ‘set forth specific facts showing that there is a genuine issue for trial.’” *Bouchat v. Baltimore Ravens Football Club, Inc.*, 346 F.3d 514, 525 (4th Cir. 2003) (alteration in original) (quoting Fed. R. Civ. P. 56(e)).

The court must “view the evidence in the light most favorable to . . . the nonmovant, and draw all reasonable inferences in her favor without weighing the evidence or assessing the witness’ credibility,” *Dennis v. Columbia Colleton Med. Ctr., Inc.*, 290 F.3d 639, 644-45 (4th Cir. 2002), but the court also must abide by the “affirmative obligation of the trial judge to prevent factually unsupported claims and defenses from proceeding to trial.” *Bouchat*, 346 F.3d at 526 (internal

quotation marks omitted) (quoting *Drewitt v. Pratt*, 999 F.2d 774, 778-79 (4th Cir. 1993), and citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986)).

### ANALYSIS

Gray essentially offers three arguments to contend that its discovery of Fink's theft in January 2006 was not untimely under the policy. First, Gray suggests that it could not satisfy the policy's discovery deadline of September 23, 2004, because it was not appointed receiver by the Circuit Court until after that date. Gray contends that notwithstanding this fact, it notified Travelers of its claim soon after it discovered the loss in January 2006. Second, Gray suggests that because Travelers had actual notice of Fink's misappropriation of funds, the discovery clause in the policy was satisfied. Finally, Gray argues that it is entitled to discovery concerning what Travelers and Homemaxx knew about Fink's theft in 2004. The court will consider each of these arguments in turn.

As a threshold matter, under Maryland law, courts determine the meaning of contract language by adhering "to the principle of the objective interpretation of contracts." *ABC Imaging of Washington, Inc. v. The Travelers Indemnity Co. of America*, 820 A.2d 628, 632 (Md. Ct. Spec. App. 2003). Because "[a]n insurance policy is a contract between the insurer and the insured," "where the language employed . . . is unambiguous, a court shall give effect to its plain meaning and there is no need for further construction by the court." *Id.* at 632-33.

Following these general guidelines of contract interpretation, courts have noted that independent discovery clauses, similar to the one at issue here, serve a specific purpose in an insurance agreement distinct from notice provisions. Unlike "occurrence" policies, which cover acts occurring within the policy period, regardless of when the acts are discovered or a claim is

made, a “claims made” policy provides coverage when the act is discovered and reported to the insurer during the applicable period, regardless of when the act occurred. *Southeast Bakery Feeds, Inc. v. Ranger Ins. Co.*, 974 S.W.2d 635, 639 (Mo. Ct. App. 1998); *see also Winthrop and Weinstine v. Travelers Cas. and Sur. Co.*, 993 F. Supp. 1248, 1254-56 (D. Minn. 1998).

Commercial crime insurance policies often exhibit features of both occurrence and claims made plans in that losses attributed to criminal acts are generally indemnified if they both occur and are discovered during a stated policy period. *See Southeast Bakery Feeds, Inc.*, 974 S.W.2d at 639-40. Because discovery clauses limit an “insurer’s liability to losses discovered within a fixed period,” thereby providing predictability to an insurer’s exposure, they must be “strictly enforced.” *Id.* at 640. Moreover, discovery clauses serve as “a safeguard to the insurer, imposing upon the insured a reasonable effort to monitor its employees’ work and faithfulness,” and “allow the surety to avoid having to investigate stale claims.” *Id.* Therefore, “[d]iscovery of loss under an indemnity policy or bond is a different obligation than filing a notice of claim.” *Id.*

Here, the policy between Travelers and Homemaxx provides an independent discovery clause stating that Travelers would only pay for “covered loss discovered no later than one year from the end of the policy period.” (Def.’s Mem. at Ex. 2, Commercial Crime Insurance Policy at ¶ 4.) Contrary to Gray’s assertions, the policy indicates that the insured is the entity that must “discover” loss within one year from the end of the policy period. This conclusion results from reading the subsequent paragraph in the policy concerning notice of loss, which begins with: “[a]fter *you* discover a loss or a situation that may result in loss . . . .” (*Id.* at ¶ 5. (emphasis added)). The “you” in the clause logically refers to Homemaxx, and makes clear that the discovery clause applies solely to the named insured. *See also Southeast Bakery Feeds, Inc.*, 974

S.W.2d at 639 (construing nearly identical language to mean that the discovery clause applies to the insured).

Because the policy requires the insured to discover a covered loss within one year from the end of the policy period, Gray appears to have pled itself out of a cause of action. Gray's Complaint states that it "properly and timely" notified Travelers that it was invoking insurance coverage, specifically citing the attached Second Proof of Loss form. (Complaint at ¶ 7.) As previously noted, the Second Proof of Loss form states that the insured did not discover a covered loss until January 2006. (*Id.* at Ex. A, Second Proof of Loss at ¶ 2.) At no point has Gray moved to amend its Complaint. Therefore, because the terms of the policy explicitly do not cover losses discovered one year beyond the end of the policy period, Travelers would be entitled to dismissal under Rule 12(b)(6).

Going beyond the Complaint to summary judgment, however, Gray, by its own admission, did not discover the loss until nearly fifteen months after the discovery deadline and did not notify Travelers of the loss until May 2007. It is perplexing that Gray argues that it did not discover the loss until 2006 in light of First American's August 2004 letter to Travelers and the December 2004 Circuit Court receivership order specifically referencing Gray's right to pursue the fidelity bond. Nevertheless, Gray appears to argue that the court should take into consideration the fact that it could not have discovered the loss before September 23, 2004, because it was not appointed receiver until December of that year.

Although this argument, which will be construed as one seeking an equitable tolling of

the discovery period under the policy,<sup>3</sup> is not entirely without merit, Gray is not entitled to such extraordinary relief. While strictly enforcing a discovery clause would preclude a receiver appointed after a discovery deadline from invoking a commercial crime policy, courts may toll “the running of the discovery period where there has been such adverse domination and control of the institution by the defrauding employees that the institution did not have the capacity to discover or report the malfeasance.” *Paradis v. Aetna Cas. & Sur. Co.*, 796 F. Supp. 59, 62-63 (D.R.I. 1992); *see also California Union Ins. Co. v. American Diversified Sav. Bank*, 948 F.2d 556, 565 (9<sup>th</sup> Cir. 1991). Even if the court assumes that Homemaxx was adversely dominated by both Fink and Morse, which is hardly clear, Gray is not entitled to equitable relief where it failed to act in a timely and reasonable manner. As of December 2004, there was ample evidence available to Gray, including the First American letter to Travelers, Traveler’s response letter, and the Circuit Court order, that funds may have been misappropriated from Homemaxx.

Furthermore, since Gray was appointed limited receiver, there has been continuous litigation surrounding Homemaxx that has provided Gray with an opportunity to investigate related discovery materials. *See First American Title Ins. Co. v. Homemaxx Title and Escrow, LLC* (Civ. No. 1:05-cv-1658 CCB) (June 17, 2005); *Legal Mutual Liab. Ins. v. Jon Scott Morse*, (Case No. 05-31164 JS). It is simply unreasonable that Gray claims it did not discover the loss until January 2006. Moreover, despite the January 2006 discovery, Gray did not notify Travelers of its intent to pursue insurance relief until May of 2007. The May 2007 notice came nearly three years after the policy’s discovery deadline and nearly four years after the policy’s expiration.

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<sup>3</sup> In its opposition brief, Gray did not specifically argue for equitable tolling of the discovery period. For the sake of completeness, however, the court will address the merits of this argument.

Given the express terms of the policy, and the general rule of strictly construing a discovery clause, the court finds that Gray is not entitled to equitable tolling of the discovery period.

Gray next contends that because First American sent a letter to Travelers alleging employee theft at Homemaxx in August 2004, Traveler's had actual notice of a potential claim, which satisfies the policy's discovery clause. As previously discussed, however, the discovery provision in the policy applies only to the insured, Homemaxx, and is distinct from the subsequent notice provision in the policy. Travelers stated in its response letter on September 16, 2004 that the crime insurance policy at issue "is not a third party contract . . . [and] only the Insured can make a claim for employee dishonesty." (Pl.'s Opp. Mem. at Ex. 5, Travelers Letter.) It is not Travelers' obligation to investigate a claim lodged by a third party. Moreover, to the extent that Travelers was on notice of a potential claim, such notice should not require Travelers to anticipate and prepare for a claim filed nearly three years later. To require Travelers to do so would defeat the purpose of the discovery clause.

Finally, Gray argues that it should be permitted to conduct discovery pursuant to Fed. R. Civ. P. 56(f) in order to determine whether Homemaxx, through Fink or Morse, or Travelers had "discovered" Homemaxx's covered loss before September 23, 2004. Rule 56(f) permits a court to deny summary judgment or grant a continuance when the nonmovant is able to demonstrate through affidavits that it could not effectively oppose summary judgment without a discovery period. *Evans v. Techs. Applications & Serv. Co.*, 80 F.3d 954, 961 (4<sup>th</sup> Cir. 1996). In seeking discovery, however, a party must file an affidavit that "particularly specifies legitimate needs." *Nguyen v. CNA Corp.*, 44 F.3d 234, 242 (4<sup>th</sup> Cir. 1995).

Here, in addition to Gray's accompanying Rule 56(f) affidavit lacking the requisite level

of specificity, the contemplated discovery would be futile. First, as previously noted, a loss under a crime insurance policy must be discovered by the insured, and not the insurer. Thus, discovery concerning what Travelers knew in 2004 would be irrelevant to the discovery clause. Second, knowledge of misconduct by the employees who engaged in that misconduct will not be imputed to the company for the purpose of satisfying a discovery clause. *See Southeast Bakery Feeds, Inc.*, 974 S.W.2d at 639 (noting that “the discovery clause does not cover losses discovered by the dishonest employee during the discovery period, but only covers those losses timely discovered by the named insured”). Thus, discovery concerning what Fink, and possibly Morse, knew in 2004 would be both obvious and inapposite. Finally, to the extent that Morse was not aware of Fink’s criminal misconduct, then Homemaxx may not have been under adverse domination in 2004. *See California Union Ins. Co.*, 948 F.2d at 565 (finding company was not adversely dominated where “non-wrongdoing employees could have discovered [] losses”). In that event, the company, quite simply, either did not discover Fink’s theft by September 23, 2004, or did not give Travelers timely notice under the policy. Under either scenario, Homemaxx would have failed to comply with the express terms of the policy. Furthermore, to the unlikely extent that Gray could use Morse’s alleged discovery of a covered loss in 2004 as a trigger for invoking the policy, its May 2007 notice of the claim submitted to Travelers would be untimely. The policy provides that “[a]fter you discover a loss or a situation that may result in loss . . . you must: a. Notify us as soon as possible . . . c. Give us a detailed, sworn proof of loss within 120 days.” (Def.’s Mem. at Ex. 2, Commercial Crime Insurance Policy at ¶ 5.). Thus, even if Morse discovered the loss prior to September 23, 2004, for the many reasons previously stated, Gray’s notice of the claim in May of 2007 would clearly be untimely and prejudicial.

Therefore, because the discovery requested by Gray is futile,<sup>4</sup> the court will grant Travelers' motion for summary judgment.

A separate order follows.

March 25, 2007  
Date

/s/  
Catherine C. Blake  
United States District Judge

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<sup>4</sup> The court further notes that much of the information Gray seeks to discover has been within its control for the past three years. As limited receiver for Homemaxx, Gray was specifically authorized by the Circuit Court in December 2004 to “take immediate charge and possession of [] escrow accounts and operating accounts . . . for the purpose of investigating the improper diversion of monies from these accounts . . . [and] to take immediate charge and possession of the premises . . . where Homemaxx [] operated its business in order to gain access to the business records contained therein.” (Def.’s Mem. at Ex. 6, Receivership Order.) Where a party has had ample opportunity to investigate necessary facts related to its claim, further discovery is not appropriate under Rule 56(f).

