2016 WL 860363
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United States Court of Appeals,
Second Circuit.

Edward Morris **WEAVER**, an individual, Plaintiff–Appellant,

v.

AXIS SURPLUS INSURANCE COMPANY, an Illinois corporation, Defendant–Appellee.

No. 14–4180–cv.
|
March 7, 2016.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Sandra J. Feuerstein, Judge).

Attorneys and Law Firms

James W. Spertus (Ezra D. Landes, on the brief), Spertus, Landes & Umhofer, LLP, Los Angeles, CA, for Appellant.

Matthew I. Schiffhauer, Kaufman Borgeest & Ryan LLP, Valhalla, NY, for Appellee.

Present JOHN M. WALKER, JR., REENA RAGGI, PETER W. HALL, Circuit Judges.

SUMMARY ORDER

***1** UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment entered on November 3, 2014, is AFFIRMED.

Plaintiff Edward Morris **Weaver**, former CEO of **Multivend**, LLC, sued defendant Axis Surplus Insurance Company for breach of contract and a declaratory judgment, challenging its refusal to provide coverage under **Multivend's** directors and officers liability insurance policy (the "Policy") in a criminal prosecution brought against him by the U.S. Department of Justice (the "DOJ"). On appeal from a pre-discovery award of summary judgment to Axis, **Weaver** argues the district court erred in determining as a matter of law that the Policy excluded coverage for defense of the DOJ action because it related to a claim first made prior to the Policy's effective period. Because the parties do not dispute the underlying material facts, the case turns on the interpretation of an insurance contract, a question of law that we review *de novo*. *See CGS Indus ., Inc. v. Charter Oak Fire Ins. Co.*, 720 F.3d 71, 76 (2d Cir.2013); *see also MBIA Inc. v. Fed. Ins. Co.*, 652 F.3d 152, 165 (2d Cir.2011) (stating that insurer bears burden of proving that claim falls within scope of exclusion). [1]

1 The parties agree that New York law governs this diversity action.

In conducting this review, we assume the parties' familiarity with the facts and record of prior proceedings, which we reference only as necessary to explain our decision to affirm, largely for reasons stated by the district court in its thorough and well-reasoned opinion. *See* ***Weaver*** *v. Axis Surplus Ins. Co.*, No. 13–CV–7374 (SJF)(ARL), 2014 WL 5500667 (E.D.N.Y. Oct. 30, 2014). The district court determined that the Policy's "Exclusions" in section IV and "Limits of Liability" under section V provided independent and alternative grounds for Axis's refusal to defend in the criminal action. Because we reach that same conclusion as to Section IV, we do not address Section V. [2] *See, e.g.*, *New York Univ. v. Cont'l Ins. Co.*, 87 N.Y.2d 308, 323, 639 N.Y.S.2d 283, 292 (1995) (observing that "coverage is the net total of policy inclusions minus exclusions").

2 Nor do we address **Weaver's** claim for breach of a duty of good faith and fair dealing, which he does not pursue on appeal. *See Jackler v. Byrne*, 658 F.3d 225, 233 (2d Cir.2011) (stating that such claims not raised in brief are deemed abandoned).

Section IV.A.2.a of the Policy excludes coverage for "any **Claim** ... in any way involving ... any demand, suit or other proceeding pending ... against any **Insured** on or prior to [February 20, 2008], or any **Wrongful Act,** fact, circumstance or situation underlying or alleged therein." J.A. 169; *see also id.* at 158. [3] **Weaver** does not dispute that the DOJ action constitutes a "Claim," or that the DOJ action involves the same facts and circumstances underlying the November 26, 2007 letter that **Multivend** received from the Securities Division of the Maryland Attorney General's Office (the "Division"). Rather, **Weaver** contends only that the November 2007 Letter was not a "demand" within the meaning of section IV.A.2.a. We disagree.

3 The Policy applies boldface type to defined terms.

Although "demand" is not a term defined in the Policy, under New York law, "a demand requires an imperative solicitation

for that which is legally owed," as distinguished from a request carrying no legal consequences. *Gil Enters., Inc. v. Delvy*, 79 F.3d 241, 246 (2d Cir.1996) (citing *Gershman v. Barted Realty Corp*., 22 Misc.2d 461, 462, 198 N.Y.S.2d 664, 665 (Sup.Ct.1960) (defining "demand" as "[a] *requisition or request* to do a particular thing specified *under a claim of right* on the part of the person requesting" (emphasis added) (internal quotation marks omitted)). The November 2007 Letter satisfies these requirements. To determine "the extent of [**Multivend's**] compliance" with the Maryland Business Opportunity Sales Act (the "Act"), Md.Code Ann., Bus. Reg. §§ 14–101 to –129, the Division insisted not only that **Multivend** provide certain documents and information, but also "that [**MultiVend**] acknowledge in writing that it will immediately cease all offers and sales of the Vendstar business opportunity to Maryland residents." J.A. 250–51. The Letter explained that the Division made these requests pursuant to its "authority to investigate and take action against any person who violates" the Act, including by bringing a civil action seeking, *inter alia*, injunctive relief. *Id.* at 249. Although the Letter did not state that **Multivend** was, in fact, in violation of the Act, it did state that **Multivend's** "[f]ailure to respond may result in more formal legal action." *Id.* at 251. This was sufficient to make the November 2007 Letter a "demand" because it set forth the Division's request under a claim of right, including its entitlement to the documents identified therein, and put **Multivend** on notice of the legal consequences of any failure to comply. *See Gil Enters., Inc. v. Delvy*, 79 F.3d at 246.

***2** No different conclusion is warranted by **Weaver's** arguments to the contrary. That the Division asked **Multivend** to "[p]lease confirm whether the company agrees to voluntarily cease" its offers and sales did not render "precatory," Appellant Br. 12, its request "that [**Multivend**] acknowledge in writing" that it would do so. J.A. 251; *see Gershman v. Barted Realty Corp.*, 22 Misc.2d at 462, 198 N.Y.S.2d at 665 ("The demand may be couched in the customarily-used polite language of the day. All that is required is the assertion of the right ... and a request for compliance therewith." (internal quotation marks omitted)); *see also MBIA Inc. v. Fed. Ins. Co.*, 652 F.3d at 161 (explaining that where SEC believed target would comply on voluntary basis, insurer could not require that insured "suffer extra public relations damage to avail itself of coverage a reasonable person would think was triggered by the initial investigation"). Nor does **Weaver's** assertion that the Letter failed to provide notice of any "drastic legal repercussions" withstand scrutiny, Appellant Br. 27, because the Letter underscored the Division's authority to seek specific forms of monetary and nonmonetary relief, and threatened "more formal legal action" in the event that **Multivend** did not "prompt[ly] and complete[ly]" respond, J.A. 251. In any event, the Division was not obligated to advise **Weaver** of the "specific consequences" of failing to provide the information it sought, so long as the Letter made clear that it was not just a "mere request for information." *Gil Enters., Inc. v. Delvy*, 79 F.3d at 246. Insofar as **Weaver** contends this construction inappropriately "cobble[s] together two unrelated portions of the Maryland AG's letter," Appellant Br. 26, the argument fails because we must construe the document as a whole. *See MBIA Inc. v. Fed. Ins. Co.*, 652 F.3d at 160–61.

Because the November 2007 Letter constituted a "demand" as a matter of New York law, section IV.A.2.a of the Policy unambiguously excluded coverage for **Weaver's** defense of the DOJ action on the grounds that it involves the same facts and circumstances as the Letter, which predated section IV's Pending and Prior Claims Date. Accordingly, the district court correctly awarded summary judgment to Axis on this basis. [4]

4 **Weaver** further insists that Axis owed a duty to defend pending resolution of this dispute, even if coverage was properly denied. *See* Appellant Br. 50 (citing *CGS Indus., Inc. v. Charter Oak Fire Ins. Co.*, 720 F.3d at 80). However, by failing to raise this claim in the district court—notwithstanding his opportunities to do so-**Weaver** has forfeited it on appeal. *See In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 133 (2d Cir.2008). **Weaver's** argument that he preserved this claim by seeking declaratory relief in his complaint fails because he did not assert in response to Axis's motion for summary judgment that the term "demand" suffered from any factual, legal, or contractual uncertainty sufficient to impose upon Axis a duty to defend him until the dispute was definitively resolved. *Cf. Hugo Boss Fashions, Inc. v. Fed. Ins. Co.*, 252 F.3d 608, 620 (2d Cir.2001). Indeed, **Weaver** does not here assert that the district court erred in failing to address such a claim.

All Citations

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