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U.S. COURT OF APPEALS

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ACADEMY OF COUNTRY MUSIC, a California nonprofit corporation, Plaintiff-Appellant, v. CONTINENTAL CASUALTY COMPANY, an Illinois corporation, Defendant-Appellee.	No. 22-55534 D.C. No. 2:20-cv-03046-PLA MEMORANDUM[*]

Appeal from the United States District Court
for the Central District of California
Paul L. Abrams, Magistrate Judge, Presiding

Argued and Submitted June 12, 2023
Pasadena, California

Before: PAEZ and CHRISTEN, Circuit Judges, and FITZWATER,[**] District Judge.

Plaintiff-Appellant Academy of Country Music ("Academy") appeals a summary judgment order entered in favor of Defendant-Appellee Continental

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The Honorable Sidney A. Fitzwater, United States District Judge for the Northern District of Texas, sitting by designation.

Casualty Company ("Continental"). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. In 2016, Academy and its Chief Executive Officer ("CEO"), Robert Romeo ("Romeo"), entered into a separation agreement to facilitate the termination of Romeo's employment without cause. Under the separation agreement, Romeo would be paid the remainder of his base salary and car and phone allowances, payable "on regularly scheduled paydays in accordance with [Academy's] usual payroll practices, until August 23, 2017." He would also be paid a lump-sum settlement of $170,000. In exchange, Romeo released all claims against Academy and agreed to provide certain minimal transitional services.

Shortly after the parties entered into the separation agreement, Academy discovered that Romeo may have breached his employment contract while acting as CEO. As a result, Academy's board unanimously voted to stop making payments under the separation agreement. Romeo asserted that Academy had breached the separation agreement and sought arbitration. The arbitrator found in Romeo's favor and awarded damages and fees in excess of $1.2 million.

Academy had an insurance policy ("the Policy") from Continental that included Employment Practices Liability Coverage ("EPL") and Directors and Officers Liability Coverage ("D&O"). Academy filed a claim under the Policy for coverage

of the arbitration award. Continental covered Academy's legal fees for the arbitration proceeding but declined to indemnify Academy for the arbitrator's award. Academy then filed the instant suit, alleging claims for breach of contract and tortious breach of the duty of good faith and fair dealing. The district court granted summary judgment for Continental, and Academy appeals.

2. "This court reviews a district court's grant of summary judgment de novo." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 629 (9th Cir. 1987). We also review the interpretation of a contract de novo. *Kassbaum v. Steppenwolf Prods., Inc.*, 236 F.3d 487, 490 (9th Cir. 2000)). We may affirm "on any ground raised below and fairly supported by the record." *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1030 (9th Cir. 2013) (quoting *Proctor v. Vishay Intertechnology Inc.*, 584 F.3d 1208, 1226 (9th Cir. 2009)).

3. Continental contended in its summary judgment motion that the arbitration award was excluded from Policy coverage. It maintained that for EPL coverage, the Policy excluded from the definition of covered "loss" "any amounts for which an Insured is liable due to an act or omission in knowing violation of any written contract of employment[.]" For D&O coverage, the Policy excluded "any amounts for which an Insured is liable due to an act or omission in knowing violation of any oral or written contract or agreement[.]"

4. We hold that these two exclusions operate to preclude coverage of the arbitration award and therefore affirm the district court's judgment.

Under the EPL coverage exclusion, a loss is not covered if it arises out of Academy's knowing violation of a written contract of employment. When interpreting a contract under California law, "ordinary words must be given their normal, popular meaning … while it must be presumed legal terms are used in their legal sense." *Poag v. Winston*, 241 Cal. Rptr. 330, 337 (Cal. Ct. App. 1987) (internal citations omitted).

Academy knowingly violated the separation agreement because it consciously decided to cease making payments to Romeo, without any reasonable basis for concluding that its performance under the separation agreement was excused. Although Academy maintains that it was not obligated to perform under the separation agreement because it believed Romeo had breached his employment contract, that belief was unreasonable. First, the arbitrator justifiably concluded that Romeo's wrongful acts did not constitute material breaches of his employment contract and thus did not excuse Academy from performing under the separation agreement. Second, Academy knew or should have known about Romeo's objectionable conduct long before the parties entered into the separation agreement. Academy's conduct thus amounted to a knowing violation of the separation agreement.

Additionally, the separation agreement is a written employment contract. It required Romeo to discharge certain transitional duties at Academy's election. Academy argued in the arbitration, and the arbitrator concluded, that the separation agreement either was an employment contract or was closely intertwined with Romeo's original employment contract. The separation agreement therefore falls within the normal meaning of the term "contract of employment." Accordingly, Academy's decision to stop making payments as required by the separation agreement constitutes a knowing violation of a written employment contract. The arbitration award is therefore excluded from the Policy's EPL coverage.

5. Under the Policy, D&O coverage is excluded for any loss arising out of Academy's knowing violation of any oral or written contract or agreement. The EPL coverage exclusion is narrower than this exclusion in that it requires that Academy violate a written contract *of employment*. Because the narrower EPL exclusion applies to the arbitration award, the broader D&O exclusion does as well. Accordingly, the arbitration award is excluded from D&O coverage.

6. Because the Policy does not provide coverage for the arbitration award, we affirm the summary judgment entered in Continental's favor.

AFFIRMED.