NOT FOR PUBLICATION
WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

PEDRO MORAN-ALVARDO, Plaintiff,	: SUPERIOR COURT OF NEW JERSEY :
v.	: ESSEX COUNTY : DOCKET NO.: ESX-L-9756-10
NEVADA COURT REALTY, LLC et al., Defendants	:

Hearing Held: March 6, 2015
Decided: March 6, 2015

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By: Stephanie A. Mitterhoff, J.S.C.

This matter is before the court on Third-Party Defendant Travelers Insurance Company's motion for reconsideration of Judge Lombardi's December 22, 2014 Order entering judgment in favor of Defendant/Third-Party Plaintiff Nevada Court Realty, LLC in the sum of eighty-five thousand dollars ($85,000). That sum represents the amount of an underlying settlement, together with reasonable counsel fees and costs. The December 22, 2014 Order also dismissed Nevada Court's claims for contractual indemnification. As Judge Lombardi has since retired,

this matter came before me on motion to alter or amend Judge Lombardi's opinion pursuant to R. 4:49-2. At oral argument, counsel for Nevada Court noted that it was incumbent on Travelers, as the party moving for reconsideration, to provide the court with a transcript of the proceeding in order to fully comprehend the basis for Judge Lombardi's decision. Acknowledging that would have been the better course, the court has had an opportunity to listen to the recording of the hearing. Moreover, in any event, even accepting as true all of the factual assertions by Travelers, and the court having reviewed the Appellate Division opinion in this case, the briefs filed by the parties, and the governing case law, I am satisfied that there is no basis to amend or alter the prior judgment and the application is therefore denied.

Judge Lombardi issued an oral opinion and order after a bench trial. The matter was before the trial court on remand from the Appellate Division, pursuant to a June 27, 2014 unpublished opinion under consolidated Docket No.'s A-2630-12T3 and A-3443-12T3. The issues on these consolidated appeals were (1) whether the trial court erred in granting summary judgment to EZ Donuts and dismissing the contractual indemnification claim with prejudice by Order dated April 13, 2012 and (2) whether the trial court erred in granting summary judgment to Nevada Court requiring Travelers to provide insurance coverage. The Appellate Division reversed both orders and remanded the matter to the trial court for further proceedings.

In its written decision, the Appellate Division noted that the disputes arose under two provisions under the subject commercial lease: one setting forth the tenant's obligation to obtain insurance coverage naming the landlord as an additional insured, the other dictating the circumstances under which the tenant would be obligated to provide defense and indemnification to the landlord. The Appellate Division's opinion, however, which was largely dicta and did not reach any definitive holding. Rather, the appellate court reversed both orders of summary

judgment finding that there was a need for further fact-finding to assist the trial court in evaluating the parties' claims.

Based on the evidence presented at trial, Judge Lombardi found that the underlying accident was 100% the fault of the Landlord and that EZ Donuts bore no responsibility for the occurrence of the accident. In addition, Judge Lombardi found that Landlord Nevada Court Realty was grossly negligent in failing to provide any snow or ice remediation in the three days leading up to the accident. Thus, pursuant to the terms of the lease as set forth more fully below, Judge Lombardi concluded that EZ Donuts did not owe the Landlord a defense and indemnification. Notwithstanding, the judge found that pursuant to the coverage provisions of the lease and the additional insured endorsement of the Travelers policy, the Landlord was entitled to coverage for the loss under the subject policy. Based on this court's review of the lease, the additional insured endorsement, and governing case law, it appears that Judge Lombardi was entirely correct and therefore the motion to alter the judgment is denied.

The underlying facts are not in dispute. On December 24, 2008, Plaintiff Pedro Moran-Alvarado was walking across a parking lot on his way to a Dunkin Donuts store operated by Defendant EZ Donuts, Inc. to get a cup of coffee. Plaintiff was approximately 57 feet from the Dunkin Donuts storefront when he slipped and fell on ice. The premises are owned by Defendant Nevada Court Realty, LLC. In furtherance of their landlord/tenant relationship, Nevada Court and EZ Donuts executed a written lease setting forth their respective obligations.

Paragraph 13 of the lease agreement dictated the obligations of the tenant, EZ Donuts, to obtain insurance coverage in favor of the landlord Nevada Realty. Pertinent to this coverage dispute, the lease provided:

> (a) Tenant in its own name as insured shall secure and maintain insurance coverage for and relating to the Premises which shall be effective from

Tenant's entry to the Premises and throughout the terms of this Lease as follows:

(1) Comprehensive general liability insurance including coverage for all occurrences in and about the Premises with the following minimum coverage limits:

(i) for bodily injury or wrongful death to any one person, $1,000,000.00;
(ii) for injury or wrongful death from any one accident, $1,000,000.00;
(iii) for all damages arising out of injury to or destruction of property in any one accident, $1,000,000.00.

. . . . . .

(b) Every policy of liability insurance required under this Paragraph shall name as its additional insured Landlord and shall waive all rights to subrogation and indemnification from the above named parties. **If available, every insurance policy obtained by the tenant in accordance with the terms of this Paragraph shall also include a provision that no act or omission of any party insured thereunder shall affect or limit the obligation of the insurance company to pay the amount of any loss sustained.** Such policies shall not be invalidated should any of the insured[s] waive, in writing, prior to a loss, any and all rights of recovery against any party for losses covered by such policies.

Pursuant to its contractual obligations under the lease, EZ Donuts procured the subject policy of insurance, Policy number I-680-4682B234-COF-08 with Travelers Insurance Company. As required by the lease, the policy named Nevada Court Realty LLC as an additional insured. The Additional Insured endorsement page of the policy contained the following provisions:

3. WHO IS AN INSURED (Section II) is amended to include the person or organization shown in the schedule **but only with respect to liability arising out of the ownership, maintenance, or use of that part of the premises leased to you and shown in the Schedule** and subject to the following additional exclusions.[1]

[1] No issue as to a policy exclusion was raised by the parties.

Section 1 of the Schedule identified the leased premises as 13 Court Street in Newark, New Jersey. Section 2 of the Schedule identified Nevada Court Realty as the named additional insured.

The lease itself further defined the leased premises as Store 13 at 25-33 Court Street,

> approximately 2072 square feet inclusive of Tenant's pro rata portion of the common auxiliary space which is part of Tenant's building and the improvements on or to be built thereon (Said improvements , including the sidewalks, common auxiliary space, and said improvements, are herein collectively called "Demised Premises" or "Premises"), together with any and all assessments, appurtenances, rights and privileges now or hereinafter belonging thereto, including the right and easement to use the Common Area in common with other tenants or the Shopping Center.

In addition to the section of the lease dealing with coverage, in a separate section the lease contained indemnification provisions. Specifically, Paragraph 16 of the lease provided:

> The Tenant agrees to indemnify and save harmless the Landlord against all liability, damage, penalties, judgments, or claims whatsoever by anyone in or about the Premises, except for the willful acts of the Landlord, and shall, at its own cost and expense, defend any and all suits or actions which may be impleaded with others upon any such above-mentioned matter, claim or claims. **This paragraph shall not apply if the liability arises from the Landlord's willful failure to perform any covenant under this Lease to be performed by the Landlord, but nothing herein shall be deemed to limit Tenant's obligation to maintain liability insurance for the benefit of the Landlord and its designees as provided above.**
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> Landlord or its agents shall not be liable for any damage to property of Tenant or of others entrusted to Landlord's employees or agents, nor for loss of or damage to any property of Tenant by theft or otherwise, nor for any injury or damage to persons or property resulting from any cause of whatsoever nature, nor shall Landlord or its agents be liable for any such damage caused by other persons in, upon or about said building or caused by operations in construction of any private, public or quasi-public work, **unless caused by or due to the gross negligence or willful misconduct of Landlord, its agents, servants or employee, invitees, or licensees, or contractors.** Tenant shall indemnify and save harmless Landlord against and from all liabilities obligations, damages, penalties, claims, costs and expenses, including reasonable attorney's fees, paid

> suffered or incurred as a result of any breach by Tenant, Tenant's agents, contractors, employees, invitees or licensees of any covenant or condition in this Lease, or the carelessness, negligence or improper conduct of Tenant, Tenant's agents, contractors, employees, invitees or licensees **unless said liabilities, obligations, damages, penalties, claims, costs and expenses including reasonable attorney's fees result from the gross negligence or willful misconduct of Landlord.**

Pursuant to Judge Lombardi's factual finding that the Landlord was grossly negligent in failing to do any ice or snow remediation in the three days leading up to the accident, he found that the Landlord's claims for contractual indemnification were barred by Paragraph 16 of the lease, which clearly states that the Tenant's duty to defend and indemnify the Landlord for accidents on the premises is extinguished upon a finding that the Landlord was grossly negligent in failing to perform its duties under the lease. The parties do not dispute the court's finding that EZ Donuts did not owe a defense and indemnification to Nevada Court Realty.

Rather, Third-Party Defendant Travelers Insurance contends that the judge's conclusion that EZ Donuts owed no duty to defend and indemnify is fundamentally inconsistent and irreconcilable with his conclusion that the Landlord was entitled to coverage for the loss under the Travelers policy. This argument fails because it ignores the fact that a separate provision in the lease in Paragraph 13 required the Tenant to obtain general commercial liability insurance naming the Landlord as an additional insured. Unlike the indemnification provisions of the lease, Paragraph 13 of the lease explicitly states that "no act or omission of any party insured thereunder shall affect or limit the obligation of the insurance company to pay the amount of any loss sustained.**"** Moreover, the indemnity provisions in Paragraph 16 explicitly state that although "[t]his paragraph shall not apply if the liability arises from the Landlord's willful failure to perform any covenant under this Lease to be performed by the Landlord**, but nothing herein shall be deemed to limit Tenant's obligation to maintain liability insurance for the benefit**

of the Landlord and its designees as provided above." Accordingly, pursuant to the plain terms of the lease, it is clear that the intent of the parties was that even where the Tenant had no duty to defend and indemnify the Landlord for the Landlord's default, the Landlord's right to be covered under the GCL policy would be preserved.

Travelers' argument that enforcing such an agreement contravenes the holding of Pennsville Shopping Center Corp. v. American Motorists Ins. Co., 315 N.J. Super. 519 (App. Div. 1998), is simply wrong. Initially, Pennsville is distinguishable on both factual and legal grounds. The lease at issue in Pennsville, as in this case, required the Tenant to name the Landlord as an additional insured on a one million dollar GCL policy. In Pennsville, however, unlike this case, the lease expressly stated that the **Landlord** would indemnify the **Tenant** for any losses or liability for damages "resulting from the Landlord's failure to carry out maintenance of the common areas required of it by the Lease." The court in Pennsville held that the clear intent of the parties was that the Landlord would defend and indemnify the Tenant for losses that were solely due to the Landlord's dereliction of its contractual duties. Accordingly, the court held that whether the Landlord had coverage for a particular loss under the additional insured endorsement in that case had to be determined in conjunction with the language of the lease evidencing the scope of coverage contemplated by the parties.

Here in contrast there is nothing in the subject lease that evidences an intent that the Landlord would defend and indemnify the Tenant if the liability was a result of the Landlord's sole negligence. To the contrary, Paragraph 13 of the lease requires the Tenant to provide insurance coverage in favor of the Landlord and that paragraph explicitly states that **"no act or omission of any party insured thereunder shall affect or limit the obligation of the insurance company to pay the amount of any loss sustained."** Moreover, the indemnity

provisions in this case, set forth at Paragraph 16, explicitly state that although "[t]his paragraph shall not apply if the liability arises from the Landlord's willful failure to perform any covenant under this Lease to be performed by the Landlord**, but nothing herein shall be deemed to limit Tenant's obligation to maintain liability insurance for the benefit of the Landlord and its designees as provided above."** Thus, the clear intent of the parties in this case, as Judge Lombardi found, was that Travelers would cover losses that were wholly attributable to the negligence of the Landlord.

Contrary to Travelers' assertions, there is no statutory or common law prohibiting this type of contractual undertaking. In Liberty Village Associates v, West American Ins Co., 308 N.J. Super. 393 (App. Div. 1998), the court considered whether the Landlord was covered under an additional insured endorsement that provided that coverage would be afforded only for incidents arising "out of the use of" the tenant's premises. In that case, the plaintiff was walking towards Gourmet, a store she intended to patronize, when she slipped and fell on ice. It was undisputed that she had not yet reached the tenant's leased premises and was still in the common area maintained by the landlord when she fell. The court observed that the endorsement did not limit coverage for accidents occurring within the leased premises, but utilized a much broader phrase, "arising out of the use of."

That phrase, the court found, had previously been construed by the Appellate Division in Franklin Mutual Ins. Co. v. Sec. Indem. Ins. Co., 275 N.J. Super. 335 (App. Div. 1994) and Harrah's Atlantic City, Inc. v. Harleysville Ins Co., 288 N.J. Super. 152 (App. Div. 1996). In Franklin, the additional insured endorsement covered the landlord for but "only with respect to liability arising out of the ownership, maintenance or use" of the premises leased to the tenant. In that case the plaintiff slipped and fell on exterior stairs leading away from the tenant Jury Box

Luncheonette's premises. It was undisputed that the stairs were not within the leased premises and that it was solely the landlord's obligation to repair and maintain the steps. In Harrah's, the additional insured endorsement provided that coverage was owed to the landlord "only for liability arising out of the use of" the premises. The plaintiffs in Harrah's, after shopping at the tenant Talk of the Walk's store, exited the hotel and proceeded to cross the street to enter the hotel's garage when they were struck by a vehicle operated by a Harrah's valet.

The court in Franklin held that the carrier for the tenant was obliged to provide coverage for the loss even though the accident occurred in the common area that was exclusively the landlord's obligation to maintain. There the court found that the phrase "arising out of the use":

> Must be interpreted or construed in a in a broad and comprehensive sense to mean 'originating from the use of' or 'growing out of the use of' the premises leased to Jury Box. Thus, there need be shown only a nexus between the occurrence and the use of the leased premises in order for the coverage to attach. The inquiry, therefore, is whether the occurrence which caused the injury, although not foreseen or expected, was in the contemplation of the parties to the insurance contract a natural and reasonable incident or consequence of the use of the leased premises and thus, a risk against which they may reasonably expect those insured under the policy would be covered.
> [275 N.J. Super. at 340-41.]

The court based its ruling on the fact that there was a substantial nexus between the fall on the stairs and the use of the premises leased by the tenant.

Similarly, in Harrah's, the court reaffirmed that a landlord is entitled to coverage under an endorsement providing coverage for accidents arising out of the use of the premises, even where the accident occurs outside the demised premises and even where the tenant has no liability and the landlord is 100% responsible for the accident. 288 N.J. Super. at 157. The Appellate Division held that "where the landlord can trace the risk creating its liability directly to the tenant's business presence, it is not unreasonable for the landlord to expect coverage, inasmuch as it can truly be said that the accident originated or grew out of the leased premises."

Id. at 158-159. Concurring with Franklin, the court in Harrah's held that "coverage under such language is afforded for accidents 'occurring outside of the leased premises," and that **"coverage was not contingent on whether the tenant had any liability for the accident."** Id. at 157.

In line with these cases, the court in Liberty Village similarly held that under an additional insured endorsement that covers losses arising out of the use of the leased premises, coverage was owed even though the tenant had no liability for the accident.

Clearly, based on this line of cases, there is nothing unlawful preventing parties from entering into an agreement that a tenant will purchase insurance that will cover the landlord for the landlord's own negligence. In this case, as Judge Lombardi found, the endorsement is the one that provides coverage for accidents arising out of the use of the premises. Specifically, the endorsement provides:

> 3. WHO IS AN INSURED (Section II) is amended to include the person or organization shown in the schedule **but only with respect to liability arising out of the ownership, maintenance, or use of that part of the premises leased to you and shown in the Schedule** and subject to the following additional exclusions.

Judge Lombardi correctly concluded that because the Plaintiff at the time of his fall was walking to EZ Donuts to get a cup of coffee, the accident arose out of the use of the premises and therefore coverage was triggered.

Contrary to EZ Donuts' assertions, there is no "conflict" between the Pennsville line of cases and the Franklin line of cases. Franklin and its progeny define when an accident should be deemed to arise out of the use of the demised premises. Pennsville and its progeny direct that a court should look to the parties' agreements under the lease to determine under what circumstances the parties intended the Landlord to be covered as an additional insured. Both conditions for coverage are satisfied in this case: the accident clearly arose out of EZ Donuts' use

of the demised premises, and the lease provisions as more fully set forth above clearly evinced an intent that the Landlord would have coverage as an additional insured for losses that were wholly attributable to the negligence of the Landlord.

In that regard, the coverage provision of the lease stated quite plainly that **"no act or omission of any party insured thereunder shall affect or limit the obligation of the insurance company to pay the amount of any loss sustained."** Moreover, even though the contractual indemnity provisions do not apply under these circumstances, there is an express disclaimer in the indemnity clause itself: "**nothing herein shall be deemed to limit Tenant's obligation to maintain liability insurance for the benefit of the Landlord and its designees as provided above."**

For the foregoing reasons, Third-Party Defendant Travelers' motion to alter or amend the judgment is denied.