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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2954-13T2

HARRY J. HERZ, JO ANN D.
NAKLICKI, and ROBERT S. JANSSEN,

Plaintiffs-Appellants,

and

VINCENT ONORATO,

Plaintiff,

v.

141 BLOOMFIELD AVENUE CORPORATION
and JOHN P. MacEVOY,

Defendants-Respondents.

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141 BLOOMFIELD AVENUE CORPORATION,

Plaintiff-Respondent,

v.

HARRY J. HERZ, JO ANN D. NAKLICKI,
ROBERT JANSSEN, and LOUIS DIBELLA,

Defendants-Appellants,

and

IDA ONORATO,

Defendant.

HARRY J. HERZ, JO ANN D. NAKLICKI,
ROBERT JANSSEN, and LOUIS DIBELLA,

Third-Party Plaintiffs-Appellants,

and

IDA ONARATO,

Third-Party Plaintiff,

v.

PENN-AMERICA INSURANCE COMPANY and
JOHN P. MacEVOY,

Third-Party Defendants-Respondents.

Submitted April 20, 2015 – Decided June 1, 2015

Before Judges Guadagno and Leone.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket Nos. L-9674-08 and L-537-10.

Piro, Zinna, Cifelli, Paris & Genitempo, L.L.C., attorneys for appellants (Daniel R. Bevere, on the brief).

Riker Danzig Scherer Hyland & Perretti, LLP, attorneys for respondent Penn-America Insurance Company (Glenn D. Curving, of counsel and on the brief; Stephanie M. Panico, on the brief).

Debra D. Tedesco, attorney for respondents John P. MacEvoy and 141 Bloomfield Avenue Corporation (Ms. Tedesco, of counsel and on the brief).

PER CURIAM

Appellants Harry J. Herz, Jo Ann D. Naklicki, and Robert S. Janssen, along with Vincent Onorato,[1] are the owners of real property in Verona, New Jersey. In 2004, appellants leased the property to 141 Bloomfield Avenue Corporation (141 Bloomfield), for the operation of a bar and restaurant business, the Verona Inn. The term of the lease was five years ending July 31, 2009, at a total rent of $596,856, payable in monthly installments which increased from $9,000 per month in 2004-05 to $10,944 in 2008-09. John P. MacEvoy signed the lease as President of 141 Bloomfield. The lease contained the following clause:

> The owner and principal of Tenant, 141 Bloomfield Avenue Corporation, is John P. MacEvoy. He represents that he will be active in the management of the Verona Inn and dwelling. In the event of a default on the within Lease, John P. MacEvoy will be personally liable for all obligations, rents (past and future) and damages [etc.], due in connection with said Lease.

MacEvoy's signature appears once on the lease, on the following line:

[1] Vincent Onorato was a plaintiff in the original 2008 complaint, but did not join in the counterclaim and third party complaint filed in 2010. On January 29, 2014, the court dismissed Onorato's complaint for failure to appear at trial and he is not participating in this appeal.

141 BLOOMFIELD AVENUE CORPORATION,
Tenant
By John P. MacEvoy, President

It is not disputed that 141 Bloomfield failed to make timely monthly payments for most of the lease term. In December 2008, appellants filed a complaint against 141 Bloomfield and MacEvoy, individually, seeking unpaid rent and other damages.

In January 2010, 141 Bloomfield filed a separate complaint against Herz, Naklicki, Janssen, Ida Onorato,[2] and Louis DiBella[3] alleging breach of the lease and constructive eviction. 141 Bloomfield claimed that it suffered lost business profits resulting from appellants' failure to fix a defective furnace, which resulted in pipes bursting; failure to pay the water bill; and failure to maintain a septic tank on an adjoining piece of property, which threatened to release waste and prompted the Verona Health Department to shut down the Verona Inn.

[2] The complaint indicates that Ida Onorato died sometime after July 2004 and her ownership interest in the property passed to Janssen.

[3] DiBella and Herz own property adjoining 141 Bloomfield Avenue, which was used as a parking lot for an Acura car dealership. 141 Bloomfield alleged that their negligence in allowing Acura to drive its cars over the property caused damage to the property's septic system and prompted the Verona Health Department to shut down the Verona Inn due to environmental concerns. DiBella is participating in this appeal.

In June 2010, appellants filed an answer and a third-party complaint against their insurance provider, Penn-America Insurance Company seeking indemnification from the claims raised by 141 Bloomfield. Penn-America moved for summary judgment, arguing that this was essentially a landlord-tenant dispute and not covered by the general liability policy it issued to appellants. The motion judge agreed and granted summary judgment, dismissing appellants' third-party complaint against Penn-America.

On September 19, 2013, the motion judge granted summary judgment in favor of MacEvoy, holding that he signed the lease in his capacity as President of 141 Bloomfield and did not sign a personal guarantee and cannot be held liable under the lease. Appellants then entered into a consent judgment with 141 Bloomfield in which appellants received $100,000. The consent judgment provided that, in the event the summary judgment order in favor of MacEvoy was reversed, the consent judgment would be vacated and all claims would be reinstated and proceed to arbitration.

On appeal, appellants challenge both grants of summary judgment. For the reasons that follow, we affirm.

I.

"A ruling on summary judgment is reviewed de novo." Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 405 (2014). We use the same standard as trial courts in determining whether summary judgment is proper. Murray v. Plainfield Rescue Squad, 210 N.J. 581, 584 (2012).

Summary judgment is proper if, after drawing all inferences in favor of the non-moving party, "no genuine issue as to any material fact" exists. R. 4:46-2(c). "An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." Ibid.

Appellants first argue that MacEvoy should be held personally liable for any damages arising out of the lease. As a general rule, guarantee agreements are strictly construed against the party "at whose insistence such language was included." Ctr. 48 Ltd. P'ship v. May Dept. Stores Co., 355 N.J. Super. 390, 405 (App. Div. 2002). Although a guarantor's obligation cannot extend beyond the strict terms of his or her promise, "the terms of a guarantee agreement must be read in light of commercial reality and in accordance with the

reasonable expectations" of the parties involved. Id. at 405-06.

A corporation is an entity separate and distinct from its principals. Touch of Class Leasing v. Mercedes-Benz Credit of Can., Inc., 248 N.J. Super. 426, 441 (App. Div.), certif. denied, 126 N.J. 390 (1991). The general rule is that an officer cannot be held personally liable for the conduct of a corporation. Macysyn v. Hensler, 329 N.J. Super. 476, 486 (App. Div. 2000). Indeed, an agent's signature binding the corporation does not automatically render the agent liable under the contract. Norman v. Beling, 33 N.J. 237, 243-44 (1960).

It is undisputed that MacEvoy signed as President of 141 Bloomfield. As the motion judge recognized:

> Mr. [MacEvoy] signed the lease, but it couldn't be [clearer that] he signed the agreement as President of 141 [Bloomfield]. He did not sign it individually. There is no signature line for him to agree to be personally liable. The only thing he signed was, he signed as President of the corporation.

Appellants argue that the omission of a separate signature line binding MacEvoy personally was a clerical error and does not invalidate the personal guarantee. We disagree. Given the strict construction of guarantee agreements, and the long-standing principle that corporations are distinct entities from their officers, MacEvoy cannot be held personally liable for 141

Bloomfield's alleged breach of the lease. As there was no separate signature indicating that MacEvoy was undertaking a personal guarantee, we cannot conclude that there was an agreement between the parties that he was signing the lease in his individual capacity. As the motion judge noted, appellants cannot rely on a clerical error as a basis "to make someone . . . liable for something that they never signed on the line for."

Appellants also argue that MacEvoy impermissibly introduced extrinsic evidence that the parties never intended to personally obligate him, which is barred by the parol evidence rule. Appellants claim that a certification submitted by MacEvoy, in which he states that he never intended to personally guarantee the contract, seeks to modify or nullify the personal guarantee provision of the lease.

The issue here is whether MacEvoy agreed to be bound personally under the lease and not about the meaning of the personal guarantee clause. Because the nature of this inquiry concerns the formation of the contract, it is permissible to use extrinsic evidence to inform the analysis. See Conway v. 287 Corporate Ctr. Assocs., 187 N.J. 259, 269 (2006) (explaining that New Jersey courts allow for a broad examination of

extrinsic evidence, including evidence of the circumstances leading up to the formation of the contract).

Lastly, appellants claim that MacEvoy, as a businessman, should have been aware of the general business custom of including personal guarantees in commercial leases, thus the provision should be given its intended effect. Appellants provide no support for this contention.

II.

In challenging the summary judgment in favor of Penn-America, appellants first argue that the trial court erred in finding that the claims raised did not fall within the general insuring agreement of the Penn-America policy and maintain that Penn-America is obligated to defend and indemnify them from the claims set forth in 141 Bloomfield's complaint.

Our review of a trial court's interpretation of a contract is de novo. Fastenberg v. Prudential Ins. Co. of Am., 309 N.J. Super. 415, 420 (App. Div. 1998). Insurance policies are contracts, and the terms are interpreted in accordance with their "plain and ordinary meaning." Flomerfelt v. Cardiello, 202 N.J. 432, 441 (2010) (quoting Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165, 175 (1992)). If there is an ambiguous phrase in the policy, the ambiguity is resolved in favor of the insured. Voorhees, supra, 128 N.J. at 175. We must enforce the

contract as written if the terms are clear and unambiguous. Stone v. Royal Ins. Co., 211 N.J. Super. 246, 248 (App. Div. 1986).

The Penn-America commercial general liability (CGL) policy contains the following pertinent provisions:

> 1. Insuring Agreement
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result.
>
> . . . .
>
> b. This insurance applies to "bodily injury" and "property damage" only if:
>
> (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";
>
> (2) The "bodily injury" or "property damage" occurs during the policy period[.]

The CGL policy defines "occurrence" and "property damage" as follows:

> 13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

. . . .

17. "Property damage" means:

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

The CGL policy also contains exclusions, including exclusion j(1), which provides "[t]his insurance does not apply" to property damage to "[p]roperty you own, rent or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property[.]" Such a policy requires that there be damage to property other than the insured's own property. N.J. Dep't of Envtl. Prot. v. Signo Trading Int'l, Inc., 130 N.J. 51, 63 (1992).

The first allegation in 141 Bloomfield's complaint alleged that a defective furnace caused the pipes in the building to burst. This damage ultimately resulted in loss of use and lost profits. There is no allegation of "property damage" caused by

an "occurrence." Rather, 141 Bloomfield sought damages for loss of use and lost profits as a result of the burst pipes.

Lost profits are considered consequential damages and do not constitute property damage under the CGL policy. Heldor Indus., Inc. v. Atl. Mut. Ins. Co., 229 N.J. Super. 390, 398 (App. Div. 1988). Moreover, "there must first be a finding of physical damage to tangible property from which the consequential damages flow." Id. at 397.

The motion judge held that "if the property damage isn't covered because it's excluded, the consequential damages arising therefrom, similarly must meet the same fate . . . ." Because the defective furnace did not result in damage to third-party property, and because there can be no claim for consequential damages arising out of an uncovered loss, Penn-America is not required to defend and indemnify appellants.

The second claim relates to appellants' failure to pay the water bill, which resulted in lost profits at the restaurant after the water was turned off. The CGL policy covers third-party property damage caused by an "occurrence," which is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." As the motion judge succinctly stated, the failure to pay the water bill is "not an occurrence, it's not an accident, it's

just what happens when you don't pay your bills." The motion judge's reasoning is sound, and we find no basis to intervene.

Appellants rely on Lerman Motors in arguing that Penn-America is obligated to defend and indemnify them from 141 Bloomfield's lost profits claims. Great Am. Ins. Co. v. Lerman Motors, Inc., 200 N.J. Super. 319 (App. Div. 1984). In Lerman Motors, a fire occurred in the premises owned by a landlord and occupied by a car dealership. Id. at 322. The car dealership sustained damage to its tangible personal property and suffered loss of business. Ibid. We held that the consequential damages that flowed from the property damaged by the fire were not precluded from coverage. Id. at 326-27. We find Lerman Motors distinguishable as there is no damage to third-party property here. As already noted, because there is no covered event, any consequential damages flowing from that event are also not covered under the CGL policy.

Appellants next argue that exclusion j(1) in the CGL policy agreement does not apply to 141 Bloomfield's claims for lost profits. Exclusionary clauses that limit coverage are construed narrowly. Gibson v. Callaghan, 158 N.J. 662, 671 (1999). The burden is on the insurer to demonstrate that the claim falls within the purview of the exclusion. Am. Motorists Ins. Co. v. L-C-A Sales Co., 155 N.J. 29, 41 (1998). However, exclusionary

provisions are presumptively valid if they are "specific, plain, clear, prominent, and not contrary to public policy." Homesite Ins. Co. v. Hindman, 413 N.J. Super. 41, 46 (App. Div. 2010) (citing Princeton Ins. Co. v. Chunmuang, 151 N.J. 80, 95 (1997)).

Here, it is undisputed that appellants owned the building where the pipes burst. The CGL policy language was clear: property owned by the insured is excluded from coverage. As the motion judge noted, "[T]he policy does not apply to property damage caused to property that the insured owns. Well, there's no question [appellants] owned the [building]." Because the furnace and burst pipes were part of appellants' property, this exclusion applies. The policy's exclusion of this property damage also precluded coverage for consequential damages, such as 141 Bloomfield's lost profits.

Lastly, appellants argue that the pollution exclusion in the CGL policy is inapplicable to 141 Bloomfield's claim that the municipality shut down its business due to an alleged failure of a septic tank, resulting in lost profits. That provision provides:

> 2. Exclusions
>
> This insurance policy does not apply to:
>
> . . . .

> f. Pollution
>
> (1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":
>
> (a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured.

"Pollutants" are defined in the policy as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed."

The Verona Health Department shut down the Verona Inn due to environmental concerns, namely the threatened discharge of waste due to an improperly maintained septic system on an adjacent property, which was also owned by appellants. The exclusionary language in the CGL policy is clear: "[T]he actual, alleged or threatened discharge" of "pollutants" is not covered. "Pollutants" is defined in the policy as including "waste," which would encompass the type of discharge expected from a faulty septic system. Because the Verona Inn was shut down as the result of a threatened discharge of "pollutants," under the CGL policy exclusion, there is no coverage.

Affirmed.