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NAUTILUS INSURANCE COMPANY AS SUBROGEE OF 304 PAVONIA REALTY, LLC,	SUPERIOR COURT OF NEW JERSEY HUDSON COUNTY LAW DIVISION, CIVIL PART DOCKET NO. L-3370-16
Plaintiff,	
v.	Civil Action
AMANA CONSTRUCTION CO., INC., WESTERN WORLD INSURANCE COMPANY, JOHN DOES 1-10, ABC COMPANIES 1-10, XYZ INSURANCE COMPANIES 1-10 (fictitious names),	
Defendants.	

Decided: July 21, 2017.

Sandra S. Grossman for Plaintiff (Law Offices of Steven G. Kraus, attorneys).

Margaret Catalano, Jillian Dennehy for Defendant Western World Insurance Company (Carroll, McNulty & Kull, LLC, attorneys).

VANEK, J.S.C.

INTRODUCTION

This matter is before the court on defendant Western World Insurance Company's ("Western") motion for summary judgment and plaintiff Nautilus Insurance Company's ("Nautilus") cross-motion for a "declaratory ruling," which the court reads as a cross-motion for summary judgment, as well as a petition for attorney's fees pursuant to R. 4:42-9(a)(6). The court heard oral argument in this matter on June 23, 2017. At that hearing

the court sought, with no objection, further briefing on the issue of the definition of the phrase "condominium project" in the relevant contractual language. Counsel for both parties submitted further briefing. Western submitted a letter brief in reply to Nautilus' supplemental brief. Nautilus submitted a sur-reply to that letter brief. The parties waived oral argument and consented to disposition on the papers.

STANDARD OF REVIEW

The standard for summary judgment is set forth in R. 4:46-2, and has been clarified by the Supreme Court of New Jersey in Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995). An order for summary judgment "shall be rendered if the pleadings . . . show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). In Brill, the Supreme Court of New Jersey held that:

> Whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged dispute in favor of the non-moving party.
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> [Brill, 142 N.J. at 540.]

On a motion for summary judgment, the judge's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. Ibid.

R. 4:46-2(b) sets forth the procedure for responding to a motion for summary judgment and provides, in relevant part:

> Requirements in Opposition to Motion. A party opposing the motion shall file a responding statement either admitting or disputing each of the facts in the movant's statement. Subject to R. 4:46-5(a), all material facts in the movant's statement which are sufficiently supported will be deemed admitted for purposes of the motion only, unless specifically disputed by citation conforming to the requirements of paragraph (a) demonstrating the existence of a genuine issue as to the fact.

FINDINGS OF UNDISPUTED FACT

The court finds the following facts undisputed for purposes of this motion:

On August 22, 2016, Nautilus, as subrogee of 304 Pavonia, instituted an action against Amana Construction Co., Inc. ("Amana") and Western entitled Nautilus Insurance Company as subrogee of 304 Pavonia Realty, LLC ("Pavonia") v. Amana Construction Co., Inc.; and Western Insurance Company; John Does 1-10; ABC Companies 1-10; XYZ Insurance Companies 1-10 (fictitious names), Docket No. UNN-L-3770-16 (the "Complaint").

According to the Complaint, Pavonia hired Amana in May 2014 to complete work at its property located at 304 Pavonia Avenue in Jersey City, New Jersey (the "Property"). The Complaint alleges that Amana was hired to replace the roof on a building that was being converted into a nine-unit condominium building. Pavonia's general development application to the City of Jersey City included under the caption "Proposed Development": "9 Condominium units." It also included, as to "Nature of Use": "Mid-Rise Apartment Building."

The court heard oral argument on the pending motion in this matter on June 23, 2017. At that time, counsel for Nautilus stated on the record that it did not dispute that the developer was constructing condominiums as set forth in the development application.

Nautilus asserts that Amana negligently performed roofing work at the location resulting in structural damage that became apparent on or about December 9, 2014. As a result of that purported negligence, Nautilus maintains that it is entitled to reimbursement from Amana for payments it made on behalf of Pavonia.

In addition to its claims against Amana, Nautilus has also sought recovery from Western. In particular, Nautilus maintains that it submitted a claim to Western, seeking reimbursement for damages paid by Nautilus on behalf of Pavonia, but that Western

World has denied coverage based on a "purported exclusion" in its policy. Nautilus asserts that the denial of the claim was wrongful, and it seeks a declaratory judgment holding Western liable for any judgment it obtains against Amana in this action.

Western issued a commercial general liability policy to Amana, under policy number NPP8171607, for the period extending from March 18, 2014 through March 18, 2015 (the "Policy"). The Policy affords limits in the amount of $1,000,000 per occurrence, $2,000,000 in the aggregate and $1,000,000 in the aggregate for products – completed operations. There is a $1,000 deductible per claim. The classification on the declarations page of the Policy lists: (1) Roofing – residential – three stories and under; (2) Carpentry – Interior; (3) Siding Installation; and (4) Limited Torch Coverage.

The Policy includes the following coverage provision:

> 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…
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> ***

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; and

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The Policy includes the following relevant definitions:

16."Products-completed operations hazard":

c.Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:

(1)Products that are still in your physical possession; or

(2)Work that has not yet been completed or abandoned…

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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 insured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

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The Policy includes the following relevant endorsements:

CONDOMINIUM, ROW HOUSE OR TRACT HOME CONSTRUCTION PROJECTS EXCLUSION

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This endorsement modifies insurance under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE

A. The following exclusion is added to Paragraph 2. Exclusions of Section I – Coverage A – Bodily Injury and Property Damage Liability:
This insurance does not apply to "bodily injury" or "property damage" included in the "products-completed operations hazard" arising from, or in any way relating to "your product" or "your work" included in a "condominium project", "row house project" or tract home project" that is:

a. "New construction"; or

b. Roof construction or reroofing of an existing roof, whether "new construction" or otherwise.

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C.The following definitions are added to Section V – Definitions:

"Condominium project" is defined as a residential apartment, condominium or townhouse-style project, in which individual units are located within one or more buildings or structures, the common area of which is owned in undivided interests, while the individual units are owned as separate interests.

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> CLASSIFICATION LIMITATION
> This endorsement modifies insurance provided under the following:
> COMMERCIAL GENERAL LIABILITY COVERAGE PART
> LIQUOR LIABILITY COVERAGE PART
> PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART
> OWNERS AND CONTRACTORS PROTECTIVE LIABILITY COVERAGE PART
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> This insurance applies only to a classification that is shown on the policy. If any classification is not shown, it is not insured hereunder.
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> ***

In response to the Complaint in this action, Western filed a motion to dismiss in lieu of an answer on November 4, 2016, in which it argued that it owes no coverage to Amana based on the application of a Condominium Exclusion that appears within the Policy.

This court entered an order and opinion dated December 20, 2016 in connection with that motion, in which it converted Western's motion to one for summary judgment and denied the motion without prejudice.

According to the Application for Roofing Contractors submitted by Amana for the Policy dated March 17, 2014, Amana was specifically asked whether it "ever performed work on condos, townhouses, or tract homes," and it responded in the negative. Amana was also asked in that application if it

planned on "doing any work on condos, townhouses, or tract homes within the next year," which it also answered in the negative. Amana submitted an "Application for Artisan Contractors" for the same policy period dated March 14, 2014. That application asked if Amana worked on any condominiums, townhouses or tract homes in the past five years, or if it planned on working or is working on any such properties. Amana responded "no" to both questions.

Although the relevant policy for purposes of this action was issued for the policy period beginning on March 18, 2014, the first policy issued by Western to Amana was for the prior annual period, which was from March 18, 2013 to March 18, 2014. Western also issued policies to Amana subsequent to the policy for the period March 18, 2015 to March 18, 2016 and the period of March 18, 2016 to March 18, 2017.

Amana was asked whether it worked on condominiums in the applications for each of the prior and subsequent policies, and Amana responded that it did not in each application.
Every Western policy that has been issued to Amana included a condominium exclusion.

LEGAL ANALYSIS

Arguments

Western argues it is entitled to summary judgment because the plain language of the "condominium project" exclusion applies to bar Nautilus' claims and that the evidence in the record establishes that Nautilus did not have any reasonable expectation of coverage for its work.

Nautilus argues in its cross-motion and opposition that the policy itself defines "condominium project" in terms of a form of ownership, and since its insured did not own the project in that form at the time of the loss, the exclusion does not apply. Nautilus argues that even if the exclusion does apply, it is contrary to public policy and must therefore be stricken by the court.

In its supplemental brief, Nautilus argues that "condominium project" as defined in certain New Jersey statutes contemplates a completed condominium, and not one under construction. It also argues that the case of Ment Bros. Iron Works Co. v. Interstate Fire & Cas. Co., 702 F.3d 118, 123 (2d Cir. 2012), is persuasive as to Nautilus' proposed interpretation. Finally, it argues that Western's definition could have been more precisely drafted to encompass intent, and since it was not, its failure should inure to Nautilus' benefit.

Western argues by way of supplemental briefing that New Jersey law mandates a plain reading of the term "project," and that plain meaning, as set forth through several dictionary definitions, establishes that the definition of the term "project" entails intent. Western further proffers that the "condominium project" exclusion can only be read in a manner to bar the subject claim which arises from property damage to a building which was being constructed as a condominium. In this vein, Western also argues that Amana had no reasonable expectation of coverage based upon its representations in applications for coverage that it had not nor would be performing construction on a condominium.

Western argues in reply to the arguments in Nautilus' supplemental brief that the statutory language to which Nautilus points is irrelevant to the definition of "condominium project," and indeed, that the language of at least one of those statutes supports Western's interpretation. It also argues that Ment Bros. is distinguishable from the present case. Finally, it reasserts its argument that the plain language of the exclusion governs, and that the definition of "condominium project" should be read as encompassing construction of a building which is being built to be condominiums.

In sur-reply, Nautilus argues that Western misrepresented Nautilus' factual position with regard to what the exclusion

covers. Nautilus argues that the exclusion covers only condominiums as defined by statute.

Applicable law

"Insurance policies are construed in accordance with principles that govern the interpretation of contracts; the parties' agreement 'will be enforced as written when its terms are clear in order that the expectations of the parties will be fulfilled.'" Mem'l Props., LLC v. Zurich Am. Ins. Co., 210 N.J. 512, 525 (2012) (quoting Flomerfelt v. Cardiello, 202 N.J. 432, 441 (2010)). "If the terms are not clear, but instead are ambiguous, they are construed against the insurer and in favor of the insured, in order to give effect to the insured's reasonable expectations." Flomerfelt, supra, 202 N.J. at 441. "A 'genuine ambiguity' arises only 'where the phrasing of the policy is so confusing that the average policyholder cannot make out the boundaries of coverage.'" Progressive Cas. Ins. Co. v. Hurley, 166 N.J. 260, 274 (2001) (quoting Weedo v. Stone-E-Brick, Inc., 81 N.J. 233, 247 (1979)).

"Exclusionary clauses are presumptively valid and are enforced if they are 'specific, plain, clear, prominent, and not contrary to public policy.'" Ibid. (quoting Princeton Ins. Co. v. Chunmuang, 151 N.J. 80, 95 (1997)). Exclusions are generally narrowly construed, and the burden is on the insurer to bring the claim within the exclusionary language. Id. at 442.

Neither the parties nor this court have located a published case from a court in New Jersey that has addressed the interpretation of an exclusion for a "condominium project." Thus, the court has looked to authority from other jurisdictions for guidance on the subject, however, those cases address exclusions with contractual language distinct from that before this court. The United States Court of Appeals for the Second Circuit, for example, found that a "residential property" exclusion, which included condominiums, but also included an exception to the exclusion for "apartments," did not serve to exclude coverage on a building when the building was owned in a manner inconsistent with the statutory definition for "condominium" under New York law. Ment Bros., supra, 702 F.3d at 123. The Ment Bros. Court found that under New York law, only the contractual language, and not the "ultimate intended use of a building is determinative" in applying an exclusion. Id. at 123 n.2. Since the policy language in the Ment Bros. case indicated that the exclusion applied only after conversion of apartments into condominium units, the court found that the exclusion in that case did not apply. Id. at 123.

The California Court of Appeal addressed specifically an exclusion of coverage for work performed on condominium "projects." Cal. Traditions, Inc. v. Claremont Liab. Ins. Co., 127 Cal. Rptr. 3d 451, 452 (Ct. App. 2011). In that case the

court found that based upon the California statutory definition of "condominium project" that phrase in the exclusion was not ambiguous, and therefore the exclusion applied to preclude insurance coverage. Id. at 458.

In determining the ordinary meaning of words in an insurance policy exclusion the Appellate Division has considered the dictionary definitions of disputed language. See, e.g., Sealed Air Corp. v. Royal Indem. Co., 404 N.J. Super. 363, 379 (App. Div. 2008); Byrd ex rel. Byrd v. Blumenreich, 317 N.J. Super. 496, 504 (App. Div. 1999); see also G.D.M. v. Bd. of Educ. of the Ramapo Indian Hills Reg'l High Sch. Dist., 427 N.J. Super. 246, 261 (App. Div. 2012)("In determining the common meaning of words, it is appropriate to look to dictionary definitions.") Black's Law Dictionary Online defines "project" as "[a] group of related tasks execut[ed] under a certain financial budget restrain[t] and limited time period." Merriam-Webster Online defines "project" as "a specific plan or design" or "a planned undertaking," while Oxford Online defines it as "[a]n individual or collaborative enterprise that is carefully planned to achieve a particular aim."

"Condominium" as defined by the New Jersey Condominium Act ("the Act") "means the form of ownership of real property under a master deed providing for ownership by one or more owners of units of improvements together with an undivided interest in

common elements appurtenant to each such unit." N.J.S.A. § 46:8B-3. The Act does not define "condominium project" or the term "project" in the context of condominiums.

N.J.S.A. §40A:20-14 (included in the Long Term Tax Exemption Law, N.J.S.A. §§40A:20-1 through 40A:20-22) uses the phrase "condominium project," however, it does so in such a way that it refers to a completed project. Moreover, the word "project" as used in that statute is specially defined as follows:

> "Project" means any work or undertaking pursuant to a redevelopment plan adopted pursuant to the "Local Redevelopment and Housing Law," P.L. 1992, c. 79 (C. 40A:12A-1 et al.), which has as its purpose the redevelopment of all or any part of a redevelopment area including any industrial, commercial, residential or other use, and may include any buildings, land, including demolition, clearance or removal of buildings from land, equipment, facilities, or other real or personal properties which are necessary, convenient, or desirable appurtenances, such as, but not limited to, streets, sewers, utilities, parks, site preparation, landscaping, and administrative, community, health, recreational, educational and welfare facilities.
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> [N.J.S.A. § 40A:20-3.]

Another New Jersey statute uses the phrase "condominium project" by specific reference to an undertaking which has been fully completed and is in operation as follows:

> The provisions of this act shall not apply to any lease involving the use of parking, recreational or other common facilities or areas at a **condominium project where such parking, recreational or other common facilities have been fully completed and in**

> **operation** as of the effective date of this act and the lease therefor is duly executed, whether before or after the effective date of this act, by the developer and the association.
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> [N.J.S.A. § 46:8B-37 (emphasis added).]

Decision

The court notes at the outset that Nautilus did not dispute any portion of Western's statement of material facts. Thus, for purposes of this motion, the court viewed all of Western's factual assertions as true. R. 4:46-2(b).

Again, neither the court nor the parties could locate any published case law in New Jersey or outside this jurisdiction that is directly on point with respect to the application of an insurance policy exclusion for a "condominium project." The court finds the decision of the Second Circuit Court of Appeals in Ment Bros. inapplicable to the matter at bar since that case did not involve the phrase "condominium project" but instead addressed the term "condominium." The court agrees with Western's position in its letter brief that there was a timing element set forth in the plain language of the insurance policy in the matter before the Ment Bros. Court that is not present here.

Nautilus' arguments to the court as to the use of the phrase "condominium project" in certain New Jersey statutes do not support its proffered interpretation. The statutory

definition of "project" as set forth in the Long Term Tax Exemption Law, cited by Nautilus includes, among other things, an "undertaking." N.J.S.A. § 40A:20-3. The full definition of "project" in that statute specifically describes a discrete redevelopment plan as further defined by the statute and, therefore, is of limited value here. Nevertheless, the court finds that the language describing the project as an "undertaking" supports Western's interpretation, and not that advanced by Nautilus.

The Court finds that the statutory language in N.J.S.A. § 46:8B-37 does not provide any guidance as to the issue at bar, as the statute refers specifically to ancillary amenities located in a "condominium project" without discussing "condominium project" in a manner that defines the phrase. As Western argues, the statute refers to completed amenities within an incomplete condominium project. Thus, "condominium project" remains an undefined phrase for the purposes of that Act, and is of little aid to this court on the issue before it.

Since no statute or published case defines the phrase "condominium project" for the purpose of this motion, the court finds it should rely on the plain meaning of the word "project" as defined by the dictionaries cited supra. Sealed Air Corp. v. Royal Indem. Co., 404 N.J. Super. 363, 379 (App. Div. 2008). Those definitions demonstrate that the plain meaning of

"project" is "a specific plan or design," or "a planned undertaking," or "[a]n individual or collaborative enterprise that is carefully planned to achieve a particular aim." See Merriam-Webster and Oxford, supra. Thus, the court finds that the plain meaning of "condominium project" is a specific plan, design, or undertaking to achieve the goal or result of a condominium which is defined in the subject insurance policy exclusion as "individual units [] located within one or more buildings or structures, the common area of which is owned in undivided interests, while the individual units are owned as separate interests."

By way of summary, the plain language of the phrase "condominium project" includes the construction of a building for which the goal of the undertaking is to create a condominium. The temporal component in the subject exclusion is encompassed in the use of the term "project" which is an uncompleted undertaking with a certain goal which, in this case, is a condominium.

The court notes that Nautilus' sur-reply does not address the definition of the term "project" in any respect, but asserts only its previous position, that "condominium" must be defined as an entity created under N.J.S.A. § 46:8B-1, which requires the filing of a master deed, and that the court can come to no other conclusion. However, if the court were to define

"condominium" as Nautilus insists, the court must still give meaning to the word in the exclusion that follows "condominium," which is "project." Taken together, even if the court defines "condominium" as "an entity created under N.J.S.A. §46:8B-1," a "condominium project" would still be "an undertaking or plan" to create such an entity. Thus, accepting Nautilus' interpretation of "condominium" as applicable, the court finds the exclusion applicable since the construction was in furtherance of an undisputed plan to create a condominium.

The court recognizes that Western bears the burden of bringing the claim within the exclusionary language. Hurley, supra, 166 N.J. at 274. However, the court finds that Western has carried its burden by way of its arguments regarding the plain language of the exclusion. The court finds no ambiguity in the phrase "condominium project" based upon its plain meaning and will thus enforce the exclusion as written. Mem'l Props., LLC v. Zurich Am. Ins. Co., 210 N.J. 512, 525 (2012). As the Supreme Court of New Jersey has held, a "genuine ambiguity arises only where the phrasing of the policy is so confusing that the average policyholder cannot make out the boundaries of coverage." Hurley, supra, 166 N.J. at 274 (internal quotation omitted). Since the plain meaning of "project" is clear, the court finds that "condominium project" is unambiguous and not confusing to the average policyholder, such that a policyholder,

like Amana, should understand that coverage in this case would exclude any work performed on a project where a building was being constructed as a condominium.

For purposes of completeness, the court will address Western's argument that Amana had no reasonable expectation that its work would not fall under the exclusion. In this vein, Western argues that the exclusionary language was prominently displayed in every policy Western issued from Amana and the "reasonable expectations" doctrine is meant to guard the insured against misleading terms and conditions within contracts. The Supreme Court of New Jersey has recognized that "if an insured's 'reasonable expectations' contravene the plain meaning of a policy, even its plain meaning can be overcome." Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165, 175 (1992) (citing Werner Indus. v. First State Ins. Co., 112 N.J. 30, 35-36 (1988)). However, in this case Nautilus has not disputed any of the facts set forth by Western as to the responses to the questions on the insurance coverage applications it completed nor has Nautilus proffered any argument whatsoever that it had a reasonable expectation of coverage as to the project based upon the undisputed facts in the record despite the plain language of the exclusion. Since Nautilus has not even argued that Amana had a reasonable expectation of coverage despite the exclusion in the policy, the court shall not alter its analysis finding that the

exclusion bars Nautilus' claim based upon the plain language of the insurance policy.

Finally, Nautilus' argument that Western's interpretation is contrary to public policy is without merit. Nautilus attempts to analogize the immediate circumstance to a separate statutory regime that has no bearing on this matter. It argues that pursuant to the requirements of mandatory insurance for contractors, it would be against public policy for Western to deny coverage to its insured, because the contractor is obligated under law to maintain such coverage. However, there has been no case law or statute provided to the court requiring that an insurance company is obligated to provide coverage without exclusion. The obligation of maintaining insurance is on the contractor who must ensure that it has procured coverage for the job that it is undertaking. Thus, the court does not find that the exclusion in Western's insurance policy violates public policy.

Conclusion

For the reasons set forth above, Defendant Western World Insurance Company's motion for summary judgment is GRANTED based upon the plain language of the exclusion for "condominium projects" contained in the subject insurance policy. Nautilus Insurance Company's cross-motion for declaratory relief seeking a determination that the exclusion is not applicable is DENIED.