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COMCAST OF GARDEN STATE, LP	:	SUPERIOR COURT OF NEW JERSEY
	:	LAW DIVISION / CAMDEN COUNTY
Plaintiff,	:	
v.	:	DOCKET NO. CAM-L-0925-16
	:	
THE HANOVER INSURANCE COMPANY, And JNET COMMUNICATIONS, LLC t/d/b/a VITEL COMMUNICATIONS, LLC	:	*Civil Action*
	:	**OPINION**
Defendants.	:	

Decided: October 27, 2017

Michael J. Quinn, Esquire, Counsel for Plaintiff, Comcast of Garden State, LP

Seth A. Abrams, Esquire, Counsel for Defendants, The Hanover Insurance Company and JNET Communications, LLC t/d/b/a Vitel Communications, LLC

STEVEN J. POLANSKY, J.S.C.

INTRODUCTION

On September 1, 2017, the Court heard cross-motions for summary judgment filed by the parties in this matter. The Court granted the motion for summary judgment of plaintiff, Comcast of Garden State ("Comcast"), and denied the cross-motion for summary judgment of defendant, Hanover Insurance Company ("Hanover").[1] Defendant Hanover now moves for reconsideration of the decision declaring that the Hanover Insurance policy provided insurance coverage to Comcast as an additional insured under the policy of insurance issued to JNET Communications, LLC ("JNET").

[1] The Court also granted summary judgment in favor of defendant JNET Communications LLC d/b/a Vitel Communications. That portion of the Court's Order is not at issue in the motion for reconsideration.

BACKGROUND

Richard and Linda Endres filed suit against Comcast and JNET under Docket No. L- 3309-14, asserting that Richard Endres sustained injuries as a result of tripping over a temporary cable installed by JNET. The temporary cable was orange in color and laid on the ground. Comcast thereafter was to have a new cable buried. Comcast in the interim went to the property to confirm that the existing underground cable required replacement. Before the underground cable could be replaced, plaintiff tripped over the above ground cable laying on the ground, sustaining injuries.

The underlying case filed by plaintiffs Endres resulted with a jury finding both JNET and Comcast liable to the plaintiffs. JNET was determined to be 40% responsible for the accident and Comcast was determined to be 60% responsible. The jury awarded damages in the amount of $359,017.51.

This action involves a claim by Comcast seeking to be covered as an additional insured under a policy of insurance issued by Hanover for the judgment in favor of Endres. JNET purchased a policy of insurance from Hanover effective for the period April 22, 2012 to April 22, 2013 bearing Policy No. LHN 8774861 01. The policy contained a "special broadening endorsement" which modified the definition of "who is an insured" as follows:

> This endorsement amends coverages provided under the Commercial General Liability Coverage Form through new coverages, higher limits and broader coverage grants.
>
> 1. Additional Insured by Contract, Agreement or Permit
>
>   Under Section II – Who is An Insured, Paragraph 5. is added as follows:

5.a. Any person or organization with whom you agreed, because of a written contract, written agreement or permit to provide insurance, is an insured, but only with respect to:

(1) "Your work" for the additional insured(s) at the location designated in the contract, agreement or permit; or

(2) Premises you own, rent, lease or occupy.

This insurance applies on a primary basis if that is required by the written contract, written agreement or permit.

The term "your work" is defined in the policy on Form CG 00 01 (Edition 12/07) which reads as follows:

22. "Your work".

a. Means:

(1) Work or operations performed by you or on your behalf; and

(2) Materials, parts or equipment furnished in connection with such work or operations.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work", and

(2) The providing of or failure to provide warnings or instructions.

The special broadening endorsement does not modify the definition of "your work".

A factual dispute exists regarding the correct contract under which JNET performed work for Comcast. Contracts entered into on August 1, 2003 and on May 6, 2012 both were in effect at the time work was performed by JNET. While a factual dispute exists with respect to which contract was applicable to the work performed, the parties do not dispute that both contracts would constitute "insured contracts" under the terms of the insurance policy.

CONTENTIONS OF THE PARTIES

Hanover asserts that the special broadening endorsement contained in its policy of insurance is a proprietary endorsement drafted by Hanover which differs from the standard broad form endorsement utilized by many insurers and approved through the Insurance Services Office (ISO). Hanover argues that while the ISO forms utilize the language "arising out of", the Hanover form limits coverage to liability resulting from the work of its insured, JNET. Hanover equates this language to limiting additional insured coverage to only protect against Comcast's vicarious liability for the conduct of JNET. They assert that Comcast is not entitled to coverage as an additional insured with respect to any work performed by Comcast or for Comcast's own negligence.

Comcast responds that the Hanover policy should be read broadly to provide coverage to Comcast as an additional insured. More specifically, Comcast asserts that the cable was placed at the property by JNET, and that the plaintiff's fall involved the cable which was put in place by JNET, the Hanover insured. Comcast argues that the Hanover policy is not limited to Comcast's vicarious liability for the conduct of JNET, but rather provides much broader coverage for liability which resulted from the work of JNET irrespective of whether Comcast was found to be independently negligent.

ANALYSIS

A motion for reconsideration pursuant to Rule 4:49-2 should be granted only in those cases where "(1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or (2) it is obvious that the Court either did not consider, or failed to appreciate, the significance of probative, competence evidence." Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996) (citing D'Atria v. D'Atria, 242 N.J. Super. 374, 401-02 (Ch. Div. 1990)). Reconsideration is a matter within the sound discretion of the court, to be exercised in the interest of justice. Johnson v. Cyklop Strapping Corp., 220 N.J. Super. 250, 257 (App. Div. 1987), certif. den. 110 N.J. 196 (1988).

Policies of insurance are interpreted in favor of the insured and against the insurer. Salem Group v. Oliver, 128 N.J. 1, 4 (1992). The court must enforce the clear and unambiguous terms of the policy of insurance. Erdo v. Torcon Construction Company, 275 N.J. Super. 117, 120 (App. Div. 1994). Words utilized in the insurance policy are interpreted in accordance with their plain and ordinary meaning. Voorhees v. Preferred Mutual Insurance Company, 128 N.J. 165, 175 (1992).

The test for determining whether an ambiguity exists is whether the phrasing of the policy of insurance is sufficiently confusing such that the average policyholder cannot make out the boundaries of coverage. Nunn v. Franklin Mutual Insurance Company, 274 N.J. Super. 543, 548 (App. Div. 1994); Ryan v. State Health Benefits Commission, 260 N.J. Super. 359, 363 (App. Div. 1992). A disagreement between the insurer and the insured concerning interpretation of the language of an insurance policy does not alone create an ambiguity. Aviation Charters, Inc. v. Avemco Insurance Co., 335 N.J. Super. 591, 594 (App. Div. 2000), affirmed as modified 170 N.J. 76 (2000). A policy of insurance is ambiguous only where reasonably intelligent

persons would differ regarding its meaning. Where the policy language will support two interpretations, only one of which will support a finding of coverage, the court will choose the interpretation favoring the insured and find that coverage exists. Meier v. New Jersey Life Insurance Co., 101 N.J. 597, 612-13 (1986); Meeker Sharkey Associates, Inc. v. National Union Fire Insurance Company of Pittsburgh, 208 N.J. Super. 354, 358 (App. Div. 1986).

Additional insured endorsements generally provide that coverage of the additional insured is afforded for bodily injury and property damage "with respect to" or "arising out of" the named insured's work or operations. This qualifying language is not controversial when the additional insured's liability is vicarious or derivative of the named insured's liability. The question here is whether this qualifying language affords coverage to the additional insured for the additional insured's independent fault which creates liability by combining with the fault of the named insured.

New Jersey courts have broadly interpreted the "with respect to" and "arising out of" language in additional insured endorsements. In Franklin Mutual Insurance Company v. Security Indemnity Insurance Company, 275 N.J. Super. 335 (App. Div. 1994), certif. den. 139 N.J. 185 (1994), Franklin Mutual insured the landlord/owner of the premises where a third party was injured. Security Indemnity Insurance Company provided coverage to a tenant which operated a luncheonette. A third party was injured on steps outside of the luncheonette. This area was controlled and maintained by the landlord. The additional insured endorsement in the tenant's insurance policy provided that the landlord was an additional insured, and contained both phrases "with respect to" and "arising out of" in the insuring provision. The additional insured endorsement read as follows:

> It is agreed that the "Persons Insured" provision is amended to include as an insured the person or organization designated below, but only with respect to liability arising out of the ownership, maintenance or use of that part of the premises designated below leased to the named insured….

275 N.J. Super. at 338-39.

Security Indemnity argued that it was not required to provide coverage because the accident occurred on exterior steps which were not part of the premises leased to its insured. The court held that there only need to be a "substantial nexus" between the occurrence and the use of the leased premises for there to be coverage under the additional insured endorsement. Id. at 341. The court held that it was not necessary that the accident occur on the leased premises, explaining:

> While the accident did not occur precisely within that part of the premises leased to Jury Box, we do not interpret or construe the endorsement to provide coverage only where the occurrence takes place within the leased premises. In our view, the accident arose out of the use of premises leased to Jury Box in the broadest and most comprehensive sense, and was therefore within the coverage provided to Law building Associates by the Security policy.

Ibid.

The Appellate Division thereafter held in Harrah's Atlantic City, Inc. v. Harleysville Insurance Company, 288 N.J. Super. 152 (App. Div. 1996) that the sole negligence of the additional insured was covered by operation of the "arising out of" language. In the Harrah's case, the injured claimants had parked in Harrah's parking lot. They had lunch in Harrah's and then shopped at a store called "Talk of the Walk". After the claimants finished shopping, they walked back through Harrah's hotel and outside to the sidewalk. As they began to cross the road to reach Harrah's parking lot, the claimants were injured when struck by a vehicle driven by a Harrah's employee.

The Harrah's court explained the Franklin Mutual decision as follows:

> By using the "arising out of…" phrase, the insurer in Franklin necessarily understood that it was providing coverage to the landlord against accidents occurring outside of the leased premises. Id. at 341, 646 A.2d 443. It is also clear that by wording the endorsement as it did, the insurer did not make coverage contingent on whether the tenant had any liability for the accident. Therefore the finding of the liability against the tenant in Franklin was not a factor in determining the scope of the lessor's coverage.

288 N.J. Super. at 157-158.

The court reasoned that the landlord, through the additional insured endorsement, protects itself against the risk of liability generated by the tenant's business. The actual location of the accident has no bearing on whether the additional insured endorsement provides coverage.

Carriers and the ISO responded to adverse court decisions that extended additional insured coverage to third-parties for their own negligence by adding limiting language to additional insured endorsements, precluding coverage for the sole negligence of the additional insured. Most proprietary additional insured coverage forms, as well as the more recent ISO forms, retain coverage afforded to additional insureds for joint negligence. The ISO revisions accomplished this by limiting additional insured coverage to liability "caused in whole or in part" by the named insured's negligence. The Hanover policy contains no such limitation.

The primary difference between the ISO endorsement and the Hanover endorsement is that the Hanover policy provides coverage to the additional insured for liability "with respect to…your work for the additional insured". Under the ISO form, coverage is provided for liability "with respect to liability caused in whole or in part…by your work." The court is of the opinion that this is a distinction without difference in meaning as applied to the facts of the present case.

The focus of Hanover in the motion for reconsideration is on the difference between the language "with respect to" and the language "arising out of". Reported decisions have not differentiated between these two phrases, and many policies combine these phrases. The Harrah's court in finding a substantial nexus existed between the tenant's presence on Harrah's property and the accident outside explained 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 be truly said that the accident originated from or grew out of the use of the leased premises. Harrah's Atlantic City, Inc. v. Harleysville Insurance Company, 288 N.J. Super. at 158-59. Here Comcast can trace the risk creating liability to the cable placed by JNET.

While Hanover argues that the phrase "with respect to" is much more restrictive than the phrase "arising out of", this is not supported by the language of the insurance policy. The term "with respect to" has been defined as meaning "with reference to" or "as regards". Oxford Dictionary, https:\\en.oxforddictionaries.com\definition\us\with_respect_to (last visited October 20, 2017). Hanover in its reply brief at page two contends that the phrase "with respect to" means "with reference to" or "in relation to". These terms suggest that there must be some causal relationship or nexus between the work performed by the Hanover insured and the accident for which Comcast seeks coverage. A causal relationship or nexus exists where the accident was a natural and reasonable incident or consequence of the work performed by the Hanover insured, JNET. Here, JNET's work was the placement of a cable on the ground to temporarily provide cable service. This cable was the work defined by the additional insured endorsement. The underlying claimant sustained an injury as a result of the cable placed by JNET. This creates the required nexus or causal relationship between JNET's work and the accident which was the

subject of the underlying suit. Accordingly, the underlying incident falls within the coverage afforded by the additional insured endorsement.

Hanover asserts that its additional insured endorsement limits the coverage afforded to Comcast's vicarious liability for the conduct of JNET. Many courts have concluded that the language requiring that the liability of the additional insured result "in whole or in part" from the conduct of the named insured precludes coverage where the additional insured is solely liable for the accident. Nothing in the language of the Hanover additional insured endorsement remotely suggests an intent to narrow coverage for additional insureds to vicarious liability for the conduct of the named insured, or to make coverage contingent upon the named insured also being found liable. The court concludes that the phrase with respect to your work without further limitation provides broader coverage since the term only requires some relation to the named insured's work for there to be coverage for the additional insured. Here the fall involved a cable placed by the Hanover insured. Placement of the cable was the work performed by the Hanover insured, JNET. Therefore, the subsequent injury sustained by the plaintiff involves a claim with respect to the work of JNET for Comcast, the additional insured. This clearly and unambiguously falls within the coverage as written by Hanover. If Hanover wanted to limit coverage to Comcast's vicarious liability for the conduct of JNET, it should have utilized language clearly stating this intent. See Capital City Real Estate, LLC v. Certain Underwriters at Lloyds, London, 788 F.3d, 375, 380 (4th Cir. 2015); McIntosh v. Scottsdale Insurance Company, 992 F.2d 251, 255 (10th Cir. 1993). Hanover failed to utilize language in its policy which could reasonably be interpreted to limit coverage for an additional insured to its vicarious liability for the conduct of the named insured.

CONCLUSION

The court concludes that additional insured coverage "with respect to…your work" provides extremely broad coverage that only requires some causal relationship or nexus between the named insured's work and the liability of the additional insured to trigger coverage. The Hanover policy language is clear and unambiguous. Such a causal relationship or nexus exists here. Nothing in the language contained in the Hanover additional insured provision supports the argument that Hanover's responsibility is limited to vicarious liability for acts of the named insured when viewing the plain and ordinary meaning of the language utilized by Hanover. Hanover's policy language is extremely broad, potentially providing additional insured coverage even where the named insured has no liability for the underlying event.

The underlying accident resulted from a fall allegedly caused by a cable placed by the Hanover insured, JNET. Placement of the cable was the work performed by the Hanover insured. This clearly and unambiguously falls within the additional insured coverage under the Hanover policy. Having failed to limit its responsibility to Comcast's vicarious liability for the conduct of JNET, Hanover's motion for reconsideration is DENIED.