SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2907-15T3

313 JEFFERSON TRUST, LLC,

Plaintiff-Respondent/
Cross-Appellant,

v.

MERCER INSURANCE COMPANIES, d/b/a UNITED FIRE GROUP, d/b/a MERCER INSURANCE COMPANY, d/b/a MERCER INSURANCE COMPANY OF NEW JERSEY, INC., d/b/a FRANKLIN INSURANCE COMPANY,

Defendants-Appellants/
Cross-Respondents,

and

TRICOMITIS, INC., d/b/a EL GRECO HOME IMPROVEMENT,

Third-Party Defendants.

Submitted May 31, 2017 – Decided January 8, 2018

Before Judges Messano, Suter and Grall.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-4908-14.

Stolz & Associates, LLC, attorneys for appellants/cross-respondents (J. Elliott Stolz, on the brief).

Tesser & Cohen, attorneys for respondent/ cross-appellant (Stephen Winkles and Matthew Lakind, on the brief).

The opinion of the court was delivered by

SUTER, J.A.D.

Defendant Mercer Insurance Company of New Jersey Inc. (Mercer) appeals orders that denied its motion to declare it not liable for a final default judgment (default judgment) entered in 2013 against its insured, third-party defendant Tricomitis, Inc. (Tricomitis) following a proof hearing. The default judgment was for $685,899.99 plus $10,503.96 in pre-judgment interest. It was entered based on a separate lawsuit, in which Mercer was not a party, in favor of plaintiff 313 Jefferson Trust, LLC (Jefferson Trust). That lawsuit involved claims for damages arising from a construction project where Tricomitis was the contractor for Jefferson Trust.

In 2014, Jefferson Trust sued Mercer under Mercer's comprehensive general liability insurance (CGL) policy that named Tricomitis as Mercer's insured. A July 10, 2015 order denied Mercer's motion to dismiss Jefferson Trust's lawsuit. A February 19, 2016 order denied in part and granted in part Mercer's summary judgment motion. That order allowed Jefferson Trust's claims for

consequential damages[1] under the CGL policy but not its claims for nonconsequential damages, finding that those types of damages were not covered claims under the policy. Mercer appeals both orders, claiming that Jefferson Trust did not have standing to sue based on the default judgment or under the policy of insurance and that it had no duty to defend or indemnify Tricomitis.

Jefferson Trust cross-appeals another order also entered on February 19, 2016, that granted in part and denied in part Jefferson Trust's cross-motion for summary judgment, by limiting its claim against Mercer to consequential damages.

Both parties appeal the February 29, 2016 Order for Final Judgment, which entered judgment in favor of Jefferson Trust against Mercer for $505,046.40. Tricomitis has not participated in this appeal. We affirm the July 10, 2015 order, and reverse and remand both orders entered on February 19, 2016 and the judgment entered on February 29, 2016.

I.

In May 2009, Jefferson, as the owner, and Tricomitis, as the contractor, signed a standard form agreement (A1A form contract) for the demolition and construction of a building located at 313-

[1] The order listed these as professional fees, consulting fees, delay damages, and cost to complete, plus interest going back to September 13, 2013.

315 First Street in Hoboken. The contract called for demolition of the building and masonry, excavation of the area, and construction consisting of block work, concrete work and framing. The historic façade of the building was to remain intact. The contract required Tricomitis to purchase and maintain insurance, including liability insurance, with certain policy limits.

On February 11, 2009, Mercer issued a "Special Contractors Policy" to Tricomitis effective until February 11, 2010. The policy was purchased though a broker, in the limits as required by the contract with Jefferson Trust. An ACORD certificate of insurance was issued that identified Mercer as the insurer, Tricomitis as the insured, and Jefferson Trust as a "certificate holder" under the policy. The policy with endorsements set forth the scope of the coverage, exclusions, and exceptions.

In the course of the project, Jefferson Trust claimed Tricomitis did not comply with their contract because, among other deficiencies, the concrete slab that was poured had voids, lacked essential rebar, and was uneven. Tricomitis stopped work and Jefferson Trust stopped payment.

In February 2011, Tricomitis filed a lawsuit in Superior Court against Jefferson Trust for breach of contract. Jefferson Trust filed an answer and a counterclaim against Tricomitis alleging defective workmanship and sought damages. Jefferson

Trust obtained a default against Tricomitis.[2] Mercer was not a party to that case.

In letters dated December 28, 2011 and February 22, 2012, Mercer denied Tricomitis a defense or indemnification under the policy, claiming that the complaint alleged alter ego and fraudulent misrepresentation claims, and that it demanded compensatory and punitive damages. Mercer cited to provisions of its policy in concluding the "allegations and demands do not involve 'bodily injury['] or 'property damage'" under the policy. Also, the claim [did] not arise out of an 'occurrence' but rather, [from] intentional actions."[3] In the December 2011 letter, Mercer specifically advised,

> Based on the above noted insuring agreement, exclusions and definitions, it is the Company's position that the liability coverage included with this policy does not apply to the claims presented by 313 Jefferson, LLC as these allegations and demands do not involve 'bodily injury['] or 'property damage.' Also, the claim does not arise out of an 'occurrence' but, rather, intentional actions. Inasmuch as the liability coverage included with the policy does not apply to the allegations made by 313 Jefferson Trust, LLC in their Third-Party Complaint, we must respectfully deny liability coverage for these particular claims.

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[2] The record does not explain the basis for the entry of default.

[3] Mercer contends that Jefferson Trust was provided notice of the denial, but this is disputed.

> Therefore, the Company will provide neither defense nor indemnification for these claims and will not participate in any settlement or pay any award, verdict, or judgment rendered against Tricomitis Inc. (t/a El Greco Home Improvement and/or Nickolos Polemis, aka Nick Polemis) in connection with this matter.

On July 9, 2013, a proof hearing was held before a Superior Court judge during which Jefferson Trust provided evidence of the nature and extent of damages suffered as a result of the defective construction work by Tricomitis. The judge found there were problems that "went to the essence of the structural soundness of the building." There were air pockets, or vacuums within the wall. The walls were not flush or plum. There was rebar that was missing. Based on "core drillings," it was determined that "the concrete was not pitched properly, and the engineer opined that the -- the way the concrete was presently constituted, it could not support the structure because the slab was absolutely unable to support a three-story building that was intended to be placed above it." Tricomitis did not complete the work that was due under the contract.

In addition, the judge found that Tricomitis had been given "the opportunity to cure the things." She found that Jefferson Trust incurred costs to remediate, which also included additional professional fees by engineers and architects, as well as consulting and management fees. The court disallowed any claim

for legal fees because there was no provision for attorney's fees in the underlying contract. The court allowed delay costs, which included interest charges by the bank, taxes, and sewer and water costs for the twenty-five weeks of delay. The cost of all the repairs, including the additional professional fees, but without attorney's fees was $685,899.99 "as a result of the defendants' breach of the contract, to perform in a workmanlike manner." A final default judgment was entered on September 13, 2013, for $685,899.99 plus prejudgment interest of $10,503.95.

In November 2014, Jefferson Trust sued Mercer in the Superior Court under Tricomitis's policy, claiming that Mercer was on notice as early as November 15, 2011, about Tricomitis's negligence and that it had "wrongfully denied" coverage to Jefferson Trust for its covered claims which now were reduced to judgment. It alleged bad faith by Mercer and that it was an additional insured under the policy. Jefferson Trust sought a judgment for the final default judgment amount plus "consequential and punitive damages," penalties and interest. Mercer denied liability.[4]

[4] Mercer's answer included a third party complaint against Tricomitis, seeking a declaratory judgment that Tricomitis "failed to defend the claims and thus violated the terms and conditions of the Mercer policy including but not limited to 'duties after a loss,'" which constituted a separate basis to deny coverage. These claims were not pursued on appeal.

Mercer's motion to dismiss this complaint was denied on July 10, 2015. The judge found that because Jefferson Trust demonstrated "exceptional diligence" in seeking to recover on the judgment, and the judgment against Tricomitis was returned as unsatisfied, this "trigger[ed] . . . the entitlement under N.J.S.A. 17:28-2"[5] for Jefferson Trust to proceed against Mercer, resulting in the denial of its motion for summary judgment.[6]

Jefferson Trust and Mercer filed motions for summary judgment, seeking a declaration of their rights under the Mercer

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[5] N.J.S.A. 17:28-2 provides in relevant part:

> No policy of insurance against loss or damage resulting from accident to or injury suffered by an . . . other person and for which the person insured is liable . . . shall be issued . . . in this state . . . unless there is contained within the policy a provision that the insolvency . . . of the person insured shall not release the insurance carrier from the payment of damages for injury sustained or loss occasioned . . . , and stating that in case execution against the insured is returned unsatisfied in an action brought by the injured person . . . because of the insolvency . . . , then an action may be maintained by the injured person . . . under the terms of the policy for the amount of the judgment in the action not exceeding the amount of the policy.

[6] The court also denied Jefferson Trust's cross-motion for summary judgment. Jefferson Trust has not appealed this order.

policy for the default judgment that had been entered against Tricomitis. In ruling on these motions on February 19, 2016, the trial court held that Mercer did not waive its ability to defend this action by having not intervened in the proof hearing because there was no requirement that Mercer intervene. However, the trial court found that the final default judgment was binding on Mercer. Although Mercer's and Tricomitis's positions about the duty to defend and to indemnify were "wildly divergent," they had "like-minded concerns about limiting the damages." Had Mercer or Tricomitis "chosen to participate, [they] could have and would have been in the same position attempting to limit the amount of damages."[7] Mercer was bound by the findings from the proof hearing because the proof hearing was contested.

The trial court granted in part and denied in part both motions. In relying on the Court's decision in Weedo v. Stone-E-Brick, Inc., 81 N.J. 233 (1979), the trial court noted that the CGL policy in that case included liability coverage for an "occurrence." However, "the exclusion applie[d] to negate coverage for suits against contractors for breach of contract and faulty workmanship where the damages claimed [were] the cause of

[7] In fact, Tricomitis was represented by counsel at the proof hearing. Nick Polemis participated, as well, who described himself as "an employee with Tricomitis in charge of this job."

correcting the work itself." The trial court referred to our decision in Cypress Point Condo. Ass'n v. Adria Towers, LLC, 441 N.J. Super. 369 (App. Div. 2015), but at that time, although certification had been granted, the Supreme Court had not yet decided the case. See Cypress Point Condo Ass'n v. Adria Towers, LLC, 226 N.J. 403 (2016). The trial court found that our decision "reaffirm[ed]" the "distinction between consequential damages claims and workmanship claims or remediation claims."

The trial court found that the judge who heard the proof hearing made "detailed findings and annotations" when she entered the default judgment against Tricomitis. However, some of those damages were for "consequential damages," but others, "while she included them in her judgment, would fall outside the coverage of this policy."

The court held that Mercer was liable under the policy to Jefferson Trust for "consequential damages" that the court defined as including $22,119.10 in "professional fees from the engineer and others that would not have been incurred had the work been performed properly and the job proceeded as contracted for." Also included were $49,375 and $125,000 in consulting and management fees because they were related to the breach and proximately stemmed from it. The court included six months of mortgage interest, sewer charges and property taxes, totaling $102,028.16.

Also included were the costs for completing the job, which the court found to be $171,471.94. This was calculated as the difference between the gross amount that Jefferson Trust paid, $685,899.99, and the amount it would have had to pay to Tricomitis, $514,428.05. The court added this amount ($171,471.94) to the other amounts for a total of $469,994.20 in consequential damages. Prejudgment interest brought the total to $505,046.40. The court granted Mercer's motion for summary judgment on all non-consequential claims, which was the difference between $469,994.20 and the amount of the default judgment.

On appeal, Mercer contends that the court erred by not dismissing the complaint in July 2015, because Jefferson Trust had not obtained a final judgment against Tricomitis. Without this, Jefferson Trust lacked standing, did not satisfy N.J.S.A. 17:28-2, and was barred from litigation by the policy's "no action" clause. The default judgment "was not a legal substitute for adjudication on the insured's liability for damages."

Mercer appeals the February 19 and 29, 2016 orders, alleging that the claims against Tricomitis were not covered under the policy as property damage or as an occurrence. The claims should have been excluded as faulty workmanship claims. Mercer also contends that Jefferson Trust was not an additional insured under the policy.

In the cross-appeal by Jefferson Trust, it argues that Mercer's policy covered all of the damages that were set forth in the default judgment and that the court erred by not awarding the full amount to Jefferson Trust. It also contends it should have been awarded attorney's fees as a successful claimant on a liability insurance policy, citing Rule 4:49-2(a)(6).

II.

We review a trial court order granting or denying summary judgment under the same standard employed by the motion judge. Globe Motor Co. v. Iqdalev, 225 N.J. 469, 479 (2016). The question is whether the evidence, when viewed in a light most favorable to the non-moving party, raises genuinely disputed issues of fact sufficient to warrant resolution by the trier of fact, or whether the evidence is so one-sided that one party must prevail as a matter of law. See Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016); see also Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). We review issues of law de novo and accord no deference to the trial judge's legal conclusions. Nicholas v. Mynster, 213 N.J. 463, 478 (2013).

Whether Jefferson Trust is entitled to payment from Mercer for Tricomitis's defective workmanship is a legal question involving application of the insurance policy's language. We apply

the plain language of the policy. "[W]hen 'the language of a contract is plain and capable of legal construction, the language alone must determine the agreement's force and effect.'" Cypress Point, 226 N.J. at 415 (quoting Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 118 (2014)).

A.

Mercer covered Tricomitis under a standard CGL policy.[8] Typically, "[a] CGL policy 'protects business owners against liability to third-parties.'" Cypress Point, 226 N.J. at 416 (quoting 3 Jeffrey E. Thomas, New Appleman on Insurance, Law Library Edition § 16.02[3][a][i], LexisNexis (2015)). The policy provided broad coverage for liability. Specifically, in Section IIA — Main Liability Coverage, the policy provided:

> COVERAGE E — LIABILITY TO OTHERS
>
> A. We pay for the benefit of insureds, up to the applicable limit(s) of liability (See Part II D) shown in the Declarations, those sums that insureds become legally liable to pay as damages because of bodily injury or property damage insured in this policy.
>
> Such bodily injury or property damage must:

[8] Mercer's brief quoted from provisions of its policy and then failed to cite to the specific page numbers in its appendix where those provisions could be located. It appears the citations are to its Commercial Umbrella Liability Form, located in its appendix. Jefferson Trust cited to the Special Contractors Policy also in Mercer's appendix. We rely on the Special Contractors Policy because Mercer's denial of coverage letter dated December 28, 2011 quoted verbatim from that policy form.

1. Be caused by an occurrence that takes place within the applicable coverage territory: See Common Conditions.

The terms "property damage" and "occurrence" are defined terms in the policy. Property damage is defined, in relevant part, as "direct physical injury to tangible property, including loss of use of such property (the loss of use is deemed to occur at the time of such direct physical injury)," or, "[l]oss of use of tangible property that is not physically injured . . . at the time of the occurrence causing the loss," both of which are "caused by a covered occurrence[.]" Similar to the policy in Cypress Point, the definition of property damage in Mercer's policy is not limited to property owned by a third party and does not specifically exclude property where the insured has performed work. Cypress Point, 226 N.J. at 421.

The only tangible property involved here[9] was constructed after the demotion of the existing building by Tricomitis. It built a concrete slab that lacked essential rebar. Instead of removing that, Jefferson Trust "shored-up" the slab with a steel frame and then constructed a three-story building on top of that as it and planned. When these summary judgment motions were heard, the construction was completed. However, there were no findings

[9] No one disputes that the historical facade was not damaged.

made by the trial court that tangible property was directly injured or if not physically injured, that the property suffered a loss of use. Rather, the trial court relied on findings from the proof hearing that were in the nature of contract damages incurred by Jefferson and did not make a finding that there was property damage under the insurance policy.

The liability provisions of the Mercer policy required that there must be "property damage" that was "caused by an occurrence that takes place within the applicable coverage territory; [and] occur[red] during the policy term; and [p]rior to the policy term, no insured . . . knew that the . . . property damage had occurred in whole or in part." The term "occurrence" is defined in the policy as meaning "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

Claims of poor workmanship under the 1986 CGL policy form were in issue in Cypress Point, 226 N.J. at 403.[10] There, after

[10] In Weedo, 81 N.J. at 233, where a contractor was sued based on its faulty workmanship in applying stucco on one house and installing roofing and gutters on another, the insurer conceded "that but for the exclusions in the policy, coverage would obtain." Id. at 237-38, n.2. Weedo involved the 1973 version of the policy which is different from the 1986 policy form at issue here. In Fireman's Ins. Co. of Newark v. Nat'l Union Fire Ins. Co., 387 N.J. Super. 434, 448 (App. Div. 2006), where the issue involved the replacement of faulty constructed firewalls, we observed "the majority rule is that faulty workmanship does not constitute an "occurrence. The 1973 policy form also was in issue in that case.

construction was completed, condominium owners experienced roof leaks and water infiltration allegedly from faulty workmanship by subcontractors during construction of the units. The Association claimed "consequential damages" to steel supports and sheet rock from the defective construction. The insurers denied coverage to the developer, arguing on summary judgment that "they were not liable because the subcontractors' faulty workmanship did not constitute an 'occurrence' that caused 'property damage' as defined by the policies." Id. at 411.

The Court noted that the term occurrence has been interpreted to "encompass unanticipated damage to nondefective property resulting from poor workmanship." Id. at 423 (citing Greystone Constr. v. Nat'l Fire & Marine Ins. Co., 661 F.3d 1272, 1282-83 (10th Cir. 2011)). In the Cypress Point policy, an occurrence was an "accident" which the Court found "encompasses unintended and unexpected harm caused by negligent conduct." It held that "consequential harm caused by negligent work is an 'accident.'" Id. at 427-28. The Court held that water damage to the completed and nondefective portions of Cypress Point was an accident that was the result of the subcontractors' faulty workmanship and therefore met the definition of an occurrence.

Here, although there may have been unintended or unexpected expenses because of the contractor's poor workmanship, there was

no finding by the trial court that there was harm to any completed, nondefective portions of a building as was the case in Cypress Point. We do not read Cypress Point so broadly as to define occurrence without some damage to nondefective property. By focusing on consequential damage, the trial court did not determine whether there was an occurrence under the policy.

Mercer contends that even if Jefferson Trust's claims of property damage are from an occurrence, they are excluded under the "your work" exclusion. Exclusions are "limitations on coverage . . . whose function it is to restrict and shape the coverage otherwise afforded." Weedo, 81 N.J. at 237. Jefferson Trust counters, claiming that there are two exceptions to that exclusion, which when applied, provide coverage for the full amount of its claims, not just the consequential damages found by the trial court.

Starting with the exclusion, the Mercer policy provided for a "Your Work" exclusion under "Part IIC – Liability Not Insured" that reads:

> 3. BUSINESS ACTIVITIES/BUSINESS RISK EXCLUSIONS
>
> B. We do not insure any property damage to your products or your work caused, to any extent, by your products or your work or any part of such.

This is the type of business risk exclusion referenced in Weedo, namely "the risk that the contractor's work may be faulty and may breach express and implied warranties." Fireman's, 387 N.J. Super. at 442. In Weedo, the Court held that "CGL policies did not indemnify insureds "where the damages claimed are the cost of correcting the [alleged defective] work itself." Weedo, 81 N.J. at 235. Under the exclusion here, Mercer did not insure any property damage to "your work" caused, "to any extent, by . . . your work or any part of such." By itself, this clause would exclude coverage for any property damage attributable to Tricomitis's work.

The "your work" exclusion has two exceptions that Jefferson Trust contends "narrows" the exclusion and requires coverage by Mercer. The policy reads:

> This Exclusion does not apply to your work if:
>
> 1. The work has not, at the time of the damage, been abandoned or completed; or
>
> 2. The damaged work, or work out of which the damage arises, was performed on your behalf by a subcontractor.

Cypress Point involved application of the second exception that pertains to subcontractors. That provision was not part of the 1973 CGL policy form when Weedo was decided; it was added in the 1986 version. The Court held in Cypress Point that this

exception required the insurer to provide coverage. "Thus, the Association's claims of consequential damages caused by the subcontractors' faulty workmanship are covered not only by the insuring agreements' initial grant of coverage but also by the subcontractors exception to the 'your work exclusion.'" Cypress Point, 226 N.J. at 431.

Here, no subcontractors were named as defendants in any of the lawsuits. Mercer appears to concede, however, that Tricomitis used subcontractors at least in part. If so, then the subcontractors' defective work and the harms caused by it would not be excluded from coverage under the Mercer policy. However, the record is not clear what work was done by Tricomitis and what was done by subcontractors. Proper application of the exception requires clarification of these facts.

Cypress Point makes reference to but did not involve application of the other exception to the exclusion for your work. That exception was for "work [that] has not, at the time of the damage, been abandoned or completed." Here, the construction contract was not completed by Tricomitis. The court appears to have fixed the time of the damage to Jefferson Trust as May 9, 2009, because, the court found that Jefferson Trust was damaged within the effective dates of the Mercer policy. Although the record is not clear whether its work was abandoned prior to this,

the exception references work that was not abandoned or completed, meaning that either would be an exception to the exclusion.[11]

The trial court focused on consequential and non-consequential damages, without analyzing the liability coverage, exclusions or exceptions under the Mercer policy. The analysis required consideration of these provisions. Then, in determining the amount of the consequential damages, the court's analysis started with the default judgment ($685,899.99), which was the amount incurred to remediate the workmanship. The court then determined the cost of completing the job. This figure ($171,471.94) was the difference between the default judgment and what Jefferson Trust would have had to pay Tricomitis on the contract. The court included this amount as part of the consequential damages even though it was for remediation.

We remand the case for the court to analyze the facts consistent with Mercer's policy language and to determine whether there was property damage which was attributable to the "unintended and unexpected harm caused by the negligent conduct." Id. at 427. The court is to determine the work on the project that was conducted by Tricomitis's subcontractors or not completed at the

[11] "[T]he word 'or' in a statute is to be considered a disjunctive particle indicating an alternative." In re Estate of Fisher, 443 N.J. Super 180, 192 (2015) (citing State v. Kress, 105 N.J. Super. 514, 520 (Law Div. 1969)).

time of the damage, all of which is necessary in applying exceptions under the Mercer policy.

B.

As part of the remand, the trial court is to ascertain whether Jefferson Trust is entitled to attorney's fees. Although typically "litigants . . . bear the cost of their own legal representation," Occhifinto v. Olivo Constr. Co. LLC, 221 N.J. 443, 449 (2015), counsel fees can be awarded where authorized by statute, rule or contract. Here, the judge who heard the proof hearing denied fees in entering the final default judgment, holding that they were not part of the policy. It did not consider Rule 4:42-9(a)(6) which allows fees "[i]n an action upon a liability or indemnity policy of insurance, in favor of a successful claimant." The court erred in denying fees without consideration of this Rule.

In Occhifinto, the Court observed that a party "who 'obtain[s] a favorable adjudication on the merits on a coverage question as the result of the expenditure of [counsel] fees,'" is a successful claimant under Rule 4:42-9(a)(6). Id. at 451 (alterations in original) (quoting Transamerica Ins. Co. v. Nat'l Roofing, Inc., 108 N.J. 59, 63 (1987)). This can include a "third party beneficiary of a liability insurance policy [who] litigates a coverage question against a defendant's insurance carrier." Id. at 451. In light of this, Jefferson Trust may be entitled to

attorney's fees and it was error to simply reject the claim without consideration of the Rule.

C.

Mercer contends that Jefferson Trust was not an additional insured under the Mercer policy. The certificate of insurance form referenced Jefferson Trust, stating that "[t]he following party is herby (sic) added as an ADDITIONAL INSURED, for general liability coverage with respect to work being performed by our insured." Under an endorsement to the policy, to receive the additional coverage there must be "a written contract of agreement to add as an additional insured in this policy." The Acord certificate was issued for "information [purposes] only" by the broker. By its terms, it did "not amend, extend or alter the coverage afforded by the policies below." In the absence of a written contract adding Jefferson Trust as an additional insured, as required by the endorsement, Jefferson Trust was not an additional insured under the policy. See Wells v. Wilbur B. Driver Co., 121 N.J. Super. 185 (Law Div. 1972) (asserting a certificate of insurance is not a policy or contract of insurance and does not create a contractual relationship between the insurer and certificate holder).

D.

Mercer contends the court erred in 2015 by not granting its motion to dismiss Jefferson Trust's complaint. We review the challenged order that denied Mercer's motion to dismiss the complaint de novo, applying the same legal standard as the trial court. Donato v. Moldow, 374 N.J. Super. 475, 483 (App. Div. 2005). A motion to dismiss a complaint for failure to state a cause of action under Rule 4:6-2(e) must be denied if, giving plaintiff the benefit of all his or her allegations and all favorable inferences, a cause of action has been made out. Burg v. State, 147 N.J. Super. 316, 319-20 (App. Div. 1977). We review the complaint "in depth and with liberality." Printing Mart-Morristown v. Sharp Elecs. Corp. 116 N.J. 739, 746 (1989).

Mercer contends that Jefferson Trust could not maintain a direct action against it because it was not a named insured under the policy, because it lacked standing and because the policy did not cover claims that were based on judgments entered from a proof hearing. We find no merit in any of these arguments. The policy provided:

> ACTION OF SUIT AGAINST US, PART II
>
> No action may be brought against us until all conditions here are complied with, and until the amount of the insured's obligation (payable under this policy) has been

> determined by judgment in trial or by agreement made with our written consent.
>
> No right exists here for you or others to make us party to an action against any insured.

Here, the final judgment against Tricomitis was determined following a "contested" proof hearing.[12] That judgment satisfied the policy's language of a judgment determined in trial. See Vaccaro v. Pa. Nat'l Mut. Cas. Ins. Co., 349 N.J. Super. 133, 143-44 (App. Div. 2002) (observing that "An uncontested proof hearing that fixes damages is not the equivalent of an adjudication of damages so as to invalidate the contractual arbitration clause. To bind the [insurance] carrier, there must be notice to the carrier and an adversarial proceeding that determines damages.").

There was no requirement that the judgment be returned unsatisfied before proceeding against Mercer. See Clement v. Atl. Cas. Ins. Co., 25 N.J. Super. 96, 102-03 (Law Div. 1953) (finding under a similar "action or suit against us clause," there was no condition precedent requirement that the judgment against the insured first be returned as unsatisfied). The judge then found that plaintiff engaged in "exceptional diligence in seeking to recover the sums due" from Tricomitis, a company that is insolvent.

[12] Tricomitis was represented by counsel at the proof hearing. Also present was Nick Polemis, a third party defendant, who was an employee of Tricomitis in charge of the job. Both cross-examined the sole witness called by Jefferson Trust.

We find no error by the judge in denying Mercer's motion to dismiss Jefferson Trust's lawsuit in light of the facts here.

After carefully reviewing the record and the applicable legal principles, we conclude that the parties' further arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed in part; reversed in part and remanded. We do not retain jurisdiction.