NOT TO BE PUBLISHED WITHOUT THE APPROVAL
OF THE COMMITTEE ON OPINIONS

LOUIS VELEZ and MIRNA VELEZ,

Plaintiffs,

v.

ANGEL CONSULTING, LLC, AR MANAGEMENT COMPANY, JOSEPH J. BALZAMO, DEBBIE SABILLON, THE HIGHLAND ESTATES CONDOCMINIUM ASSOCIATION, INC., TERESA RUSSANO, BONNIE FAIR, ALEX CORREA AND DANIEL WARNER,

Defendants,

AND

AR MANAGEMENT COMPANY,

Third Party Plaintiffs,

v.

MACKOUL RISK SOLUTIONS, MERRIMACK MUTUAL FIRE INSURANCE CO., FRANKLIN MUTUAL INSURANCE, JOHN DOES 1-10, ABC CORP. 1-10,

Third Party Defendants,

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – BERGEN COUNTY

DOCKET NO. **BER-L-8280-19**

Civil Action

OPINION

Argued: **August 6, 2021**
Decided: **August 10, 2021**

HONORABLE ROBERT C. WILSON, J.S.C.

Fernando Iamurri, Esq., appearing on behalf of Third-Party Plaintiff/ Defendant AR Management Company (from Fernando Iamurri, P.C.)

Stephen R. Katzman, Esq., appearing on behalf of Third-Party Defendant Merrimack Mutual Fire Insurance Company (from Methfessel & Werbel)

PROCEDURAL HISTORY & FACTUAL BACKGROUND

THE FACTS OF THIS CASE arise out of a fire that damaged several units in a building, including Unit 7, owned by Plaintiffs Louis & Mirna Velez. The Velez Plaintiffs initiated this action against the Highland Estates Condominium Association ("Association"); several board members of the Association; AR Management Company ("AR Management"), the Association's property management company; Angel Consulting LLC, the general contractor for the restoration to the fire-damaged units and common elements; Joseph Balzamo and Debbie Sabillon, principals of AR Management and Angel Consulting; and Daniel Warner, Angel Consulting's subcontractor.

Plaintiffs bring claims based on faulty workmanship and incomplete work regarding the repairs by contractor Angel Consulting and its subcontractors, and issues concerning the relationship between Angel Consulting and the Association's Management Company AR Management which are both owned by Joseph Balzamo. The latter claims involve allegation of self-dealing, conflicts of interest and mismanagement of the fire damages insurance proceeds paid by the Association's insurer, Third-Party Defendant Merrimack Mutual Fire Insurance Company ("Merrimack").

Indemnification and defenses were sought from Merrimack and Merrimack ultimately denied liability coverage as to the Association, AR Management, and Joseph Balzamo but agreed to defend the individually named board members, Defendants Teresa Russano, Bonnie Fair, and Alex Correa. The Trustees were defended pursuant to a Directors & Officers Liability Endorsement ("D&O Endorsement"), which affords coverage for "Wrongful Acts" committed by an "Insured." The term "Wrongful Act" is defined as "any negligent act, any error, omission

or breach of duty of Directors or Officers of the 'Named Insured' while acting in their capacity as such." The term "Insured" is defined as:

> all Directors and Officers of the "Named Insured", and committee members and employees acting on behalf of the Directors and Officers with respect to claims for which the "Named Insured" may be obligated to indemnify its Directors and Officers. The word "Insured" shall also include persons, their estates, guardians, or legal representatives who are no longer Directors and Officers of the "Named Insured" or committee members and employees acting on behalf of the Directors and Officers at the time of discovery of a "Wrongful Act" giving rise to a claim hereunder, but who were at the time when the "Wrongful Act" upon which a claim is based was committed.

The term "Named Insured" is defined as "the organization named in the Declarations of this coverage part," i.e., the Association. The Association's policy also contains a Businessowners Liability Coverage Form, BP ("BP Form"). Liability coverage for the Velez Complaint was denied as to AR Management, as well as the Association and Trustees, under the BP Form.

AR Management filed a Third-Party Complaint against Merrimack seeking an order declaring that Merrimack must indemnify AR Management for the claims in the Velez Complaint, and reforming the policy to specifically include coverage for AR Management for the claims made in the Velez Complaint. Merrimack now moves for Summary Judgment against Third-Party Plaintiff AR Management as to the liability coverage for any of the allegations asserted against AR Management in the Velez Complaint.

For the reasons set forth below, Third-Party Defendant Merrimack Mutual Fire Insurance Company's Motion for Summary Judgment is **GRANTED**.

SUMMARY JUDGMENT STANDARD

The New Jersey procedural rules state that a court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the

affidavits, if any, 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 v. Guardian Life Insurance Co., the Supreme Court set forth a standard for courts to apply when determining whether a genuine issue of material fact exists that requires a case to proceed to trial. 142 N.J. 520 (1995). Justice Coleman, writing for the Court, explained that a motion for summary judgment under R. 4:46-2 requires essentially the same analysis as in the case of a directed verdict based on R. 4:37-2(b) or R. 4:40-1, or a judgment notwithstanding the verdict under R. 4:40-2. Id. at 535-536. If, after analyzing the evidence in the light most favorable to the non-moving party, the motion court determines that "there exists a single unavoidable resolution of the alleged dispute of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of R. 4:46-2." Id. at 540.

RULES OF LAW AND DECISION

Merrimack's motion for Summary Judgment must be granted because there is no issue of genuine material fact, the language of the BP Form and D&O Endorsement do not provide coverage to AR Management, and the remedy of reformation is inapplicable.

I. The BP Form and D&O Endorsement do not Provide Coverage to AR Management or the Association

Under the BP form there is no coverage for breach of fiduciary duty. Breach of fiduciary duty is not an "occurrence," like an accident causing property damage, under this general liability insurance. Breach of fiduciary duty is not covered like negligence or other tort liability claims. Under the D&O Endorsement, breach of fiduciary duty is covered. Under the D&O Endorsement coverage is not triggered by an occurrence, but rather by a "wrongful act" that causes damage. A wrongful act is defined as "any negligent act, any error, omission or breach of duty of Directors or Officers of the 'named insured' while acting in their capacity as such."

AR Management does not meet the definition of an "Insured" under the D&O Endorsement, which is defined as "all Directors and Officers of the 'Named Insured', and committee members and employees acting on behalf of the Directors and Officers with respect to claims for which the 'Named Insured' may be obligated to indemnify its Directors and Officers." The D&O Endorsement only covers the individual directors and officers of the Association and employees acting on their behalf. AR Management is not an individual, nor a director, officer, trustee or employee of any of the trustees, of the Association.

All of the damages as alleged in the Velez Complaint constitute either pure economic losses, and thus do not meet the definition of "property damage," or are excluded under one or more of the various faulty workmanship exclusions. Costs associated with repairing faulty workmanship, as well as resulting losses such as diminution in value, are not covered. See Weedo v. Stone-E-Brick, 81 N.J. 233 (1979). It is only when the faulty workmanship proximately causes a separate (and otherwise covered) occurrence that damages something other than the faulty work product itself that coverage is triggered. Id.

Here, the Velez Complaint does not allege any separate consequential occurrences, but rather simply poor workmanship or work that was never completed. This is precisely the type of "business risk" that is not covered by general liability insurance. See Weedo, 81 N.J. at 239. All the Velez Plaintiffs' alleged damages are comprised of the costs of repairing faulty or incomplete workmanship and/or economic losses. There is no coverage under the BP Form.

Lastly, coverage for Count VIII, alleging common law fraud is barred from coverage. Claims of intentional fraud are necessarily excluded as the intent to induce reliance constitutes a subjective intent to injure. See SL Indus., Inc. v. Am. Motorists Ins. Co., 128 N.J. 188, 212 (1992).

II. There is No Basis to Reform the Policy as No Mutual Mistake was Made, and Merrimack did not Engage in Fraud or Unconscionable Conduct

The Third-Party Complaint of AR Management also seeks to reform the Merrimack policy. However, it asserts no proper basis to do so. A mistake could not be shown, and if there was a mistake it was unilateral on the part of AR Management and not accompanied by fraud or other unconscionable conduct by Merrimack. The extraordinary remedy of reformation is available only "where there is a mutual mistake or where a mistake on the part of one party is accompanied by fraud or other unconscionable conduct of the other party." Heake v. Atlantic Cas. Ins. Co., 15 N.J. 475, 481-82 (1954) (citations omitted). Reformation predicated upon mutual mistake requires that both parties are in agreement at the time they attempt to reduce their understanding to writing, and that the writing fails to express that understanding correctly. See St. Pius X House of Retreats, Salvatorian Fathers v. Diocese of Camden, 88 N.J. 571, 579 (1982). Also, the party seeking reformation must present "clear and convincing proof that the contract in its reformed, and not original, form is the one that the contracting parties understood and meant it to be." Cent. State Bank v. Hudik-Ross Co., 164 N.J. Super. 317, 323 (App. Div. 1978) (citations omitted). Reformation is an equitable remedy which typically seeks to correct a "scrivener's error," or a mistake in the policy.

No such mutual mistake was made here. AR Management fails to point to any actual mistake, and instead seems to be making a reasonable expectations argument that the coverage afforded under the Merrimack policy did not meet AR Management's own subjective expectation of coverage. It is well settled that "reasonable expectations doctrine" only applies in the context of a commercial policy if there is a facial ambiguity in the policy. See Oxford Realty Grp. Cedar v. Travelers Excess & Surplus Lines Co., 229 N.J. 196, 208 (2017). AR Management shows no such ambiguity, and none exists. Absent a showing of unilateral mistake

caused by fraud, which is not the case here, a lack of understanding of basic policy terms and basic insurance coverage concepts on the part of AR Management is not fraud on Merrimack's part. The remedy of reformation is inapplicable under these facts.

CONCLUSION

For the aforementioned reasons, Third-Party Defendant Merrimack Mutual Fire Insurance Company's Motion for Summary Judgment is **GRANTED**.