SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3442-20

JOHN FITZPATRICK and
COLLEEN FITZPATRICK,

Plaintiffs-Appellants,

v.

ORADELL ANIMAL HOSPITAL, INC., JOSEPH HELPERN, ADVANCED VETERINARY TECHNOLOGIES, INC., JEREMY HOGAN, ANIMAL SCAN, INC., WARREN RADIOLOGY MRI, LLC, JAMES J. STUPPINO, HARTFORD FIRE INSURANCE COMPANY, MEHL ELECTRIC CO., AGILENT TECHNOLOGIES, INC., FENNER & ESLER AGENCY, INC., FENNER-ESLER INSURANCE, and H. LOUIS ESLER, JR.,

Defendants,

and

CNA INSURANCE COMPANIES,

Defendant-Respondent.

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Argued October 11, 2022 – Decided November 1, 2022

Before Judges Mayer, Enright and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-2936-16.

Bruce H. Stern argued the cause for appellants (Stark & Stark PC, attorneys; Bruce H. Stern, of counsel and on the briefs).

Melissa A. Cornibe argued the cause for respondent (CNA Coverage Litigation Group, attorneys; Melissa A. Cornibe, of counsel and on the brief).

PER CURIAM

Plaintiffs John Fitzpatrick and Colleen Fitzpatrick[1] appeal from a June 17, 2021 order granting summary judgment in favor of defendant Continental Casualty Company (Continental).[2] We affirm.

Plaintiff sustained injuries on March 6, 2015, when a magnetic resonance imaging (MRI) machine installed at defendant Oradell Animal Hospital (Oradell) exploded.

[1] Colleen Fitzpatrick asserted a per quod claim seeking damages for injuries suffered by her husband. We use the term plaintiff to refer solely to John Fitzpatrick.

[2] Improperly pleaded as CNA Insurance Companies.

Oradell leased the MRI machine from defendant Advanced Veterinary Technologies, Inc. (AVT). On December 17, 2022, Oradell and AVT signed an agreement to lease the MRI machine (lease agreement), with a five-year renewal option, beginning on April 1, 2004. Oradell had an option to exercise four lease renewals.

The lease agreement required AVT to install the MRI machine at Oradell's facility. At the end of the term, the lease agreement provided "AVT shall de-install, inspect, test, pack, remove and ship the [MRI machine] at AVT's expense." The lease agreement also stated AVT was responsible for "the repair of any damage to [Oradell's premises] on account of the removal of the [MRI machine] . . . ." Additionally, the lease agreement required Oradell to maintain insurance for "loss or theft of, or damage to, the [MRI machine] in the amount of $550,000, naming AVT as an additional insured and a loss payee . . . ."

Oradell complied with this provision by purchasing insurance from Continental. Continental issued a commercial insurance policy (Policy) to Oradell, covering the period September 21, 2014 to September 21, 2015. Under the "Coverages" section of the Policy, Continental agreed to "pay those sums that [Oradell] becomes legally obligated to pay as damages because of 'bodily

injury,' 'property damage' or 'personal and advertising injury' to which this insurance applies."

The Policy defined "insured" to mean "any person or organization qualifying as such under Section C. – Who Is An Insured." AVT was not included on the "Additional Named Insureds Schedule." However, the Policy contained a "Blanket Additional Insured - Liability Extension" section. Under that provision,

> WHO IS AN INSURED is amended to include as an insured any person or organization (called additional insured) described in paragraphs 2.a. through 2.h. below whom you are required to add as an additional insured on this policy under a written contract or agreement but the written contract or agreement must be:
>
> 1. Currently in effect or becoming effective during the term of this policy; and
>
> 2. Executed prior to the 'bodily injury,' 'property damage' or 'personal and advertising injury' . . . .

Subsection 2.h. provided additional insured status to lessors of equipment, stating

> Any person or organization from whom [Oradell] lease[s] equipment. Such person or organization are insureds only with respect to their liability arising out of the maintenance, operation or use by [Oradell] of equipment leased to [Oradell] by such person or organization. A person's or organization's status as an

> insured under this endorsement ends when their written contract or agreement with [Oradell] for such leased equipment ends.

Subsection 2.h. of the Policy contained exclusions to coverage. The exclusions section stated the additional insurance provision did not apply

> (1) To any "occurrence" which takes place after the equipment lease expires; or (2) To "bodily injury," "property damage" or "personal and advertising injury" arising out of the sole negligence of such additional insured.

On February 10, 2009, AVT's president, Joseph A. Helpern, sent a letter to the director of Oradell, Paul Gambardella, proposing a five-year lease extension for the MRI machine, beginning on March 1, 2010. Gambardella agreed to the lease extension, subject to the terms in the lease agreement.

On January 30, 2015, Helpern sent Gambardella an email, enclosing another lease extension for the MRI machine. The proposed lease extension would have extended the lease term for another four months, effective March 1, 2015.

On January 31, 2015, Gambardella responded to Helpern's email, explaining that Oradell would be installing a portable imaging machine provided by another vendor in April 2015. Therefore, Oradell did not want to "pay rent through June" to lease AVT's MRI machine.

At his deposition, Helpern testified the first five-year lease extension commenced on March 1, 2010 and terminated on March 1, 2015. He claimed Oradell "opted to unofficially extend [the lease agreement] beyond the end of that date . . . ." According to Helpern, Oradell realized it did not need another lease extension, and AVT removed the MRI machine "a few days after the termination of the lease." When asked if the lease agreement ended on February 28, 2015 or March 1, 2015, Helpern did not remember "the date that [Oradell and AVT] agreed that the system would be decommissioned."

During his deposition, Gambardella first testified the lease agreement terminated at "[t]he end of February of 2015." Gambardella subsequently agreed that Oradell "unofficially" extended the lease agreement beyond February 28, 2015. However, Gambardella stated there was never any written agreement extending the lease beyond the first written lease extension.

In March 2015, defendant Jeremy Hogan, an AVT engineer, went to Oradell to decommission the MRI machine. Hogan started decommissioning the MRI machine on or about March 3, 2015. According to Hogan, he decommissioned the MRI machine because Helpern told him Oradell did not renew the lease. Hogan never decommissioned an MRI machine while a lease was still in effect.

Hogan further testified there were no Oradell employees in the room when the MRI machine exploded on March 6, 2015. He also stated no Oradell employees were involved in the decommissioning process.

According to Hogan, on the date of the explosion, there were two individuals unaffiliated with AVT in the room where Hogan was decommissioning the MRI machine. Plaintiff had been hired by Oradell to renovate the space for the new portable imaging machine. He was working for Oradell independent of the decommissioning work and in the same room as Hogan on the day of the explosion.

While decommissioning the MRI machine, Hogan testified he "pick[ed] something up off the ground" and was surrounded by a "white cloud of helium." A split second later, the MRI machine exploded. The next thing Hogan remembered was "waking up on the ground." Plaintiff and Hogan suffered injuries from the explosion.

On August 31, 2017, plaintiffs filed a third amended complaint against Oradell, Helpern, AVT, Hogan, and others. On February 22, 2018, Hogan filed a cross-claim against Continental, seeking insurance coverage under the Policy. Continental filed an answer.

After completing discovery, including depositions, Hogan moved for summary judgment, asserting Continental had an obligation to provide him with insurance coverage for plaintiffs' claims. Plaintiffs joined Hogan's motion. Continental opposed Hogan's motion and filed a cross-motion for summary judgment.

The motion judge heard oral argument on November 9, 2018. In an eight-page written decision, the judge found Hogan's "actions did not arise out of Oradell's maintenance, operation or use of the MRI machine," because Hogan was decommissioning the MRI machine on the date of the explosion. Additionally, the judge found "no substantial nexus between the plaintiff's injuries/Hogan's conduct and any negligent maintenance, operation or use of the MRI machine by Oradell." To the contrary, the judge concluded the decommissioning of the MRI machine was "the antithesis of the maintenance, operations and/or use of the MRI."

The motion judge also found "coverage [was] not available based upon the expiration of the first extension of the lease agreement on March 1, 2015" and the lease agreement expired "five days before the date of loss." The judge explained that the clear and unambiguous terms of the Policy provided "[a]

person's or organization's status as an insured under this endorsement ends when their written contract or agreement with [Oradell] for such equipment ends."

Even if there was an unofficial agreement between Oradell and AVT to extend the lease agreement, the judge found any unofficial agreement was "never memorialized in writing." The judge stated "the [P]olicy confirms that an organization['s] status as an insured requires a written contract or agreement as a prerequisite to coverage under the [Continental] [P]olicy." Thus, the judge held there was no coverage available to Hogan under the Policy.

On January 31, 2019, the judge entered an order granting Continental's motion for summary judgment and denying Hogan's motion for summary judgment.

After a proof hearing, the judge entered a June 14, 2021 judgment in favor of plaintiffs and against AVT, awarding damages in the amount of $1,383,555.67 to John Fitzpatrick and $115,296.31 to Colleen Fitzpatrick.

On appeal, plaintiffs contend the judge erred in determining Hogan was not entitled to coverage as an additional insured under the Policy. Plaintiffs claim the lease agreement had not expired as of the date of the explosion. They also assert their claims arose out of Oradell's maintenance, operation, or use of the MRI machine to trigger coverage under the Policy. We disagree.

We review the trial court's grant or denial of a summary judgment motion de novo. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021). A motion for summary judgment must be granted "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).

"To decide whether a genuine issue of material fact exists, the trial court must 'draw[] all legitimate inferences from the facts in favor of the non-moving party.'" Friedman v. Martinez, 242 N.J. 449, 472 (2020) (quoting Globe Motor Co. v. Igdalev, 225 N.J. 469, 480 (2016)). "Summary judgment should be granted, in particular, 'after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" Friedman, 242 N.J. at 472 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)). The key inquiry is whether the evidence presented, when viewed in the light most favorable to the non-moving party, is "sufficient to permit a rational factfinder to resolve the alleged disputed issue in

favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

We reject plaintiffs' argument that Oradell and AVT had a valid contract to extend the lease agreement on the date of the explosion because informal discussions and email exchanges did not constitute a "written agreement." The Policy clearly and unambiguously stated "[a] person's or organization's status as an insured under [the lessor of equipment endorsement] ends when their written contract or agreement . . . ends." (emphasis added).

Contrary to plaintiffs' argument, there is no ambiguity regarding the phrase "written contract or agreement" as used in the Policy. The starting point regarding insurance contract interpretation is the plain meaning of the contractual language. Oxford Realty Grp. Cedar v. Travelers Excess & Surplus Lines Co., 229 N.J. 196, 207 (2017). If the contractual language is clear, "that is the end of the inquiry." Ibid. (quoting Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am., 195 N.J. 231, 238 (2008)). The fact that litigants offer conflicting interpretations of policy language does not render the policy language ambiguous. Fed. Ins. Co. v. Campbell Soup Co., 381 N.J. Super. 190, 195 (App. Div. 2005). "A genuine ambiguity arises only when 'the phrasing of the policy is so confusing that the average policy holder cannot make out the

boundaries of coverage.'" Ibid. (quoting Weedo v. Stone-E-Brick, Inc., 81 N.J. 233, 247 (1979)).

While plaintiffs offer a different interpretation of the phrase "written contract or agreement," courts have routinely interpreted this language to mean "written contract or written agreement." See, e.g., Quincy Mut. Fire Ins. Co. v. Imperium Ins., 636 F. App'x 602, 605 (3d Cir. 2016); Indem. Ins. Co. v. Pac. Clay Prod. Co., 13 Cal. App. 3d 304, 313 (Ct. App. 1970). While these cases are not binding on this court, they provide persuasive reasoning and we are satisfied the "written contract or agreement" language in the Policy plainly and unambiguously refers to a written contract or written agreement. To conclude otherwise would render the word "written" as used in the Policy meaningless.

Moreover, contrary to Helpern's testimony, equipment is only decommissioned upon the expiration of the lease term. As stated in the lease agreement, "[a]t the scheduled conclusion of this [lease], . . . AVT shall de-install, . . . remove, and ship the [MRI machine] . . . ." Under the express terms of the lease agreement, the lease must terminate before decommissioning begins.

Notwithstanding the parties' differing recollections regarding an unofficial extension of the lease agreement for the MRI machine, the representatives of AVT and Oradell both testified the extension was not in

writing as mandated under the Policy. Further, Hogan testified he was informed Oradell did not renew the lease agreement and he was sent to decommission the MRI machine based on the termination of the lease agreement.

Because it is undisputed the first lease agreement extension ended on March 1, 2015, and the alleged second lease agreement extension was never memorialized in writing, Hogan failed to demonstrate he was entitled to insurance coverage and the motion judge properly granted summary judgment to Continental.

We also reject plaintiffs' argument that there was a nexus between plaintiff's injuries and Oradell's operation, maintenance, or use of the MRI machine. According to plaintiffs, decommissioning was a necessary part of Oradell's use of the MRI machine.

In support of this argument, plaintiffs rely on cases with different contract provisions than the provision in the lease agreement. Here, the language in the lease agreement provided additional insured coverage only for liability "arising out of the maintenance, operation or use by [Oradell] of equipment leased to [Oradell] . . . ." (emphasis added). At the time of the explosion, Oradell was not using the MRI machine for its business. It is undisputed that no Oradell employee touched the MRI machine for at least two days prior to the explosion.

Nor do we agree the decommissioning of the MRI machine constituted Oradell's "use" of the equipment. To accept plaintiffs' argument, we would have to agree any action taken by AVT to commission, decommission, or maintain the MRI machine would constitute use by Oradell. The argument ignores the fact that Oradell did not install, repair, maintain, or remove the MRI machine. Those activities were performed exclusively by AVT in accordance with the lease agreement.

In Penn National Insurance Co. v. Costa, 198 N.J. 229 (2009), our Supreme Court found that to trigger coverage under an automobile insurance policy, the injuries "must arise out of the performance of one of the qualifying criteria - either the 'ownership, maintenance, operation or use of a motor vehicle[.]'" 198 N.J. at 239 - 40 (quoting N.J.S.A. 39:6B–1(a)). The Court held coverage only applies if there is "a substantial nexus between the injury suffered and the asserted negligent maintenance, operation or use of the motor vehicle." Ibid.

For Hogan to be eligible for coverage under the Policy, there had to be a substantial nexus between plaintiffs' injuries and Oradell's maintenance, operation, or use of the MRI machine. Here, the uncontroverted evidence demonstrated no Oradell employee was in the room when the MRI machine

exploded. Nor had any Oradell employees participated in the two-day decommissioning process prior to the explosion. On this record, there is no evidence Oradell maintained, operated, or used the MRI machine after March 4, 2015. Thus, the judge properly granted summary judgment to Continental.

To the extent we have not specifically addressed a particular argument, it is because either our disposition of the appeal renders it unnecessary, or the argument is without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.