SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0619-21

GRAND CRU, LLC d/b/a
RESTAURANT NICHOLAS,

Plaintiff-Appellant,

v.

LIBERTY MUTUAL INSURANCE
COMPANY, LIBERTY MUTUAL
MID-ATLANTIC INSURANCE
COMPANY, and JACOBSON
GOLDFARB & SCOTT INC.,

Defendants,

and

OHIO SECURITY
INSURANCE COMPANY,

Defendant-Respondent.

———————————————————

Argued January 30, 2023 – Decided February 23, 2023

Before Judges Mawla, Smith, and Marczyk.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-1122-20.

Michael M. DiCicco argued the cause for appellant (Maggs, McDermott & DiCicco, LLC, attorneys; Michael M. DiCicco, of counsel and on the briefs; Stephanie L. DeLuca, on the briefs).

Rachel Hager argued the cause for respondent (Finazzo, Cossolini, O'Leary, Meola & Hager, LLC, attorneys; Rachel Hager and Piel A. Lora, on the brief).

PER CURIAM

Plaintiff Grand Cru, LLC, appeals from a September 21, 2021 order granting defendant Ohio Security Insurance Company's (OSI) motion to dismiss. We affirm.

I.

Plaintiff operates a restaurant in New Jersey. It purchased an all-risk insurance policy from defendant for the policy period August 15, 2019 through August 15, 2020. The policy included coverage for business income, extra expense, and loss caused by civil authority. However, the policy only contemplates certain kinds of losses.

The Business Income provision states in pertinent part:

> We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration." The "suspension" must be caused by direct physical loss of or damage to your covered [b]uilding or [b]usiness [p]ersonal [p]roperty at locations which are described

> in the [d]eclarations. The loss or damage must be caused by or result from a Covered Cause of Loss.
>
> [(emphasis added).]

The Extra Expense provision states in pertinent part:

> We will pay the actual and necessary Extra Expense you incur due to direct physical loss of or damage to the property at the locations described in the [d]eclarations . . .
>
> Extra Expense means necessary expenses you incur during the "period of restoration" that you would not have incurred if there had been no direct physical loss or damage to property caused by or resulting from a [c]overed [c]ause of [l]oss
>
> [emphasis added.]

The Civil Authority provision states in pertinent part:

> When a [c]overed [c]ause of [l]oss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:
>
> > (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and
> >
> > (2) The action of civil authority is taken in response to dangerous physical conditions

> resulting from the damage or continuation of the [c]overed [c]ause of [l]oss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

The policy additionally included an Exclusion of Loss Due to Virus or Bacteria Provision:

> We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.

In March 2020, in response to the COVID-19 pandemic, Governor Murphy declared a state of emergency and issued executive orders which suspended non-essential business operations, including restaurants. See Exec. Order No. 103 (Mar. 9, 2020), 52 N.J.R. 549(a) (Apr. 6, 2020); Exec. Order No. 107 (Mar. 21, 2020), 52 N.J.R. 554(a) (Apr. 6, 2020) (hereinafter collectively referred to as the "Executive Orders").

As a result, plaintiff was forced to close their business to the public or had to confine its service to take-out and limit its hours of operation. Plaintiff alleged it suffered a substantial loss of business and income when the Executive Orders were in effect. Plaintiff sought coverage through its insurance policy with defendant. However, defendant declined coverage because it alleged the

policy did not cover the COVID-19 related losses. In addition, defendant alleged coverage was barred by the policy's virus exclusion.

In response, plaintiff brought suit for a declaratory judgment and to compel defendant to provide business interruption and extra expense coverage, as well as coverage under the civil authority provision.[1] Plaintiff also sought a declaration that the policy's virus exclusion did not bar coverage for their losses.

On June 5, 2020, defendant removed this action to federal court. On June 26, 2020, plaintiff sought leave to file a second amended complaint and for remand. On November 25, 2020, the district court remanded the action to the trial court.[2]

Defendant moved to dismiss under Rule 4:6-2(e), arguing the plain language of the policy did not cover the losses at issue. Following argument,

---

[1] On April 3, 2020, plaintiff filed a complaint for declaratory relief against Liberty Mutual Insurance Company ("Liberty Mutual"), Liberty Mutual Mid-Atlantic Insurance Company ("LM Mid-Atlantic"), and OSI in the Superior Court of New Jersey. On June 19, 2020, the claims asserted against Liberty Mutual and LM Mid-Atlantic were voluntarily dismissed without prejudice.

[2] On February 3, 2021, plaintiff filed a second amended complaint to assert claims of negligence and breach of special duty against Jacobson Goldfarb & Scott Inc. ("JGS"), the insurance brokerage firm that secured the policy issued by defendant. On August 2, 2021, plaintiff and JGS entered into a stipulation of dismissal without prejudice as to the claims against JGS.

the trial court granted the motion and dismissed plaintiff's complaint with prejudice, finding there was no direct physical loss of or damage to plaintiff's property, and the virus exclusion applied because the Governor issued the executive orders in response to the COVID-19 virus.

On appeal, plaintiff argues the usage limitations imposed by the executive orders constituted physical loss or damage to the property, and that the policy provides coverage under the civil authority provision. They also contend the virus exclusion does not bar coverage because the Governor's executive orders, not the virus itself, caused the closure. They also argue that even if the virus exclusion did apply, the doctrine of regulatory estoppel bars defendant from asserting it.

II.

Our review of a Rule 4:6-2(e) motion to dismiss for failure to state a claim upon which relief can be granted is de novo. Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157, 171 (2021) (citing Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 108 (2019)). We "must examine 'the legal sufficiency of the facts alleged on the face of the complaint,' giving the plaintiff the benefit of 'every reasonable inference of fact.'" Ibid. (quoting Dimitrakopoulos, 237 N.J. at 107). To determine the adequacy of a

pleading, we must determine "whether a cause of action is 'suggested' by the facts." Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989) (quoting Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988)).

When "interpreting insurance contracts, we first examine the plain language of the policy and, if the terms are clear, they 'are to be given their plain, ordinary meaning.'" Pizzullo v. N.J. Mfrs. Ins. Co., 196 N.J. 251, 270 (2008) (quoting Zacarias v. Allstate Ins. Co., 168 N.J. 590, 595 (2001)). The policy must "be enforced as written when its terms are clear" so the "expectations of the parties will be fulfilled." Flomerfelt v. Cardiello, 202 N.J. 432, 441 (2010).

If an insurance policy is ambiguous, courts will construe the terms in favor of the insured. Mac Prop. Grp. LLC & The Cake Boutique LLC v. Selective Fire & Cas. Ins. Co., 473 N.J. Super. 1, 18 (App. Div. 2022) (quoting Oxford Realty Grp. Cedar v. Travelers Excess & Surplus Lines Co., 229 N.J. 196, 208 (2017)). This doctrine only applies if there is a genuine ambiguity in the contract, and "the phrasing of the policy is so confusing that the average policyholder cannot make out the boundaries of coverage." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 200 (2016) (quoting Progressive Cas. Ins. Co. v. Hurley, 166 N.J. 260, 274 (2001)).

III.

Plaintiff argues it suffered a covered loss or damage because of the Governor's executive orders mandating business closures during the COVID-19 pandemic. Plaintiff first asserts the trial court erred in granting the motion to dismiss. Plaintiff argues the verbiage "physical loss of or damage to" found in the policy is ambiguous and should be interpreted in favor of coverage under our jurisprudence. We are not persuaded.

Plaintiff's arguments are virtually identical to those of the claimants in Mac Property. In Mac Property, several businesses sought insurance coverage for lost business based on policies, which contained the language "direct physical loss of or damage to covered property" after the Governor's COVID-19 executive orders required non-essential businesses to close. Id. at 12-16. We rejected their theory, holding the term "direct physical loss of or damage to" was "not so confusing that average policyholders . . . could not understand that coverage extended only to instances where the insured property has suffered a detrimental physical alteration . . . or there was a physical loss of the insured property." Id. at 21-22.

While New Jersey has "adopted a broad notion of the term 'physical[,]'" when the word is paired with another term, the resulting phrase means

"'detrimental alteration[],' or 'damage or harm to the physical condition of a thing.'" Id. at 20 (second alteration in original) (quoting Phibro Animal Health Corp. v. Nat'l Union of Fire Ins. Co., 446 N.J. Super. 419, 437-38 (App. Div. 2016)). In Mac Property, we found it significant there was no damage to any of the equipment or property of the businesses. Id. at 23. In addition, we rejected the notion that use of the words "loss" and "damage" required a distinction. Id. at 26. We also found the distinction argued by the claimants in that case to be "irrelevant . . . because the contention 'ignore[d]' the fact that the relevant coverage provisions provided that 'the loss itself must be a "direct physical" loss, clearly requiring a direct, physical deprivation of possession.'" Id. at 26 (alteration in original) (citing Verveine Corp. v. Strathmore Ins. Co., 184 N.E.3d 1266, 1277 (Mass. 2022)).

Here, the disputed policy states:

> We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration." The "suspension" must be caused by direct physical loss of or damage to your covered [b]uilding or [b]usiness [p]ersonal [p]roperty at locations which are described in the [d]eclarations. The loss or damage must be caused by or result from a [c]overed [c]ause of[l]oss.

The above language is similar to the policy language in Mac Property. Plaintiff's policy clearly and unambiguously requires that suspension of a claimant's

business be "caused by direct physical loss of or damage to [the] property." Applying the holding in Mac Property, it follows that the policy should be applied as it is written. We interpret the policy's requirement of physical loss of or damage to property to require "a direct, physical deprivation of possession" of the property. Mac Property, 473 N.J. Super. at 26. The executive orders barred plaintiff from operating its property for its intended purpose at full capacity but did not physically deprive plaintiff from possessing it. In fact, plaintiff was still allowed to service customers using take-out services.

We note plaintiff cites Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co., 311 F.3d 226 (3d Cir. 2002), for the proposition that "New Jersey courts have interpreted the physical loss or damage requirement broadly, holding that the loss of use, loss of access, loss of value, or uninhabitability of property constitutes physical loss or damage." Port Authority substantially predates our decision in Mac Property, and in any event is not controlling.[3]

[3] In Port Authority, the Third Circuit held that an insured which owned a building with "asbestos . . . present in the components of a structure, but . . . not in such form or quantity as to make the [structure] unusable" had not suffered a "loss" under the insured's all risk policy. Port Authority, 311 F.3d. at 236. Only the actual release of the asbestos fibers or the "imminent threat" of such a release could qualify as a "loss" under the all-risk policy. Ibid. The Third Circuit recently affirmed this principle in Wilson v. USI Ins. Serv. LLC, 57 F.4th 13, 138 (3d Cir. 2023). We find in the record no imminent threat of a "release"

Plaintiff also contends the virus exclusion in the policy does not apply because the proximate cause of plaintiff's loss was not COVID-19, but the Governor's executive orders. The Exclusion of Loss Due to Virus or Bacteria Provision in the policy states:

> We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.

We addressed the same proximate cause argument in Mac Property and held the executive orders "were only issued to curb the COVID-19 pandemic, making the virus the efficient proximate cause of plaintiffs' losses." Mac Property, 473 N.J. Super. at 40. We concluded "the [executive orders] were inextricably intertwined with COVID-19" and "[b]ecause plaintiffs' business losses thus were 'caused by or resulted from' [the] COVID-19 virus, their policies' endorsements bar coverage." Ibid. The facts here are virtually identical and we find no reason to deviate from the sound reasoning of Mac Property.

Next, plaintiff argues the policy's virus exclusion violated the doctrine of regulatory estoppel, and the trial court should have barred defendant from

---

which would eliminate or destroy the functionality of plaintiff's property or render it useless or uninhabitable. Id. at 142. The imminent threat posed by COVID-19 has always been to the people that may patronize plaintiff's place of business, not the place of business itself.

invoking the exclusion. Plaintiff contends the insurance industry misrepresented the scope of the exclusion language as it sought approval of the virus exclusion from regulators by claiming the exclusion would not result in a reduction of coverage.

Regulatory estoppel applies when "an insurer makes misrepresentations to a regulatory body regarding the meaning and effect of language it has requested to include in its policies . . . ." Id. at 31. If an insured makes misrepresentations regarding the scope of a particular clause, they "may be prevented from enforcing the otherwise clear and plain meaning of that language against an insured." Ibid. The record here is devoid of any evidence of a false statement or misrepresentation to a regulatory body by defendant regarding the scope of the virus exclusion.

Any arguments raised by plaintiff and not addressed here lack sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.