SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0661-21

HIGHGATE HOTELS, L.P., 6 WEST 32ND STREET LLC, REPUBLIC MIDTOWN HOSPITALITY LLC, REPUBLIC ENTERPRISES LLC, and 17 W 32 STREET OWNER LLC,

Plaintiffs-Appellants,

v.

LIBERTY MUTUAL FIRE INSURANCE COMPANY, ALLIANZ GLOBAL RISKS US INSURANCE COMPANY, AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY, ENDURANCE AMERICAN SPECIALTY INSURANCE COMPANY, ACE AMERICAN INSURANCE COMPANY, THE PRINCETON EXCESS AND SURPLUS LINES INSURANCE COMPANY, QBE SPECIALTY INSURANCE COMPANY, MITSUI SUMITOMO INSURANCE COMPANY OF AMERICA, and HOMELAND

INSURANCE COMPANY OF
NEW YORK,

Defendants-Respondents.

Argued February 27, 2023 – Decided April 24, 2023

Before Judges Mawla and Smith.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-2318-21.

Bruce D. Greenberg argued the cause for appellants (Lite DePalma Greenberg & Afanador, LLC, Carella Byrne Cecchi Olstein Brody & Agnello, PC, Adam J. Gomez (Grant & Eisenhofer, PA) of the California and Pennsylvania Bar, admitted pro hac vice, and Jason D. Meyers (Cohen Ziffer Frenchman & McKenna), attorneys for appellant; Bruce D. Greenberg, James Edward Cecchi, Caroline F. Bartlett, Lindsey H. Taylor, Adam J. Gomez, and Jason D. Meyers, on the briefs).

Elizabeth V. Kniffen (Zelle, LLP) of the Minnesota bar, admitted pro hac vice, argued the cause for respondents QBE Specialty Insurance Company and Homeland Insurance Company of New York (Megan E. Shutte (Zelle, LLP), Jonathan R. MacBride (Zelle, LLP), and Elizabeth V. Kniffen, attorneys; Megan E. Shutte, Jonathan R. MacBride, and Elizabeth V. Kniffen, on the brief).

Brett D. Solberg (DLA Piper, LLP) of the Texas bar, admitted pro hac vice, argued the cause for respondent Allianz Global Risks US Insurance Company (Michael D. Hynes, on the brief).

Rachel Hager, Charles Jesuit (Cozen O'Connor, PC), and Susan M. Kennedy (Wiggin & Dana, LLP) argued the cause for respondents Liberty Mutual Fire Insurance Company, Endurance American Specialty Insurance Company, and American Guarantee and Liability Insurance Company (Finazzo Cossolini O'Leary Meola & Hager, LLC, attorneys; Rachel Hager, Piel A. Lora, Charles Jesuit, and Susan M. Kennedy, on the joint brief).

Matthew I. Gennaro and Casey A. Boyle argued the cause for respondents Princeton Excess, Surplus Lines Insurance Company, and Mitsui Sumitomo Insurance Company of America (Clyde & Co US, LLP, attorneys for The Princeton Excess and Surplus Lines Insurance Company; Riker Danzig Scherer Hyland & Perretti, LLP, attorneys for Mitsui Sumitomo Insurance Company of America; Barbara M. Almeida and Casey A. Boyle, on the joint brief).

Meghan C. Goodwin argued the cause for respondent ACE American Insurance Company (Clyde & Co US, LLP, attorneys, join in the brief of respondent Liberty Mutual Fire Insurance Company; Daren S. McNally, Barbara M. Almeida, and Meghan C. Goodwin, on the brief).

PER CURIAM

Plaintiffs, hotel property owners, appeal from an October 5, 2021 order granting defendants' motion to dismiss plaintiffs' amended complaint under Rule

4:6-2(e).[1] Among other things, plaintiffs contend the trial court erred by applying New York law in deciding the motion, erred in its interpretation of the phrase "direct physical loss or damage" in the master policy coverage provisions, and erred in its interpretation of various exclusion provisions. We conclude the trial court improperly applied the choice of law analysis and that the existence of the COVID-19 virus in the hotel air or on hotel surfaces does not constitute direct physical loss or damage to the premises. We affirm in part and reverse in part.

I.

Plaintiffs, Highgate Hotels, L.P. (Highgate), 6 West 32nd Street LLC, Republic Midtown Hospitality LLC, Republic Enterprises LLC, and 17 W 32 St Owner LLC, own and operate multiple hotels across the country including in

[1] The following defendants were dismissed with prejudice: ACE American Insurance Company (ACE); American Guarantee & Liability Insurance Company (American); Allianz Global Risks US Insurance Company (Allianz); Homeland Insurance Company of New York (Homeland); Mitsui Sumitomo Insurance Company of America (MSI); The Princeton Excess and Surplus Lines Insurance Company (Princeton); QBE Specialty Insurance Company (QBE). In regard to defendants Endurance Specialty Insurance Company (Endurance) and Liberty Mutual Fire Insurance Company (Liberty Mutual) the trial court dismissed Counts X and XI for declaratory judgment and breach of contract without prejudice, and all other counts were dismissed with prejudice.

New York, Illinois, Hawaii, Nevada, Massachusetts, and California.[2] Plaintiffs purchased an all-risk policy from defendants, which is characterized in the record as a "program of commercial property insurance collectively issued by defendant insurers." All defendants agreed to indemnify plaintiffs' losses on a proportional basis, subject to the shared terms and conditions set forth in the Master Policy issued by defendant Liberty Mutual. All defendants, besides Liberty Mutual, provided excess carrier's policies (the Excess Policies) which contained additional terms and exclusions. The policy period was from December 1, 2019 through October 1, 2020.

The Master Policy "insures against all risk of direct physical loss or damage to property." The Master and Excess Policies included coverage terms addressing loss or damage related to real and personal property, business interruption-gross earnings, and extra expense. Each coverage provision required physical loss or damage to the property to trigger coverage.

The Master Policy provided $600 million in coverage. The defendants allocated coverage amongst themselves:

(1) Liberty Mutual- $180 million;

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[2] Highgate Hotels filed the original complaint on April 6, 2021. This appeal considers only the amended complaint, filed June 14, 2021, which incorporates Highgate and the remaining plaintiffs.

(2) Allianz - $90 million;

(3) American - $90 million;

(4) Endurance - $7.5 million;

(5) ACE - $2.5 million;

(6) Princeton - $20 million;

(7) QBE - $120 million;

(8) Homeland - $60 million;

(9) MSI - $60 million.

Anticipating the possibility of disputes between the parties, the Master Policy contained a jurisdiction and suit clause which reads:

> In the event of the failure of the [i]nsurer to pay an amount claimed to be due hereunder, at the direction of the [i]nsured, the [i]nsurer will submit to the jurisdiction of any court of competent jurisdiction within the United States and will comply with all requirements necessary to give such jurisdiction. All matters arising hereunder shall be determined in accordance with the law and practice of such court.

In March of 2020, each of the states where plaintiffs conducted hotel operations issued executive orders requiring the closure of non-essential businesses in response to the COVID-19 pandemic. However, each executive order defined hotels as essential businesses which were permitted to continue operations during the pandemic. Plaintiffs submitted business interruption

claims to defendants alleging COVID-19 related economic losses. Defendants denied coverage in letters to the respective plaintiffs.

On June 14, 2021, plaintiffs filed a joint amended complaint against defendants, asserting claims of declaratory judgement, breach of contract, bad faith breach of contract and the duty of good faith and fair dealing. They sought coverage under several Master Policy provisions, including the business interruption and extra expense, contingent business interruption and extra expense, civil authority, ingress/egress, contagious disease, cancellation of bookings, and attraction properties provisions.

Plaintiffs alleged surfaces and items in their hotel properties were physically altered due to COVID-19 contamination, resulting in physical loss or damage to their properties. In addition, plaintiffs allege the government orders "impaired access to the insured properties" and "as a result, plaintiffs suffered direct physical loss or damage from the 'inability to use the properties insured by the [p]olicy.'"

On July 26, 2021, Liberty Mutual filed a Rule 4:6-2(e) motion to dismiss for failure to state a claim, and all defendants joined. After oral arguments, the trial court granted the motions and made findings. The trial court found: New York law applied; there was no "direct physical loss or damage" to the property,

hence no coverage existed for plaintiffs' claims; and if coverage were to be found, plaintiffs were barred by various exclusion terms. Plaintiffs appealed.

On appeal, plaintiffs argue the trial court erred: applying New York law in deciding the motion; in its interpretation of the term "physical loss or damage" in the Master Policy; in its interpretation of various exclusion terms; and erred by dismissing claims against certain excess insurers.

II.

"Choice-of-law determinations present legal questions, which are subjected to de novo review." Fairfax Fin. Holdings Ltd. v. S.A.C. Cap. Mgmt., L.L.C., 450 N.J. Super. 1, 33 (App. Div. 2017) (citing Bondi v. Citigroup, Inc., 423 N.J. Super. 377, 418 (App. Div. 2011), certif. denied, denied, 210 N.J. 478 (2012)). In addressing these issues on appeal, we owe no special deference to the trial court's interpretation or application of the law. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

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

A Rule 4:6-2(e) dismissal is typically without prejudice, but "a dismissal with prejudice is 'mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted,'" Mac Prop. Grp. LLC v. Selective Fire & Cas. Ins. Co., 473 N.J. Super. 1, 17 (App. Div. 2022) (quoting Rieder v. State, 221 N.J. Super. 547, 552 (App. Div. 1987)), or if "discovery will not give rise to such a claim." Ibid. (quoting Dimitrakopoulos, 237 N.J. at 107).

III.

A. Choice of Law

Plaintiffs argue the policy's "Jurisdiction and Suit" provision requires the application of New Jersey law because the provision requires the insurer to "submit to the jurisdiction" the insured has chosen. Moreover, plaintiffs argue the trial court misapplied the choice of law analysis, which, if applied correctly, would have resulted in a decision on the merits using New Jersey principles.

Our Supreme Court has held the service of suit clause is read as "as a consent to jurisdiction by the insurer and a prohibition against an insurer interfering with a forum initially chosen by the insured." Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am., 195 N.J. 231, 244 (2008). However, the Court declined to find the clause is any "more expansive than that." Ibid. Here, the jurisdiction and suit clause, like in Chubb, is no more than a consent to jurisdiction and does not require the implementation of New Jersey law simply because plaintiffs selected New Jersey as the forum.

When a civil action is brought in this state, New Jersey's choice-of-law jurisprudence determines whether our law or another state's governs. McCarrell v. Hoffman-La Roche, Inc., 227 N.J. 569, 583 (2017) (citing Gantes v. Kason Corp., 145 N.J. 478, 484 (1996)). "The first step in a conflicts analysis is to decide whether there is an actual conflict between the laws of the states with interests in the litigation." Cont'l Ins. Co. v. Honeywell Int'l, Inc., 234 N.J. 23, 46 (2018) (citing P.V. ex rel. T.V. v. Camp Jaycee, 197 N.J. 132, 143 (2008)).

"If there is no actual conflict, then the choice-of-law question is inconsequential, and the forum state applies its own law to resolve the disputed issue." Rowe v. Hoffman-La Roche, Inc., 189 N.J. 615, 621 (2007). "A conflict of law requires a 'substantive difference' between the laws of the interested

states." Cont'l Ins., 234 N.J. at 46 (quoting DeMarco v. Stoddard, 223 N.J. 363, 383 (2015)). "A 'substantive difference' is one that 'is offensive or repugnant to the public policy of this State.'" Ibid. (quoting DeMarco, 223 N.J. at 383). If there is a conflict, the second step requires courts to determine the state with the "most significant connections with[] the issues raised or the parties and the transaction." Lonza, Inc. v. The Hartford Acc. and Indem. Co., 359 N.J. Super. 333, 342 (App. Div. 2003)(citing Veazey v. Doremus, 103 N.J. 244, 247-49 (1986)). .

Here, the trial court did not analyze whether there was a substantive difference between New York and New Jersey's laws, effectively skipping the first step. Instead, the court began its analysis with the second step, concluding "New York has the most significant connection to this dispute and, therefore, New York law applies."

Our review of relevant New York and New Jersey law reveals no conflict in their treatment of what constitutes "physical loss of or damage to" property. New York law states:

> [W]here a policy specifically states that coverage is triggered only where there is "direct physical loss or damage" to the insured property, the policy holder's inability to fully use its premises as intended because of COVID-19, without any actual, discernable, quantifiable change constituting "physical" difference

> to the property from what it was before exposure to the virus, fails to state a cause of action for a covered loss.
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> [Consol. Rest. Operations, Inc. v Westport Ins. Corp., 205 A.D.3d 76, 78 (1st Dept 2022).]

Similarly, New Jersey law states:

> 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 of some kind, or there was a physical loss of the insured property.
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> [Mac Property, 473 N.J. Super. at 22.]

Both states require an actual physical alteration to the structure to trigger coverage. Since there is no fundamental difference in New York and New Jersey's laws regarding the interpretation of the phrase "physical loss or damage to," the choice of law question is "inconsequential," Rowe, 189 N.J. at 621, and we need not reach the "significant connection" analysis. The trial court erred when it engaged in the significant connection inquiry, and it should have applied New Jersey law in deciding defendants' motion to dismiss.

B. Insurance Coverage

On the merits, plaintiffs argue the trial court erred in granting defendants' motions to dismiss. Plaintiffs contend they suffered a covered loss or damage because the COVID-19 virus contaminated their properties.

Plaintiff's arguments are similar to those of the claimants in Mac Property. 473 N.J. Super. at 18. There, 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. 473 N.J. Super. at 12-16. We rejected their theory, holding the term "direct physical loss of or damage to" was not confusing, and instead understandable as applying where there was a physical alteration or 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 declined to adopt 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)).

The presence of the COVID-19 virus in the properties' air and surfaces did not physically alter the physical structure such that it qualifies as a direct physical loss of or damage to the properties. "The mere presence of the virus on surfaces [does] not physically alter the property, nor [does] the existence of airborne particles carrying the virus." Mac Property, 473 N.J. Super. at 24 (quoting Sandy Point Dental, P.C. v. Cincinnati Ins. Co., 20 F.4th 327, 337 (7th Cir. 2021)).

The record is devoid of any evidence pointing to damage to equipment or property on- or off-site that caused plaintiffs to lose their physical capacity to operate, and there was no physical alteration that made the hotels too dangerous to enter. We note that, without exception, the states' executive orders designated hotels as essential business. The essential business designation distinguishes plaintiff hotel owners from the plaintiffs in Mac Property.

Plaintiffs also contend the trial court erred in deciding they were excluded from coverage due to the various exclusion terms in the Master and Excess

Policies.[3] Because plaintiffs' failed to establish direct physical loss or damage to their premises, there was no coverage. Consequently, we need not reach plaintiffs' remaining points on appeal.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION

[3] Plaintiffs contend the exclusions in the Master and Excess Policies either did not apply or were sufficiently ambiguous to survive defendants motion to dismiss. They included: the contamination clause in the Master Policy; the pollution exclusion in Allianz's policy; the biological, chemical, or nuclear exclusion in ACE's policy; the biological hazards exclusion in QBE's policy; and the fungus, wet rot, dry rot, virus and bacteria exclusion in Homeland's policy. Because we find no coverage, we do not reach this question.