SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0919-21

APPEARANCE WORKSHOP, INC.,

Plaintiff-Appellant,

v.

MERCER INSURANCE COMPANY OF NEW JERSEY, INC.,

Defendant-Respondent.

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Submitted October 17, 2022 - Decided January 25, 2023

Before Judges Smith and Marczyk.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-1205-20.

Ferrara Law Group, PC, attorneys for appellant (Ralph P. Ferrara and Kevin J. Kotch, of counsel and on the briefs).

Barry, McTiernan & Wedinger, PC, attorneys for respondent (Anthony W. Guidice, on the brief).

PER CURIAM

Plaintiff Appearance Workshop, Inc., appeals from an October 13, 2021 trial court order granting summary judgment in favor of defendant Mercer Insurance Company of New Jersey. We affirm.

I.

Plaintiff operates a hair salon which was required to close in 2020 during the peak of the COVID-19 pandemic pursuant to Governor Murphy's executive orders. Plaintiff's business remained closed between March 8 and June 22, 2020 and plaintiff alleged "a substantial loss of business and income" as a result. The record shows that while the business was closed, there was no tangible alteration to plaintiff's property as a result of the executive orders.

Plaintiff had an all risk businessowner's insurance policy with defendant. The term of the policy ran from December 27, 2019 through December 27, 2020. The policy included coverage for: business interruptions, business income, extra expenses and loss resulting from civil authority.

Plaintiff made a claim under the policy, but defendant declined coverage because the closures were related to COVID-19, and the policy contained a virus exclusion. Plaintiff brought suit against defendant, including a count for declaratory judgment and a count for breach of contract. Defendant moved for summary judgment, which the court granted.

II.

We review the trial court's grant or denial of summary judgment de novo. Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016). We decide first whether there is a genuine issue of fact. Hocutt v. Minda Supply Co., 464 N.J. Super. 361, 369 (App. Div. 2020) (citing In re Estate of DeFrank, 433 N.J. Super. 258, 265 (App. Div. 2013). If not, we must decide "whether the moving party is entitled to summary judgment as a matter of law." Bhagat v. Bhagat, 217 N.J. 22, 38 (2014) (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)); see also DepoLink Ct. Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013) (we must "decide whether the trial court correctly interpreted the law.") (citation omitted).

Next, the court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill, 142 N.J. at 540; see also R. 4:46-2(c). We then decide "whether the motion judge's application of the law was correct." Atl. Mut. Ins. Co. v. Hillside Bottling Co., 387 N.J. Super. 224, 231 (App. Div. 2006). In doing so, we owe no deference to the motion judge's conclusions on

issues of law, and review those de novo. Ibid. (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

III.

Plaintiff argues it suffered a covered loss or damage because of the Governor's executive orders mandating business closures during COVID-19. Plaintiff first asserts the trial court erred in granting summary judgment because it interpreted the phrases "loss" and "damage" as having identical meanings instead of having separate and distinct meanings. Plaintiff argues that 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 Prop. Grp. LLC v. Selective Fire & Cas. Ins. Co., 473 N.J. Super. 1, 20 (App. Div. 2022). 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) (citing Phibro Animal Health Corp. v. Nat'l Union of Fire Ins. Co., 446 N.J. Super. 419, 437 (App. Div. 2016)). In Mac Property, we found it significant that 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., 489 Mass. 534, 545 (Mass. 2022)).

Here, as in Mac Property, 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 property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss
>
> [(Emphasis added).]

The above policy language is similar to the 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 property." Applying the holding in Mac Property, it is clear the policy should be applied as it is written. The policy's requirement of physical loss of or damage to property should be interpreted 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 but did not physically deprive plaintiff from possessing it. The closure amounts to a "partial loss" but does not rise to the level of a "direct physical loss" as required by the policy. Ibid. (citing Verveine Corp., 489 Mass. at 545). It follows that the closure does not trigger coverage.

Plaintiff next argues inclusion of the phrase "period of restoration" in the policy should not exclude coverage because plaintiff's business did not require any restoration. Plaintiff disagrees with the exclusion's premise, contending it

did experience a restoration period, which ended when the Governor lifted the executive orders mandating closures. Plaintiff cites no precedent to support this notion, and we are not convinced.

Mac Property addresses plaintiff's argument this way:

> The 'period of restoration' [was] defined in the policies as beginning either at the time the physical loss or damage occurred or some number of hours later and ending at the time when business operations resumed at another permanent location, or when the insured premises 'should be repaired, rebuilt or replaced with reasonable speed and similar quality.' This definition clarifies the intended meaning of 'direct physical loss' and 'direct physical damage' as contemplated by the parties in their contract. Finding coverage where there has been no physical damage to property that would require repairs, rebuilding, or replacement would render the 'period of restoration' language in the contracts 'meaningless.'
>
> [Mac Prop., 437 N.J. Super. at 22 (citing Port Murray Diary Co. v. Providence Wash. Ins. Co., 52 N.J. Super. 350, 357 (Ch. Div. 1958) (emphasis added).]

The definition of "period of restoration" in the policy here is virtually identical. The policy defines the "period of restoration" as:

> [t]he period of time that: (1) Begins: (a) 72 hours after the time of direct physical loss or damage for Business Income Coverage; or (b) Immediately after the time of direct physical loss or damage for Extra Expense Coverage; caused by or resulting from any covered Cause of Loss at the described premises; and (2) Ends on the earlier of: (a) The date when the property at the

> described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or (b) The date when business Is resumed at a new permanent location. b. Does not Include any Increased period required due to the enforcement of or compliance with any ordinance or law that: (1) Regulates the construction, use or repair, or requires the tearing down of any property; or (2) Requires any insured or others to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or In any way respond to, or assess the effects of "pollutants."

Because the policy language here is virtually identical in all relevant respects to the policies in Mac Property, we reject plaintiff's argument that the executive orders mandating closure constituted a "period of restoration" for which coverage was owed.

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 virus exclusion in the policy states:

> We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss. These exclusions apply whether or not the loss results in widespread damage or affects a substantial area.
>
> . . . .
>
> (j) Virus or Bacteria

> (1) Any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease
>
> [(Emphasis added).]

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.

Finally, plaintiff argues the policy virus exclusion violated the doctrine of regulatory estoppel, and the trial court should have barred defendant from invoking the exclusion. Plaintiff contends that 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. Plaintiff alleges that the exclusion language has resulted in a substantial reduction in coverage. Because defendant is part of the

insurance industry, plaintiff contends it follows that defendant should be precluded from invoking the virus exclusion. We are not persuaded.

If an insurer makes misrepresentations to a regulatory body, it is "appropriate and compelling" to apply regulatory estoppel to bar enforcement of otherwise clear and plain policy language against the insured. Morton Int'l, Inc. v. Gen. Accident Ins. Co., 134 N.J. 1, 75-76 (1993). To succeed on a regulatory estoppel argument, the plaintiff must be able to point to a misrepresentation made by an insurer or its representative regarding a specific exclusion. Mac Prop., 473 N.J. Super. at 31 (citing Morton Int'l, 134 N.J. at 75-76). Additionally, a plaintiff must demonstrate how the insurer's interpretation of the clause is inconsistent with prior representations made to insurance industry regulators. Id. at 32.

Plaintiff has shown no evidence that defendant has ever taken a position that differs from representations made to regulators. We conclude regulatory estoppel does not apply, and defendant should not be barred from enforcing its virus exclusion.

Affirmed.