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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1407-21

ANTONE'S, A BAR 401, LLC, and D BAR 401, LLC (all d/b/a THE ARK PUB AND EATERY),

Plaintiffs-Appellants,

v.

AMERICAN PROPERTY INSURANCE COMPANY,

Defendant-Respondent.

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Submitted January 17, 2023 — Decided January 24, 2023

Before Judges Mawla and Marczyk.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-0833-20.

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

Litvak & Trifiolis, PC, attorneys for respondent (Thomas W. Griffin, on the brief).

PER CURIAM

Plaintiffs Antone's, A Bar 401, LLC, and D Bar 401, LLC, appeal from a November 29, 2021 order granting defendant American Property Insurance Company summary judgment and dismissing plaintiffs' complaint for declaratory relief with prejudice. We affirm.

Plaintiffs own and operate a restaurant in Point Pleasant. They purchased a business owner's policy from defendant, which included a business income coverage provision and addressed losses created by civil authority. The provision read as follows:

> 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 [b]usiness [i]ncome you sustain and necessary [e]xtra [e]xpense 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 also contained an endorsement excluding losses from viruses, which read:

> EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA
>
> This endorsement modifies insurance provided under the following:
>
> COMMERICAL PROPERTY COVERAGE PART STANDARD PROPERTY POLICY
>
> A. The exclusion set forth in [p]aragraph B. applies to all coverage under all forms and endorsements that comprise this [c]overage [p]art or [p]olicy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.
>
> B. 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.
>
> . . . .
>
> E. The terms of the exclusion in [p]aragraph B., or the inapplicability of this exclusion to a particular loss, do not serve to create coverage for any loss that would otherwise be excluded under this [c]overage [p]art or [p]olicy.

Beginning in March 2020, Governor Murphy declared a state of emergency and issued executive orders which suspended non-essential business

operations, including bars and restaurants, because of the COVID-19 pandemic. See Exec. Order No. 103 (Mar. 9, 2020), 52 N.J.R. 549(a) (Apr. 6, 2020); see also Exec. Order No. 104 (Mar. 16, 2020), 52 N.J.R. 550(a) (Apr. 6, 2020); Exec. Order No. 107 (Mar. 21, 2020), 52 N.J.R. 554(a) (Apr. 6, 2020). As a result, plaintiffs provided take-out services and limited their hours of operation, sustaining business and income losses during the pandemic.

When defendant declined coverage for plaintiffs' losses, plaintiffs brought suit for a declaratory judgment "obligat[ing defendant] to provide business interruption and extra expense coverage under the [p]olicy, including coverage under the [c]ivil [a]uthority provision." Plaintiffs also sought a judgment declaring "[t]he virus exclusion . . . [did] not apply" and "[a]pplication of the virus exclusion . . . [was] void as [a matter of] public policy."

Defendant moved for summary judgment and dismissal of the complaint with prejudice. Following oral argument, the motion judge granted the motion based on the virus exclusion endorsement. The judge concluded the policy was clearly written and the Governor's executive orders did not conflict with or "[n]egate the application of the virus exclusion . . . ."

On appeal, plaintiffs argue the virus exclusion was inapplicable because their losses resulted from the Governor's orders. They claim the virus exclusion

was void because there is no "anti-concurrent" or "anti-sequential" language applicable to the exclusion. Further, defendant was barred from relying on the virus exclusion by regulatory estoppel.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits," show no genuine issue of material fact and "the moving party is entitled to a judgment . . . as a matter of law." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016) (quoting R. 4:46-2(c)). The evidence must be viewed "in the light most favorable to the non-moving party." Mem'l Props., LLC v. Zurich Am. Ins. Co., 210 N.J. 512, 524 (2012).

We review a summary judgment ruling de novo and apply the same legal standard as the trial court. Conley v. Guerrero, 228 N.J. 339, 346 (2017). Where a "decision turns on its construction of a contract, appellate review of that determination is de novo." Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 115 (2014).

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 the insurance policy's terms are ambiguous, courts will ordinarily 'construe . . . ambiguities in favor of the insured via the doctrine of contra proferentem.'" 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)). However, 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, 224 N.J. at 200 (2016) (quoting Progressive Cas. Ins. Co. v. Hurley, 166 N.J. 260, 274 (2001)).

Here, the policy states defendant "will not pay for the loss . . . resulting from any virus . . . ." The virus exclusion endorsement also appears in multiple sections throughout the policy. The policy is unambiguous.

We addressed the arguments raised on this appeal in Mac Property. 473 N.J. Super. at 12-16. There, several plaintiffs sought declaratory judgment enforcing business income and civil authority insurance provisions to cover losses incurred during the pandemic. Ibid. Writing for the court, Judge Sumners

held the losses were not covered as the executive orders "neither prohibited access to plaintiffs' premises nor prevented plaintiff owners from being on their premises, but merely restricted their business activities." Id. at 30.

We likewise conclude the Governor's executive orders were not the proximate cause of plaintiffs' losses. Although plaintiffs had to reconfigure their business hours of operation, provide take-out, and lay-off employees, the proximate cause of these losses was the COVID-19 virus, not the Governor's executive orders. The executive orders imposed restrictions on business activities, but did not prevent plaintiffs from entering and operating their business. Ibid.

"An anti-concurrent causation or anti-sequential causation clause will 'exclude coverage when a prescribed excluded peril, alongside a covered peril, either simultaneously or sequentially, causes damage to the insured.'" N.J. Transit Corp. v. Certain Underwriters at Lloyd's London, 461 N.J. Super. 440, 461 (App. Div. 2019), aff'd, 245 N.J. 104 (2021) (quoting Simonetti v. Selective Ins. Co., 372 N.J. Super. 421, 431 (App. Div. 2004)). Here, the page following the virus exclusion endorsement 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 of the loss." The policy then recites the exclusions, including a section entitled "'Fungus', Wet Rot, Dry Rot [a]nd Bacteria[.]" This section makes no mention of losses sustained from a virus. Thus, the anti-concurrent and anti-sequence clause would not apply.

Mac Property rejected the same argument, holding the executive orders were not the efficient proximate cause of the plaintiffs' losses because they "were only issued to curb the COVID-19 pandemic, making the virus the efficient proximate cause of plaintiffs' losses." 473 N.J. Super. at 40. We reject plaintiffs' arguments for the same reasons.

Finally, 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 regarding the scope of the virus exclusions. This argument lacks sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.
CLERK OF THE APPELLATE DIVISION