SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1968-20

VICTOR ROSARIO, NILDA MALDONADO, JOSE FLORES, and NOEMI FLORES,

Plaintiffs-Appellants,

v.

THE HARTFORD FIRE INSURANCE CO., and THE WESTERN WORLD INSURANCE CO.,

Defendants-Respondents.

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Argued November 1, 2022 – Decided January 4, 2023

Before Judges Gilson, Rose and Gummer.

On appeal from the Superior Court of New Jersey, Law Division, Cumberland County, Docket No. L-0814-18.

Louis Giansante argued the cause for appellants (Giansante & Assoc., LLC, attorneys; Louis Giansante, of counsel and on the briefs).

Michael S. Komar (Menz Bonner Komar & Koenigsberg LLP) of the New York bar, admitted pro

hac vice, argued the cause for respondent The Hartford Insurance Co. (Menz Bonner Komar & Koenigsberg LLP, and Michael S. Komar, attorneys; Michael S. Komar, Patrick D. Bonner, Jr., and Lindsay T. Weibel, on the brief).

Margaret F. Catalano argued the cause for respondent The Western World Insurance Co. (Kennedys CMK LLP, attorneys; Margaret F. Catalano and Suzanne Q. Chamberlin, of counsel and on the brief).

PER CURIAM

In this insurance coverage dispute, plaintiffs appeal from three February 8, 2021 Law Division orders, dismissing their second amended complaint against the defendant insurance carriers on dispositive cross-motions. Having obtained a nearly $2 million judgment against the bankrupt developer of their residential properties – for failing to disclose their homes were built on contaminated properties – plaintiffs sought the proceeds of the comprehensive general liability (CGL) policies issued by the defendant insurance carriers to the developer (underlying action). The motion judge in the present action concluded the pollution exclusion contained in defendants' CGL policies precluded coverage. We agree and affirm.

I.

We summarize the facts, which are undisputed, from the record before the motion judge. We set forth, in some detail, the protracted procedural posture of the underlying action to lend context to the issues raised on appeal.

Plaintiffs Victor Rosario and Nilda Maldonado purchased a single-family home on 4th Street in Vineland from developer Marco Construction and Management, Inc. in February 2006. Five months later, in July 2006, plaintiffs Jose Flores and Noemi Flores purchased from Marco Construction a single-family home on the adjacent lot. Unbeknownst to plaintiffs, before Marco Construction subdivided the lots, they were utilized by the previous owner and co-developer, Stephan Musey, Jr., for commercial purposes that contaminated the property.

Purchased by Musey in 1972, the site was utilized to operate a car dealership, autobody and repair shops, and a gas station. The property was serviced by underground gasoline and waste oil tanks. Automotive fluids and waste oil were discharged into floor drains and the soil. In 1988, the underground storage tanks were removed from the site without proper notice to the authorities. Thereafter, the Department of Environmental Protection (DEP)

directed Musey to conduct a remedial investigation of the property, but it was not completed.

In 2002, prospective purchaser, Carmen A. Trischitta, retained an environmental consultant to assess the property. During the investigation, the assessor discovered the outstanding environmental issues and notified the DEP. Musey accepted responsibility and agreed to remediate the site. Instead, he leveled the property with contaminated soil.

On December 31, 2004, Musey and Dominic Antonini, the principal of Marco Construction, executed a joint venture agreement to develop the property. Antonini was apprised of the property's prior usage. Before Marco Construction took title to the property in February 2005, Antonini received several documents confirming the presence of outstanding environmental issues on the site; thereafter, Trischitta told Antonini the property was contaminated. Later that year, Antonini built two single-family homes on the subdivided lot. However, Antonini failed to disclose the environmental issues to the realtors or prospective purchasers, including plaintiffs.

Between February 2005 and February 2006, Marco Construction remained the owner of the portion of the property until it was purchased by plaintiffs Rosario and Maldonado. Between February 2005 and July 2006, Marco

Construction owned the portion of the property until it was purchased by the Flores plaintiffs. Accordingly, the following CGL policies issued by the defendant insurance carriers to Marco Construction are at issue in this appeal: (1) defendant Hartford Fire Insurance Company's policy, in effect from April 20, 2004 to May 20, 2005 (Hartford policy); and (2) defendant Western World Insurance Company's policy issued for the following year, May 20, 2005 to May 20, 2006 (Western World policy).

Both policies provided substantially similar coverage. Relevant here, that coverage obligated the carriers to pay on the insured's behalf "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies."[1] The policies further stated: "This insurance applies to 'bodily injury' and 'property damage' only if" it is "caused by an 'occurrence' that takes place in the 'coverage territory'; and . . . occurs during the policy period."

Each policy contained virtually identical pollution exclusions and exceptions to those exclusions. In pertinent part, the policies provided:

> (1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":

[1] The Hartford policy also provided coverage for "personal and advertising injury."

(a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to any insured. However, this subparagraph does not apply to:

. . . .

(ii) "Bodily injury" or "property damage" for which you may be held liable, if you are a contractor and the owner or lessee of such premises, site or location has been added to your policy as an additional insured with respect to your ongoing operations performed for that additional insured at that premises, site or location and such premises, site or location is not and never was owned or occupied by, or rented or loaned to, any insured, other than that additional insured [(pollution exclusion exception)] . . . .

(2) Any loss, cost or expense arising out of any:

(a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or

(b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, or neutralizing, or in any way responding to, or assessing the effects of, "pollutants."

[(Emphasis added).]

The policies also contained exclusions for expected or intended injury, precluding coverage, in pertinent part, for: "'Bodily injury' or 'property damage' expected or intended from the standpoint of the insured." In addition, Western World's policy excluded coverage for known injuries or damages, defined as "bodily injury or property damage which first occurs before the inception date of the policy but continues to occur during the policy period if such bodily injury or property damage is known to any insured prior to the inception date of this policy." Further, the Western World policy included an endorsement, precluding coverage for "any claim for punitive or exemplary damages."

On February 14, 2005, Marco Construction's insurance agent issued a certificate of liability insurance to Sterling Bank, naming Hartford as the insurer. Similarly, on August 18, 2005, the agent issued another certificate of liability insurance to Sterling Bank, naming both Western World and Hartford as insurers. Sterling Bank was not named as an additional insured on either certificate.

In January 2008, plaintiffs filed the underlying action against Marco Construction, Antonini, Musey[2] and others, alleging violations of the Consumer

[2] We glean from the record that Musey died in June 2008 and, at some point plaintiffs amended their complaint, substituting Musey's estate as a defendant.

Fraud Act, N.J.S.A. 56:8-1 to -20, and the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 to -.24, and causes of action for misrepresentation, negligence, and equitable fraud. Plaintiffs also asserted a claim for breach of contract against Marco Construction.

In May 2008, Marco Construction, through its insurance agent, filed a notice of claim under the Hartford policy, advising: "Claimants allege that insured subdivided a property that had known chemical pollutants." A copy of plaintiffs' complaint was annexed to the notice. Following an investigation, on August 11, 2008, Hartford denied coverage under the pollution and expected or intended injury exclusions set forth in its policy.[3]

During the discovery period, Marco Construction twice renewed its demand for coverage under the Hartford policy. On February 4, 2010, and March 24, 2010, Hartford reiterated its denial of coverage based, in pertinent part, on the pollution exclusion set forth in the Hartford policy. In its March 24, 2010 denial letter, Hartford rejected Marco Construction's claim that the pollution exclusion exception applied "because Marco [Construction] acquired

[3] Hartford also denied coverage for the same reasons under its prior three policies issued to Marco Construction, i.e., April 20, 2001 to April 20, 2002; April 20, 2002 to April 20, 2003; and April 20, 2003 to April 20, 2004. These policies are not at issue on this appeal.

title to the property in question." In the alternative, "the owner or lessee of the property was not added to the policies as an additional insured with respect to [Marco Construction's] ongoing operations."

In their January 10, 2013 Rova Farms[4] demand letter, plaintiffs notified Hartford of the ensuing trial against its insured, and their contingent offer to settle the matter under the limits of the Hartford policy and another policy identified in a May 18, 2005 certificate of liability insurance. The next day, Hartford again denied coverage. On March 4, 2013, Marco Construction demanded Hartford and Western World provide "defense and liability coverage protection." Both carriers denied coverage.

In June 2014, a five-day bench trial was conducted in the underlying matter only against Marco Construction and Antonini, plaintiffs having settled their claims or obtained default judgments against the remaining defendants. On October 16, 2014, the trial court issued a thirty-five-page written opinion accompanying its aggregate judgment of $1,930,118.86, plus interest, on most of plaintiffs' claims. Among several other factual findings, the court determined, "Antonini knew that the contamination issues had not yet been resolved at the

[4] Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 496 (1974) (discussing the insurer's obligation to negotiate a settlement within the policy limits).

site when he agreed to allow Marco Construction to take title to the property." The court further found Marco Construction and Antonini were aware "the property was contaminated before Antonini began excavating the foundations" and "before he built any of the houses" because Trischitta, "told Antonini that 'this ground is contaminated.'"

Following plaintiffs' unsuccessful efforts to collect the judgment, a writ of execution was issued against the assets of Marco Construction and Antonini in September 2018. However, the writ was returned unsatisfied. Accordingly, in November 2018, plaintiffs filed a two-count complaint against Antonini, Marco Construction, and Hartford, seeking to satisfy the October 16, 2014 judgment. Eventually, the count against Hartford was severed. On July 20, 2020, plaintiffs filed their second amended complaint adding Western World as a defendant.

In October 2020, Western World moved to dismiss the complaint for failure to state a claim under Rule 4:6-2(e). Later that month, plaintiffs cross-moved for summary judgment against both defendants. In December 2020, Hartford cross-moved for summary judgment against plaintiffs.

Immediately following oral argument on January 8, 2021, the motion judge, who was not the trial judge in the underlying matter, issued a decision

from the bench, dismissing plaintiffs' claims on summary judgment. The judge rejected plaintiffs' contention that the pollution exclusion provision set forth in defendants' policies was ambiguous. Nor was the judge persuaded that the pollution exclusion exception applied here. Instead, the judge found the exception applies when

> contractors go out and they're doing work on somebody else's property, and they name that property owner as an additional insured as a requirement by that property owner for the contractor to continue to do work on their property. Those homeowners or property owners want to make sure that the contractors that they're hiring are insured, and that's what the [property exclusion exception] is about.

Although the judge expressed sympathy for plaintiffs, he concluded defendants' policies "specifically exclude[d] the type of claim that [wa]s present in this case."

The motion judge also determined the known injury and punitive damages exclusions barred coverage under the policies. On February 8, 2021, the judge issued three orders memorializing his decision: granting Western World's motion to dismiss plaintiffs' second amended complaint; granting Hartford's summary judgment motion; and denying plaintiffs' cross-motion for summary judgment. This appeal followed.

On appeal, plaintiffs primarily contend the motion judge erroneously determined the pollution exclusion exception did not afford coverage under the policies. They also argue the judge incorrectly concluded the known injury exclusion barred coverage. Because we conclude the pollution exclusion barred coverage and the exception at issue did not afford coverage, we need not reach plaintiffs' second argument.

II.

We review a court's decision on a summary judgment motion de novo, applying the same standard as the trial court. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021). Summary judgment is appropriate "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); Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 528-29 (1995). "If there is no genuine issue of material fact, we must then 'decide whether the trial court correctly interpreted the law.'" DepoLink Court Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013) (quoting Massachi v. AHL Servs., Inc., 396 N.J. Super. 486,

494 (App. Div. 2007) overruled in part on other grounds, Wilson ex rel. Manzani v. City of Jersey City, 209 N.J. 558, 563 (2012)).

In our review, the "trial court's interpretation of the law and legal consequences that flow from" it are "not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). "The interpretation of an insurance contract is a question of law for the court to determine, and can be resolved on summary judgment." Adron, Inc. v. Home Ins. Co., 292 N.J. Super. 463, 473 (App. Div. 1996); see also Celanese Ltd. v. Essex Cnty. Improvement Auth., 404 N.J. Super. 514, 528 (App. Div. 2009) (holding "unless the meaning is both unclear and dependent on conflicting testimony[,]" the court interprets the terms of a contract as a matter of law.).

Our analysis of the policies at issue is guided by well-established principles. Courts should interpret insurance policies according to "their plain, ordinary meaning." Zacarias v. Allstate Ins. Co., 168 N.J. 590, 595 (2001). Generally, "[a]n insurance policy is a contract that will be enforced as written when its terms are clear in order that the expectations of the parties will be fulfilled." Flomerfelt v. Cardiello, 202 N.J. 432, 441 (2010).

If there are no ambiguities in the language, "courts cannot 'write for the insured a better policy of insurance than the one purchased.'" Ibid. (quoting

Walker Rogge, Inc. v. Chelsea Title & Guar. Co., 116 N.J. 517, 529 (1989)). "A 'genuine ambiguity' arises only 'where the phrasing of the policy is so confusing that the average policyholder cannot make out the boundaries of coverage.'" Progressive Cas. Ins. Co. v. Hurley, 166 N.J. 260, 274 (2001) (quoting Weedo v. Stone-E-Brick, Inc., 81 N.J. 233, 247 (1979)). When an ambiguity does exist, the ambiguity is resolved against the insurer and in favor of coverage. Kopp v. Newark Ins. Co., 204 N.J. Super. 415, 420 (App. Div. 1985).

Moreover, insurance policies are "contracts of adhesion" and should be interpreted as such. Zacarias, 168 N.J. at 595. Exclusionary provisions "must be construed narrowly; the burden is on the insurer to bring the case within the exclusion." Homesite Ins. Co. v. Hindman, 413 N.J. Super. 41, 46 (App. Div. 2010). Exclusionary provisions are nonetheless "presumptively valid and will be given effect if specific, plain, clear, prominent, and not contrary to public policy." Ibid. "[T]he words of an insurance policy should be given their ordinary meaning, and in the absence of an ambiguity, a court should not engage in a strained construction to support the imposition of liability." Longobardi v. Chubb Ins. Co. of N.J., 121 N.J. 530, 537 (1990). Accordingly, courts should be careful not to disregard the clear intent of a policy's exclusion. See

Flomerfelt, 202 N.J. at 443. A "far-fetched" interpretation of a policy exclusion will not create an ambiguity. Id. at 442

Against that legal backdrop, we consider the pollution exclusion and the exception at issue set forth in defendants' policies. The pollution exclusion unambiguously excludes coverage for: "'Bodily injury' or 'property damage' arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants'" at the property, which was owned by Marco Construction during the policy periods. Unquestionably, the pollution exclusions preclude coverage for the actions undertaken by Musey, Marco Construction, and Antonini. Musey utilized the property as a car dealership, autobody shop, and auto repair facility. Musey removed two underground gasoline storage tanks and the surrounding property showed evidence of gasoline contamination. Musey then leveled the property with contaminated soil. The record evidence established Marco Construction and Antonini knew of the property's contaminated status as early as 2004, when Antonini learned of the property's prior usage. We therefore conclude defendants satisfied their burden of demonstrating the pollution exclusion contained in their policies applied. See Homesite, 413 N.J. Super. at 46.

Not surprisingly, the focus of plaintiffs' contentions is not whether the policies' pollution exclusion applies. Instead, plaintiffs reprise their argument that the pollution exclusion exception "is subject to an alternative interpretation that would provide pollution coverage to a contractor[,] who is also an owner of contaminated property, when a bank providing construction financing is a named insured." Citing the February 14, 2005 and August 18, 2005 certificates of liability insurance, plaintiffs argue their property and Sterling Bank were additional insureds under the policy. More particularly, plaintiffs assert the pollution exclusion exception

> is subject to a reading that provides pollution coverage if the insured is (1) both "a contractor and the owner of . . . such premises"; the (2) "site or location has been added to your policy as an additional insured with respect to your ongoing operations performed for that additional insured at that premises," and the (3) "site or location is not and never was owned or occupied by or rented to or loaned to any insured other than that additional insured."

Plaintiffs' interpretation of the pollution exclusion exception is a "strained construction" of its plain terms. Marco Construction owned the property during the policy periods and was not performing "ongoing operations" for "an additional insured at the premises." Further, the record is devoid of any

evidence that any person or entity was named an additional insured under defendants' policies.

Moreover, the February 14, 2005 and August 18, 2005 certificates of insurance issued to Sterling Bank did not provide the bank any additional rights and certainly does lead to the conclusion it was an additional insured under either policy. Both certificates contain in bold capital letters under the title of the document:

> THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.

As we have noted:

> Certificates of insurance do not create or bind coverage. A standard certificate of insurance only evidences the existence of the policies to which it refers; it does not alter the terms of an indemnity agreement or the parties' contract, nor does it alter or amend the terms of the policies to which it refers. It is not an insurance policy. See 1 Robert B. Hille et al., New Appleman on Insurance Law Library Edition § 3.03A(2) (Jeffrey E. Thomas & Francis J. Mootz III eds., 2022) (discussing how a standard certificate is considered "'a worthless document,' which does 'no more than certify that insurance existed on the day the certificate was issued'" (quoting Bradley Real Estate Tr. v. Plummer & Rowe Ins. Agency, 609 A.2d 1233, 1235 (N.H. 1992))); see also Wells v. Wilbur B. Driver

> Co., 121 N.J. Super. 185, 197 (Law Div. 1972) (asserting a certificate of insurance is not a policy or contract of insurance and does not create a contractual relationship between the insurer and certificate holder).
>
> [State v. Lavrik, 472 N.J. Super. 192, 214 n.6. (App. Div. 2022).]

Accordingly, we conclude neither certificate conferred rights on its holder, Sterling Bank.

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

Affirmed.