SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2221-20

ANY GARMENT CLEANERS SOMERDALE, LLC,

Plaintiff-Appellant,

v.

SELECTIVE INSURANCE COMPANY OF NEW ENGLAND, and SCOTTSDALE INSURANCE COMPANY,

Defendants-Respondents.

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Submitted January 19, 2023 – Decided February 22, 2023

Before Judges Mayer and Enright.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Docket No. L-2085-20.

Sherman, Silverstein, Kohl, Rose & Podolsky, PA, attorneys for appellant (Alan C. Milstein, of counsel and on the brief).

Day Pitney, LLC, attorneys for respondent Selective Insurance Company of New England (Elizabeth J. Sher and Joseph K. Scully, on the brief).

Riker Danzig Scherer Hyland & Perretti LLP, attorneys for respondent Scottsdale Insurance Company (Lance J. Kalik, of counsel and on the brief; Jeffrey A. Beer, Jr., on the brief).

PER CURIAM

Plaintiff, Any Garment Cleaners Somerdale, LLC (Any Garment), appeals from two March 19, 2021 orders, granting motions to dismiss filed by defendants Selective Insurance Company of New England (Selective) and Scottsdale Insurance Company (Scottsdale). We affirm both orders.

I.

In response to the COVID-19 pandemic, and mindful of an increasing number of confirmed COVID-19 cases in our State, Governor Philip D. Murphy issued various Executive Orders (EOs) in March 2020. One such order, EO 107, was issued on March 21, 2020, and "established statewide social mitigation strategies for combatting" the virus. Under EO 107, "all brick-and-mortar premises of 'non-essential' businesses [were to] remain 'close[d] to the public' for as long as the order remained in effect." Mac Prop. Grp. LLC v. Selective Fire & Cas. Ins. Co., 473 N.J. Super. 1, 11-12 (App. Div. 2022) (quoting Exec. Order No. 107 (Mar. 21, 2020), 52 N.J.R. 554(a) (Apr. 6, 2020)). The EO expressly exempted certain essential businesses from its closure requirements,

including "[r]etail functions of laundromats and dry-cleaning services." Ibid.

Any Garment has stores and plants in Somerdale, Riverton, and Merchantville that offer laundry and dry-cleaning services, or dyeing receiving stations. Notwithstanding EO 107's exemption for laundromats and dry-cleaning services, Any Garment claims it sustained business losses and extra expenses after this EO and other EOs issued. It specifically contends that while it "knows of no specific presence of the COVID-19 virus" at its properties, the EOs deprived Any Garment of the use of its properties "by causing a necessary suspension of operations," and "operated as a blockade that prevented employees and patrons from entering [its] businesses for their intended purpose."

The Scottsdale Policy

Scottsdale insured Any Garment under a commercial general liability and property policy, effective April 14, 2019 to April 14, 2020 (the Scottsdale Policy). The Scottsdale Policy provided "business income" and "extra expense" coverage for losses sustained "due to the necessary 'suspension' of [Any Garment's] 'operations' during [a] 'period of restoration.'" The policy also stated a suspension of operations "must be caused by direct physical loss of or damage to property" at Any Garment's premises, and "[t]he loss or damage must be

caused by or result from a Covered Cause of Loss." The policy defined "Covered Causes of Loss" as "direct physical loss unless the loss is excluded or limited in this policy."

Further, the Scottsdale Policy provided coverage for losses related to actions of a "civil authority." The civil authority section of the policy stated:

> [w]hen a Covered Cause of Loss 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 Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.
>
> [emphasis added.]

Additionally, the Scottsdale Policy contained a virus exclusion which applied to "all coverage under all forms and endorsements that comprise this Coverage Part or Policy . . . including . . . business income, extra expense or

action of civil authority." The virus exclusion stated Scottsdale would "not pay for loss or damage caused by or resulting from any virus . . . that induces or is capable of inducing physical distress, illness or disease." The policy also provided: "[w]e will not pay for loss or damage caused by or resulting from . . . [d]elay, loss of use, loss of market or any other consequential loss."

The Selective Policy

Any Garment purchased a commercial property insurance policy from Selective (the Selective Policy) for the period between April 14, 2020 and April 14, 2021. Thus, Selective was not Any Garment's carrier when Governor Murphy issued EO 107 and other EOs in March 2020. Notably, the Selective Policy explicitly stated it would "cover loss or damage commencing . . . [d]uring the policy period shown in the Declarations." (emphasis added).

The terms included in the Selective Policy were similar to those contained in the Scottsdale Policy in many respects. For example, the Selective Policy provided "business income," "extended period of indemnity," "extra expense" and "civil authority" coverage. Coverage for business income, extended period of indemnity, and extra expense was not triggered absent plaintiff suffering a "direct physical loss" during a suspension of operations. Also, the loss or damage to property at Any Garment's premises had to be "caused by or result

from a Covered Cause of Loss."

Additionally, the Selective Policy contained a clause for civil authority coverage which mirrored the language set forth in the Scottsdale Policy, except it provided the damaged property had to be within a five-mile, versus a one-mile, radius from Any Garment's premises. Selective also included a virus exclusion in its policy which barred coverage for any "loss or damage caused directly or indirectly" by "[a]ny virus . . . that induces or is capable of inducing physical distress, illness or disease," "regardless of any other cause or event that contributes concurrently or in any sequence to the loss" and "whether or not the loss event results in widespread damage or affects a substantial area."

Any Garment sought coverage from each defendant for "business interruption losses" it purportedly suffered "during the pendency of the [c]losure [o]rders" from March 2020, and specifically, the "stay at home" order flowing from EO 107. Defendants separately denied Any Garment's claims.

Accordingly, in June 2020, Any Garment sued defendants and other insurance entities, alleging it sustained damages due to their breach of contract and bad faith. Two months later, the matter was removed to federal court. Plaintiff successfully moved to sever certain claims and the case was remanded to state court following the entry of a consent order in December 2020. Later

that month, Any Garment filed an amended complaint against Scottsdale and Selective, alleging two counts of breach of contract and one count of bad faith.[1]

After hearing argument on March 19, 2021, Judge Yolanda C. Rodriguez dismissed Any Garment's amended complaint with prejudice. She concluded the virus exclusion in the Scottsdale Policy "clearly state[d] . . . it applie[d] to all commercial property coverage" and "expressly exclude[d] loss or damage caused by or resulting from any virus." In that vein, the judge rejected Any Garment's argument that its losses stemmed from the EOs, rather than the virus. She stated, "there can be no doubt that Governor Murphy's shut down order was to help stop the spread of [COVID-19] during a public health crisis." Because she found Scottsdale's "virus exclusion applie[d] to plaintiff's claim for business losses," she concluded Any Garment's "breach of contract actions fail[ed] to state a claim against Scottsdale."

Although Judge Rodriguez recognized she did "not need to decide if any of Scottsdale's other exclusions appl[ied]" to bar coverage, she proceeded to

[1] Count one of the amended complaint referred to the business income, extended business income, and extra expense coverage provisions of defendants' policies; count two referred to civil authority coverage; and count three alleged defendants acted in bad faith. Any Garment voluntarily dismissed count three during argument on defendants' motions to dismiss on March 19, 2021.

address other exclusionary provisions in the Scottsdale Policy, including "the loss or damage resulting from actions of the governmental body exclusion." The judge found this exclusion "also preclude[d] coverage under the facts alleged in . . . plaintiff's complaint," explaining "the Governor's closure order" was an "act of a governmental body issued in response to the COVID-19 virus. . . . [T]herefore, there was no breach of contract as against . . . Scottsdale."

Additionally, while the judge noted Any Garment voluntarily dismissed its "bad faith count" against both defendants during argument, she concluded "plaintiff . . . failed to state a claim" under this count because it was "reasonable and appropriate under the plain language of" the Scottsdale Policy for Scottsdale to deny coverage.

Turning to Selective's motion to dismiss, Judge Rodriguez "first agree[d] with Selective that coverage [was] barred because [Any Garment's] alleged business loss began before the policy period." The judge explained Selective's coverage "began on April 14, 2020," whereas "the Governor's [EO] 107 [was] dated March 21, 2020." Therefore, the judge found coverage was precluded under "[t]he plain language of the policy," which stated, "[w]e cover loss or damage commencing during the policy period shown in the declarations page."

Next, Judge Rodriguez found "Selective . . . ha[d] a clear virus exclusion

which applie[d]" to bar coverage. Further, she observed:

> [a]lthough the court . . . does not have to reach the direct physical [loss] at issue or if there's [civil] authority coverage, . . . plaintiff's allegations . . . do not trigger coverage under such provisions because [it] does not allege facts suggesting it suffered a direct physical loss or damage of property and because plaintiff was not prohibited from [access] to its premises nor were its surroundings damaged preventing [it] from access.

Additionally, the judge noted Any Garment voluntarily dismissed its bad faith count against Selective. Nevertheless, she also found this count should be dismissed because Selective's "actions [were] reasonable and appropriate in light of the clear language of the Selective Policy and the date when their policy began."

II.

On appeal, Any Garment reprises the arguments it made before Judge Rodriguez and contends she erred by: (1) misinterpreting defendants' policies and finding plaintiff did not suffer "direct physical loss," even though this type of loss is "not limited to a physical alteration to property"; (2) denying its claim for civil authority coverage; (3) dismissing its claim against Selective despite that "discovery [was] necessary . . . to determine the allocation of coverage between Selective and Scottsdale, where Selective's policy commenced after the enactment of the 'stay at home' order" under EO 107; (4) finding defendants'

virus exclusions barred coverage, even though Any Garment's losses flowed "from the closure orders, not the virus"; and (5) enforcing Scottsdale's exclusions for "delay, loss of use or loss of market" and "acts or decisions" from a governmental body barred coverage, despite that Any Garment established its "physical losses stemm[ed] from the closure orders, not the virus."

These arguments are unavailing. Thus, we affirm the challenged orders, substantially for the reasons outlined by Judge Rodriguez in her comprehensive and thoughtful oral opinion. We add the following comments.

Appellate review of a trial judge's order on a Rule 4:6-2(e) motion to dismiss is de novo, Watson v. N.J. Dep't of Treasury, 453 N.J. Super. 42, 47 (App. Div. 2017); thus, "we owe no deference to the . . . judge's conclusions," State v. Cherry Hill Mitsubishi, 439 N.J. Super. 462, 467 (App. Div. 2015) (citation omitted). "In deciding whether to grant dismissal, the complaint's allegations are accepted as true and with all favorable inferences accorded to plaintiff." Mac Prop. Grp. LLC, 473 N.J. Super. at 16 (citing Watson, 453 N.J. Super. at 47). "A complaint should be dismissed for failure to state a claim pursuant to Rule 4:6-2(e) only if the factual allegations are palpably insufficient to support a claim upon which relief can be granted." Ibid. (citations omitted) (quoting Frederick v. Smith, 416 N.J. Super. 594, 597 (App. Div. 2010)).

Because Rule 4:6-2(e) motions to dismiss "are usually brought at the earliest stages of litigation, they should be granted in 'only the rarest instances.'" Lieberman v. Port Auth. of N.Y. & N.J., 132 N.J. 76, 79 (1993) (quoting Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 772 (1989)). Still, "dismissal is mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted," Rieder v. State Dep't of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987), or if "discovery will not give rise to such a claim," Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 107 (2019).

Insureds bear the burden "to bring [a] claim within the basic terms of [an insurance] policy." Reliance Ins. Co. v. Armstrong World Indus., 292 N.J. Super. 365, 377 (App. Div. 1996) (citation omitted). "[I]nsurance purchasers are expected to read their policies and 'the law may fairly impose upon [them] such restrictions, conditions and limitations as the average insured would ascertain from such reading.'" Sears Mortg. Corp. v. Rose, 134 N.J. 326, 348 (1993) (second alteration in original) (quoting Bauman v. Royal Indem. Co., 36 N.J. 12, 25 (1961)).

When determining the meaning of an insurance policy provision, a court must "first look to the plain meaning of the language at issue." Oxford Realty

Grp. Cedar v. Travelers Excess & Surplus Lines Co., 229 N.J. 196, 207 (2017) (citation omitted). As with other types of contracts, the parties' agreement must "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).

In the absence of a specific definition in a policy, a word or term "must be interpreted in accordance with [its] ordinary, plain and usual meaning." Daus v. Marble, 270 N.J. Super. 241, 251 (App. Div. 1994) (citation omitted); see also Mac Prop. Grp. LLC, 473 N.J. Super. at 20 (citations omitted) (Where policies "do not define the term, we look to the term's plain meaning."). "[A] court should not 'engage in a strained construction to support the imposition of liability' or write a better policy for the insured than the one . . . purchased." Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am., 195 N.J. 231, 238 (2008) (quoting Progressive Cas. Ins. Co. v. Hurley, 166 N.J. 260, 272-73 (2001)).

Thus, if there is "no ambiguity in insurance contracts," their terms are "enforced . . . as written." Zacarias v. Allstate Ins. Co., 168 N.J. 590, 597 (2001). But if a policy's language is ambiguous, the court may utilize rules of construction beyond the four corners of the contract. Oxford Realty, 229 N.J. at 207. In that regard, courts will ordinarily "construe insurance contract ambiguities in favor of the insured." Id. at 208. That is, if the "policy's language

fairly supports two meanings, one that favors the insurer, and the other that favors the insured, the policy should be construed to sustain coverage." President v. Jenkins, 180 N.J. 550, 563 (2004) (citation omitted). Additionally, a court may consider the insured's "reasonable expectations." Oxford Realty, 229 N.J. at 208.

Exclusionary provisions in insurance contracts "are presumptively valid and will be given effect if 'specific, plain, clear, prominent, and not contrary to public policy.'" Princeton Ins. Co. v. Chunmuang, 151 N.J. 80, 95 (1997) (quoting Doto v. Russo, 140 N.J. 544, 559 (1995)). However, "exclusions must be narrowly construed," and "the burden is on the insurer to bring the case within the exclusion." Ibid. Thus, an insured is "entitled to protection to the full extent that any reasonable interpretation of [exclusionary clauses] will permit." S.N. Golden Ests., Inc. v. Cont'l Cas. Co., 293 N.J. Super. 395, 401 (App. Div. 1996).

"If the language of an exclusion requires a causal link, courts must consider its nature and extent because evaluating that link will determine the meaning and application of the exclusion." Flomerfelt, 202 N.J. at 442-43. "The fact that two or more identifiable causes—one a covered event and one excluded—may contribute to a single property loss does not necessarily bar coverage." Simonetti v. Selective Ins. Co., 372 N.J. Super. 421, 431 (App. Div.

2004). Generally, "[i]n situations in which multiple events, one of which is covered, occur sequentially in a chain of causation to produce a loss," courts have found "the loss is covered if a covered cause starts or ends the sequence of events leading to the loss." Flomerfelt, 202 N.J. at 447.

However, "if the claimed causes, one covered and one not, combine to produce an indivisible loss," courts "have rejected claims for coverage largely because of the allocation of the burden of proof on the insured to demonstrate a covered cause for a loss." Id. at 447-48. "The definitive question is what predominantly caused the loss, meaning the efficient proximate cause, not where in the sequence the alleged cause of loss occurred." Mac Prop. Grp. LLC, 473 N.J. Super. at 36 (citing Franklin Packaging Co. v. Cal. Union Ins. Co., 171 N.J. Super. 188, 191 (App. Div. 1979)).

"An insurance policy clause containing 'an anti-concurrent or anti-sequential clause' has been interpreted to unambiguously bar coverage for losses resulting in any manner from an excluded cause." Id. at 37 (citing Wear v. Selective Ins. Co., 455 N.J. Super. 440, 454-55 (App. Div. 2018)). "Thus, coverage is excluded for a loss attributable to a given cause 'regardless of whether any other cause, event, material or product contributed concurrently or in any sequence' to that loss." Ibid.

Pertinent to this appeal, and specifically, Any Garment's argument regarding the need "to determine the allocation of coverage between" defendants, "[t]he known loss doctrine is based on the fundamental principle that insurance is intended to cover risks which are not definitely known to the insured. The loss in progress doctrine, as differentiated from the known loss doctrine, provides that one cannot insure a loss that is already in progress." Astro Pak Corp. v. Fireman's Fund Ins. Co., 284 N.J. Super. 491, 497 (App. Div. 1995) (quoting Cont'l Ins. Co. v. Beecham, Inc., 836 F. Supp. 1027, 1046 (D.N.J. 1993)). Under these doctrines, "an insurer is protected from risks known to the insured prior to obtaining insurance and from a continuing loss that had begun before the inception date of the policy." Id. at 496-97. Thus, to obtain coverage, the insured must look to the policy in effect on the date which the loss became "manifest." Winding Hills Condo. Ass'n, Inc. v. N. Am. Specialty Ins. Co., 332 N.J. Super. 85, 87 (App. Div. 2000).

Governed by these standards and recognizing most of Any Garment's arguments are like those we exhaustively considered in our opinion in Mac Prop. Grp. LLC, we need not discuss their contentions in detail. In Mac Prop. Grp. LLC, several plaintiffs sought declaratory judgments enforcing business income and civil authority provisions to cover losses they incurred during the COVID-

19 pandemic after being forced to shut down or restrict their operations. 473 N.J. at 12-16. We concluded the motion judges appropriately dismissed the plaintiffs' complaints with prejudice under Rule 4:6-2(e). Id. at 40. In reaching that determination, we noted there were "scores of federal and state appellate-level courts that . . . addressed" the issues raised by the plaintiffs and

> [t]he overwhelming majority of them . . . granted defendant insurers' motions to dismiss complaints seeking insurance coverage for business losses due to government orders barring or curtailing [the insureds'] operations . . . to curb the . . . pandemic because the losses were not due to physical loss or damage to their insured premises.
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> [Id. at 26-27.]

Instead, their losses were due to "restrictions imposed by EOs to curb the COVID-19 pandemic." Id. at 41.

Our reasoning in Mac Prop. Grp. LLC applies in large measure to the instant appeal. Thus, we find no merit to Any Garment's arguments that because its losses "stem from the closure orders and not COVID-19," the virus exclusions in defendant's policies are inapplicable, and the "delay, loss of use or loss of market" and "acts or decisions" exclusions in the Scottsdale Policy are unenforceable. Much like the plaintiffs in Mac Prop. Grp. LLC, Any Garment did not allege the presence of the virus at its premises, but "it is unequivocal that

the virus was the sole reason the EOs were issued." Id. at 40. Therefore, Judge Rodriguez properly found the virus exclusions in defendants' policies, as well as Scottsdale's "loss of use or loss of market" exclusion barred coverage for Any Garment's claims.

Similarly, we agree with Judge Rodriguez that the EOs did not trigger civil authority coverage. That is because, like the plaintiffs in Mac Prop. Grp. LLC, Any Garment's "premises were not selectively closed by the EOs due to damage to nearby property." Id. at 30. Further, the EOs at issue "neither prohibited access to plaintiff['s] premises nor prevented plaintiff[] from being on their premises." Ibid.

Finally, there is no merit to Any Garment's contention that discovery was needed to determine the allocation of coverage between defendants. Because Any Garment does not dispute the losses it sustained were already in progress before the Selective Policy commenced, any further discovery would not change the fact Any Garment was barred from coverage under Selective's policy, considering when it went into effect. As discussed, the Selective Policy plainly and expressly stated it would cover only "loss or damage commencing . . . [d]uring the policy period," meaning the period that began on April 14, 2020 and ended on April 14, 2021.

To the extent we have not addressed any of Any Garment's remaining arguments, it is because they lack merit. 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