SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2729-21

DOVAN MANAGEMENT GROUP LLC,

Plaintiff-Appellant,

v.

AMGUARD INSURANCE COMPANY,[1]

Defendant-Respondent.

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Argued March 29, 2023 – Decided August 15, 2023

Before Judges Accurso and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Docket No. DC-008902-21.

Mark A. Clemente argued the cause for appellant (Clemente Mueller, PA, attorneys; Mark A. Clemente, on the briefs).

Robert J. Pansulla argued the cause for respondent (Finazzo Cossolini O'Leary Meola & Hager, LLC,

[1] Improperly pled as Berkshire Hathaway Guard Insurance Companies and AmGuard Insurance Company.

attorneys; Jeremiah L. O'Leary and Robert J. Pansulla, on the brief).

PER CURIAM

In this insurance coverage action, plaintiff Dovan Management Group LLC, appeals from an April 1, 2022 Law Division order granting summary judgment to AmGuard Insurance Company and dismissing Dovan's declaratory judgment action. We affirm.

I.

Dovan served as the management company for AmGuard's insured, Parkview Manor Condominium Association. After Parkview suffered a fire loss in February 2018 that destroyed its building in Roselle it sued its insurance broker and Dovan, claiming both entities bore responsibility for inadequately insuring Parkview for the fire loss. As against Dovan, Parkview specifically contended Dovan breached paragraph 3.7 of the parties' June 20, 2017 Management Agreement which required Dovan to:

> help determine the proper insurance coverages . . . and cause such insurance to be obtained and/or maintained (if obtainable) at [Parkview's] expense, at such amounts and through such carriers as [Parkview] shall designate and approve at least one month prior to the expiration of the existing policy.

Dovan's breach, according to Parkview, caused it to be underinsured for risks of loss for catastrophic events that effectively destroyed the Parkview property. In addition to a breach of contract claim, the complaint contained a second count alleging Dovan was "grossly negligent" for failing to "review the relevant policy" and assumedly advising Parkview regarding the deficiencies in the commercial general liability policy. Dovan agreed to a nuisance value settlement of the underlying complaint for $1,000 but spent $14,000 defending it.

Shortly before the underlying litigation settled, Dovan filed this declaratory judgment action in the Special Civil Part against AmGuard, Parkview's insurer, claiming a separate provision in the Management Agreement titled "Indemnity/Insurance" required Parkview to name Dovan as "an 'additional insured' on any and all policies" covering the property.[2]
Dovan also claimed it was, in fact, an additional insured under Section II – Liability, subsection C, titled "Who Is An Insured," of the AmGuard policy, which included as "an insured" "any organization acting as your real estate manager."

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[2] That provision also required Parkview to indemnify Dovan for claims of property damage, caused in whole or part, by any act or omission of Dovan, except those occasioned by its gross negligence.

Dovan tendered the underlying claim to AmGuard who disclaimed coverage in an August 15, 2019 letter. In its declination letter, AmGuard took the position Dovan was not an additional insured under its policy based on language in the Condominiums, Co-ops, Associations – Directors and Officers Liability Endorsement (Endorsement), which "modifie[d] insurance provided" under the AmGuard policy.

AmGuard contended the Endorsement amended Section II of the policy to exclude Dovan as an insured. Specifically, it relied on Section C of the Endorsement which states:

> For the purposes of the coverage provided by this endorsement, Paragraph C. Who is an Insured is replaced by the following:
>
> 1. The "association" is an insured.
>
> 2. "Insured persons" are insureds.

Later in the Endorsement, in the definitions section, "[i]nsured person" is defined as "any former, present or future director, officer, trustee, employee, or volunteer of the 'association.'"

AmGuard also claimed even if Dovan qualified as an insured, an exclusion within the Endorsement changed the coverage by excluding coverage for claims arising out of the "actual or alleged failure or omission on the part of any insured

to effect or maintain insurance" and for liability of others assumed by the association under any contract. The letter expressly reserved AmGuard's rights and defenses under the policy and specifically informed Dovan its letter was "not intended to cite every [p]olicy provision potentially applicable to this claim."

Dovan disagreed with AmGuard's position and as noted, filed a declaratory judgment action in the Special Civil Part. AmGuard answered Dovan's complaint and simultaneously moved for summary judgment. In its application, AmGuard argued its policy, and notably the Endorsement, "expressly exclude[d] coverage for contests about the amount of insurance purchased as brought by [Parkview] against Dovan." It also argued Dovan's pleading failed to establish it was entitled to coverage from AmGuard, and Dovan did not have "standing to bring this action for a declaration of coverage under a policy that does not insure [it]." Dovan opposed the application and contended it was an insured under the policy consistent with the indemnification clause in the Management Agreement.

The court rejected Dovan's argument and granted summary judgment to AmGuard, finding no legal basis for the carrier's liability. The court concluded Dovan had no contractual relationship with AmGuard and further accepted

AmGuard's argument that Dovan should have pursued its indemnity claim against Parkview in the underlying litigation.

Before us, the parties reprise the arguments made before the trial court. For its part, AmGuard again relies on exclusionary language in the Endorsement and argues the underlying claims are expressly excluded under the policy. Further, AmGuard maintains "[b]y supplying the [c]ourt with the whole section of AmG[uard]'s [p]olicy, Dovan does not quote anything that invokes coverage." Alternatively, AmGuard contends Dovan lacked standing to bring its complaint because it was not AmGuard's insured.

Dovan contends it was insured under Parkview's policy with AmGuard through the indemnity provision in the Management Agreement "and was, therefore, entitled to defense and indemnification in the underlying action." On this point, Dovan maintains it is covered under the policy as Parkview's "real estate manager," and none of the exclusionary language in the policy precludes coverage.

Specifically, Dovan asserts "[e]ven if AmGuard had some concern about the language in the underlying [c]omplaint that suggested 'gross negligence,' there would be no exclusion for the claim of breach of contract." Before us, it also expressly adopts Parkview's position from the underlying litigation that "the

claim against Dovan [wa]s not one for professional malpractice but [wa]s, instead, for breach of contract." According to Dovan, the exclusionary language AmGuard relies upon applies only to directors and officers and the court "simply failed to grasp the fact that the exclusionary language does not apply and, as such, Dovan is entitled to coverage." We reject Dovan's arguments as the AmGuard policy clearly excludes coverage for the underlying claim.

II.

We would be remiss if we did not address the significant violation of the court rules governing appeals. Most glaringly, the parties failed to provide a complete copy of the AmGuard policy. Instead, at two different parts of the appendix, the parties include only the 48-page business liability coverage section and, in a different location, the disputed Endorsement. Without the benefit of the entire policy, we could conclude the parties deprived us of the ability to conduct a meaningful appellate review of the summary judgment order under review. See Soc'y Hill Condo. Ass'n, Inc. v. Soc'y Hill Assocs., 347 N.J. Super. 163, 177 (App. Div. 2002) (explaining that a party's failure to include documents which are essential to proper consideration of the issues on appeal "render[ed] review impossible"). Because we are loathe to dismiss an appeal on procedural grounds, and further as the policy provision upon which Dovan relies

establishes the underlying claim is not covered, we address the merits of the parties' arguments.

We apply the same standard as the trial court when reviewing a grant of summary judgment. Globe Motor Co. v. Igdalev, 225 N.J. 469, 479 (2016). Pursuant to Rule 4:46-2(c), a court is required to grant summary judgment "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." Further, the interpretation and construction of an insurance contract is a matter of law that we review de novo. Simonetti v. Selective Ins. Co., 372 N.J. Super. 421, 428 (App. Div. 2004).

As most insurance policies are considered "contracts of adhesion," they are, unless specifically negotiated, "construed liberally in [the insured's] favor" to provide coverage "to the full extent that any fair interpretation will allow." Longobardi v. Chubb Ins. Co., 121 N.J. 530, 537 (1990) (alteration in original) (citing Kievit v. Loyal Protective Life Ins. Co., 34 N.J. 475, 482 (1961)). Thus, it follows that provisions granting coverage are to be interpreted liberally, while exclusionary provisions should be strictly construed, Simonetti, 372 N.J. Super. at 429, leaving the burden on the insurer "to bring the case within the exclusion,"

Flomerfelt v. Cardiello, 202 N.J. 432, 442 (2010) (quoting Am. Motorists Ins. Co. v. L-C-A Sales Co., 155 N.J. 29, 41 (1980)).

Our Supreme Court, however, has held policy exclusions 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)). If terms are not clear, however, but rather ambiguous, "they are construed against the insurer and in favor of the insured, in order to give effect to the insured's reasonable expectations." Flomerfelt, 202 N.J. at 441. In general, courts should not 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)).

III.

Against these legal principles, we affirm the trial court's decision, albeit for different reasons than those expressed by the court. See Hayes v. Delamotte, 231 N.J. 373, 387 (2018). We do so without needing to resolve the issues as framed by the parties, particularly the scope and effect of the Endorsement. That is so, because it is clear, beyond any reasonable measure, that even if we were to assume Dovan is an insured, or a beneficiary of the AmGuard policy, and the

Endorsement's exclusionary language does not apply to it, damages incurred by Dovan with respect to the underlying lawsuit are excluded under the Business Liability section of the policy on which Dovan itself relies.

More specifically, exclusion B.1.b of the Business Liability section refers to "contractual liability" and removes from otherwise covered business liability "'bodily injury' or 'property damage' for which [Dovan] is obligated to pay damages by reason of the assumption of liability in a contract or agreement." That exclusion is subject to certain limitations. First, the exclusion is inapplicable with respect to liability for damages the "insured would have in the absence of the contractor agreement"; or assumed "in a contract or agreement that is an 'insured contract,' provided the 'bodily injury' or 'property damage' occurs subsequent to the execution of the contract or agreement." An insured contract is defined to include a "lease of premises"; "sidetrack agreement"[3]; "easement or license agreement"; "elevator maintenance agreement"; or

> [t]hat part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability

[3] A sidetrack agreement is "an agreement between a property owner and a railroad company for the construction and use of a sidetrack spur running from the railroad's main line and onto the owner's property." Scott C. Turner, Insurance Coverage of Construction Disputes, § 20:7 (2d. ed. 2023).

> of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

It is clear Dovan's costs incurred in defending the underlying action and resolving the dispute are excluded by the aforementioned exclusion as that claim indisputably related to "'property damage' for which [Dovan] is obligated to pay damages by reason of the assumption of liability" in the Management Agreement; specifically, its obligation to review and recommend the appropriate amount of insurance.[4] And nothing in the record, or the reported case law of which we are aware, would impose such an obligation upon Dovan "in the absence of the [Management] [A]greement." Nor does the Management Agreement qualify as an "insured contract" as it does not involve a "lease of premises," "sidetrack agreement," "easement or license agreement," or "elevator maintenance agreement." Finally, unlike the obligations Parkview owes to Dovan in the "Indemnity/Insurance" section of the Management Agreement, no other provision of the parties' contract can fairly be characterized as a "contract or agreement pertaining to your business . . . under which [either party]

[4] Further, as noted, Dovan itself concedes the underlying litigation was essentially one for breach of contract notwithstanding the gross negligence allegation.

assume[d] the tort liability of another party to pay for 'bodily injury' or 'property damage' to a third person or organization."

Affirmed.

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

CLERK OF THE APPELLATE DIVISION