SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3295-22

MADISON LAWSON,

Plaintiff,

v.

DOUG NUNN, individually, and d/b/a NUNN RACING STABLE, INC.,

Defendant/Third-Party Plaintiff-Appellant/Cross-Respondent,

v.

STARNET INSURANCE COMPANY,

Third-Party Defendant-Respondent/Cross-Appellant.

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Submitted May 1, 2024 – Decided June 6, 2024

Before Judges Currier and Vanek.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-3993-18.

Drazin & Warshaw, PC, attorneys for appellant/cross-respondent (Steven L. Kessel, on the briefs).

Coughlin, Midlige & Garland, LLP, attorneys for respondent/cross-appellant (Karen Horoho Moriarty and James F. Layman, on the briefs).

PER CURIAM

Defendants/third-party plaintiffs, Doug Nunn, individually and doing business as Nunn Racing Stables, Inc. (collectively referred to as Nunn), appeal a June 30, 2023 Law Division order denying their motion for counsel fees. Third-party defendant, StarNet Insurance Company (StarNet) cross-appeals from the order denying its summary judgment motion.[1] Because we find no error with the trial court determinations based upon application of prevailing law, we affirm.

I.

We recount the facts material to our disposition of the issues from the summary judgment record. Nunn is a licensed thoroughbred racehorse trainer

[1] Both parties take the position that the June 30, 2023 orders were final dispositions of this litigation despite the language in the orders stating the denial is without prejudice.

that owns horse stables at Monmouth Park Racetrack (the Racetrack). On May 19, 2017, plaintiff Madison Lawson was injured at the Racetrack when she was thrown from a horse.

On September 13, 2018, plaintiff filed an employee claim petition (the WC claim) with the New Jersey Department of Labor and Workforce Development, Division of Workers' Compensation (WC court), alleging she injured her left leg while employed as an "exercise rider" for Nunn. Four days after filing the WC claim, plaintiff filed a negligence action against Nunn (the complaint) in the Superior Court, Law Division (the Superior Court action) to recover damages for the same incident alleged in the WC claim.

StarNet issued a commercial general liability (CGL) insurance policy to Nunn. Part A of the "Insuring Agreement" states

> We will pay those sums the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" from an "occurrence" arising out of "horse activities" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result.

On January 8, 2019, StarNet disclaimed "any obligation to defend or indemnify [Nunn] with respect to the [c]omplaint" based on the following "Employer's Liability Exclusion" (the Exclusion) in the CGL policy:

> Exclusions – This insurance does not apply to:
>
> . . . .
>
> f. Employer's Liability—"Bodily injury" or "property damage" to:
>
> (1) An "employee" of any insured arising out of and in the course of:
>
> (a) Employment by the insured; or
>
> (b) Performing duties related to "horses"; or
>
> . . . .
>
> This exclusion applies:
>
> (1) Whether the insured may be liable as an employer or in any other capacity; and
>
> (2) To any obligation to share damages with or repay someone else who must pay damages because of the injury.
>
> . . . .
>
> q. Workers' Compensation [(WC)] and Similar Laws—Any obligation of the insured under a [WC], . . . disability benefits, unemployment compensation law, or any similar law.

The CGL policy also includes the following definitions:

> "Employee" includes a "leased worker[,"] "temporary worker[,"] and "volunteer worker."
>
> . . . .
>
> "Volunteer worker" means a person who is not your "employee[,"] and who donates his or her work and acts at the direction of and within the scope of duties determined by you, and is not paid a fee, salary or other compensation by you or anyone else for their work performed for you.

In its denial letter, StarNet took the position that coverage for both employees and volunteer workers assisting with horses is barred under the Exclusion, except that volunteer workers are entitled to the $5,000 medical payment under "Coverage D" of the CGL. As a result of the denial, Nunn retained private counsel to file an answer and avoid default. Nunn asserted in its answer to plaintiff's WC claim that plaintiff was not employed by Nunn at the time of the accident.

On March 28, 2019, Nunn filed a third-party complaint in the Superior Court action seeking a declaratory judgment compelling StarNet to provide coverage for plaintiff's allegations against them in that litigation. Nunn moved to dismiss the Superior Court complaint without prejudice, pending the WC court's determination of whether plaintiff was Nunn's employee at the time of

the accident. On March 16, 2020, the trial court denied the motion, stating if the WC court deems plaintiff to be an employee, it would consider dismissing the complaint against Nunn with prejudice.

On December 7, 2020, the WC court ruled plaintiff was Nunn's employee at the time of the accident. About forty-five days later, the trial court dismissed plaintiff's complaint with prejudice based on the parties' stipulation.

On February 28, 2023, Nunn filed a motion seeking an award of counsel fees from StarNet based on the breach of its duty to defend Nunn in the Superior Court action. StarNet cross-moved for summary judgment arguing it had no duty to defend or indemnify Nunn since there was no coverage for either voluntary workers or paid employees under the Exclusion.

The trial court denied StarNet's cross-motion finding it had a duty to defend Nunn in the Superior Court action until December 7, 2020 when the WC court determined plaintiff was Nunn's employee. The trial court also denied Nunn's motion, concluding StarNet had no duty to reimburse it for counsel fees. The court found that under prevailing law, StarNet was entitled to seek an adjudication to determine if plaintiff's claim was "within the exclusion and beyond the policy coverage" prior to paying defense costs.

Finding there was no coverage for the Superior Court action under the CGL policy based upon the undisputed application of the Exclusion, the trial court denied Nunn's motion for reimbursement of counsel fees. This appeal followed.

II.

On appeal, Nunn argues the trial court erred in denying its motion for counsel fees. Nunn posits StarNet breached its duty to defend and has a duty to reimburse its defense costs until the WC court decided whether plaintiff was an employee since that determination informed whether there was coverage under the CGL policy. Nunn also contends the trial court improperly denied its application for counsel fees under the CGL policy, prevailing law and Rule 4:42-9.

StarNet contends in its cross-appeal the trial court erred in denying its motion for summary judgment. The insurer argues it has no duty to defend Nunn against the allegations in the Superior Court action under prevailing law because application of the Exclusion precludes coverage. StarNet also posits that it has no duty to reimburse Nunn for the costs of defending the Superior Court action under prevailing law.

We review a grant or denial of summary judgment "de novo, applying the same standard as the trial court." L.A. v. N.J. Div. of Youth & Fam. Servs., 217 N.J. 311, 323 (2014) (citing Coyne v. State, Dep't of Transp., 182 N.J. 481, 491 (2005)). Summary judgment must be granted "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). "To decide whether a genuine issue of material fact exists, the trial court must 'draw[] all legitimate inferences from the facts in favor of the non-moving party.'" Friedman v. Martinez, 242 N.J. 449, 472 (2020) (alteration in original) (quoting Globe Motor Co. v. Igdalev, 225 N.J. 469, 480 (2016)).

"In considering the meaning of an insurance policy, we interpret the language 'according to its plain and ordinary meaning.'" Flomerfelt v. Cardiello, 202 N.J. 432, 441 (2010) (quoting Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165, 175 (1992)). "If the terms are not clear, but instead are ambiguous, they are construed against the insurer and in favor of the insured, in order to give effect to the insured's reasonable expectations." Ibid.

An insurer's duty to defend allegations in a lawsuit lodged against an insured is firmly embedded in our jurisprudence, with the general approach requiring that "an insurer defend an insured when '"the complaint states a claim constituting a risk insured against."'" Hebela v. Healthcare Ins. Co., 370 N.J. Super. 260, 267 (App. Div. 2004) (quoting Voorhees, 128 N.J. at 173 (quoting Danek v. Hommer, 28 N.J. Super. 68, 77 (App. Div. 1953), aff'd o.b., 15 N.J. 573 (1954))). "[T]he duty to defend is generally determined by comparing the allegations in the complaint with the language of the policy." SL Indus. v. Am. Motorists Ins. Co., 128 N.J. 188, 197 (1992) (citing Voorhees, 128 N.J. at 173). See also Givaudan Fragrances Corp. v. Aetna Cas. & Sur. Co., 227 N.J. 322, 350 (2017) ("[W]hen a complaint is filed against an insured that might be covered by the policy language, evaluating the duty to defend requires 'a comparison between the allegations set forth in the [complaint] and the language of the insurance policy.'" (second alteration in original) (quoting Flomerfelt, 202 N.J. at 444)). "In making that comparison, it is the nature of the claim asserted, rather than the specific details of the incident or the litigation's possible outcome, that governs the insurer's obligation." Flomerfelt, 202 N.J. at 444 (citing Ohio Cas. Ins. Co. v. Flanagin, 44 N.J. 504, 512 (1965)).

We find no error with the trial court's determination that StarNet had a duty to defend Nunn and the resulting denial of StarNet's cross-motion for summary judgment. Neither party alleged the policy language is ambiguous. StarNet's duty to defend is circumscribed by the plain language of its policy.

In addition to plaintiff's WC claim, plaintiff filed a Superior Court action alleging Nunn's negligence caused the physical damages she sustained on May 19, 2017 when she was thrown from a horse. The StarNet CGL policy issued to Nunn covers claims for "damages because of 'bodily injury' . . . from an 'occurrence' arising out of 'horse activities[.'] [StarNet] will have the right and duty to defend the insured against any 'suit' seeking those damages." The allegations contained in plaintiff's complaint against Nunn fell within the coverage afforded under the StarNet CGL policy.

Under prevailing law, StarNet had a duty to defend Nunn against plaintiff's allegations of bodily injury resulting from horse activities as contained in the Superior Court complaint. Thus, the trial court properly concluded that "StarNet owed a duty to defend this action prior to the [WC court] ruling that [plaintiff] was an employee," and denied StarNet's cross-motion for summary judgment.

III.

Based on application of prevailing law, we are constrained to reject Nunn's argument that they are entitled to reimbursement of counsel fees and costs based on StarNet's breach of its contractual duty to defend Nunn until the date the WC court determined plaintiff was Nunn's employee. As a result, we affirm the trial court's denial of Nunn's motion for counsel fees.

"The general rule is that when the insurer has wrongfully refused to defend an action and is then required to reimburse the insured for its defense costs, its duty to reimburse is limited to allegations covered under the policy. . ." SL, 128 N.J. at 215; see Burd v. Sussex Mut. Ins. Co., 56 N.J. 383, 394 (1970). A coverage dispute between the insurer and insured does not "free the carrier from its covenant to defend, but rather [translates] its obligation into one to reimburse the insured if it is later adjudged that the claim was one within the policy covenant to pay." Id. at 390.

An insurer has the option of deciding to await a coverage determination before assigning counsel or paying for defense costs. Polarome Int'l, Inc. v. Greenwich Ins. Co., 404 N.J. Super. 241, 274 (App. Div. 2008); see Passaic Valley Sewerage Com'rs v. St. Paul Fire and Marine Ins. Co., 206 N.J. 596, 615-18 (2011). Where there is a coverage dispute, "an insured must initially assume the costs of defense . . . subject to reimbursement by the insurer if [the

insured] prevails on the coverage question." Flomerfelt, 202 N.J. at 446 (second alteration in original) (quoting Hartford Accident & Indem. Co. v. Aetna Life & Cas. Ins. Co., 98 N.J. 18, 24 n.3 (1984)). Where there is ultimately a determination that there is no coverage, a duty to defend does not transform into a duty to reimburse the insured's counsel fees. Ibid.

Therefore, although the coverage dispute between StarNet and Nunn did not relieve the insurer from its contractual covenant to defend, StarNet is not required to reimburse Nunn for defense costs where there was ultimately no coverage under the CGL policy at issue. StarNet was entitled to dispute coverage based on the Exclusion. The trial court ultimately found that there was no coverage based upon the undisputed application of the Exclusion after the WC court determined plaintiff was Nunn's employee.

Under prevailing law, StarNet was permitted to await a coverage determination prior to defending Nunn. Thus, we find no error in the trial court's decision that StarNet did not have a duty to reimburse Nunn for counsel fees and costs under applicable law.

IV.

We also decline to disturb the trial court's denial of Nunn's motion for counsel fees under Rule 4:42-9(a)(6), which sets forth that "[n]o fee for legal

services shall be allowed in the taxed costs or otherwise, except . . . . [i]n an action upon a liability or indemnity policy of insurance, in favor of a successful claimant." (italicization omitted). See Passaic Valley, 206 N.J. at 618. The Rule "does not mandate the allowance of counsel fees in every action upon a liability or indemnity policy, irrespective of the circumstances, but rather authorizes an allowance in a proper case, reposing in the trial judge a discretion as to when and under what circumstances an allowance would be proper." Kistler v. New Jersey Mfrs. Ins. Co., 172 N.J. Super. 324, 328 (1980) (quoting Felicetta v. Com. Union Ins. Co., 117 N.J. Super. 524, 528 (App. Div. 1971)).

"The award of counsel fees under Rule 4:42-9(a)(6) involves the exercise of sound discretion by the trial court." Occhifinto v. Olivo Constr. Co., 221 N.J. 443, 453 (2015) (italicization omitted). Determinations by a trial court regarding counsel fees "will be disturbed only on the rarest occasions, and then only because of a clear abuse of discretion." Rendine v. Pantzer, 141 N.J. 292, 317 (1995).

Rule 4:42-9(a)(6) specifically requires a determination that a party be declared prevailing before fees can be awarded in an action on a liability or indemnity policy. Here, Nunn was not a prevailing party based upon

applicable law. Insurers may dispute coverage based on policy exclusions. N.J. Mfrs. Ins. Co. v. Vizcaino, 392 N.J. Super 366, 370 (App. Div. 2007). Since StarNet did not have a duty to reimburse Nunn's counsel fees because there was no coverage, we conclude Nunn was not a prevailing party and the trial court did not abuse its discretion in denying Nunn's application for counsel fees under Rule 4:42-9(a)(6).

Affirmed.