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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1647-13T4

ASHRIT REALTY LLC,
BHAVIKA REALTY, LLC,

Plaintiffs-Appellants,

v.

TOWER NATIONAL INSURANCE COMPANY,

Defendant-Respondent.

Argued November 17, 2014 – Decided January 20, 2015

Before Judges Simonelli and Guadagno.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Docket No. L-250-12.

Matthew R. McCrink argued the cause for appellants (McCrink Kehler & McCrink, attorneys; Logan M. Terry, on the brief).

Stephen R. Katzman argued the cause for respondent (Methfessel & Werbel, attorneys; Mr. Katzman, of counsel and on the brief; Christian R. Baillie, on the brief).

PER CURIAM

Plaintiffs Ashrit Realty, LLC and Bhavika Realty, LLC own a gasoline station and convenience store in Cherry Hill, New Jersey. The property sustained moderate damage during a storm

on August 14, 2011 and more extensive damage during Hurricane Irene two weeks later. After the hurricane, a large hole formed as the result of the collapse of a pipe,¹ which ran underneath the property. Once the pipe collapsed, leaking water caused substantial soil erosion, which led to the collapse of the rear portion of the building.

Plaintiffs sought coverage for damage to the building from defendant Tower National Insurance Company, who insured the property. Defendant denied coverage based on an exclusion in the policy. Plaintiffs filed a complaint seeking declaratory relief alleging breach of contract and breach of duty of good faith. On October 25, 2013, the Law Division granted summary judgment to defendant as to all requests for coverage under the policy.

Plaintiffs appeal, alleging that the court misinterpreted the policy and that a genuine dispute of material fact precluded summary judgment. We have considered these arguments in light of the record and the applicable legal principals and find them unpersuasive. We therefore affirm.

Under the insurance policy, damage caused from hidden pipe decay is covered. Any damage caused by soil erosion and water damage, however, is not covered. The policy also includes an

¹ The pipe is also referred to in the record as a "culvert."

anti-concurrent/anti-sequential clause. This clause excludes coverage in situations where a covered event and an excluded event contribute, concurrently or sequentially, to a single loss. The types of loss excluded from coverage are contained in the policy:

B. Exclusions

1. 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 to the loss. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area.

. . . .

b. Earth Movement

. . . .

(4) Earth sinking (other than sinkhole collapse), rising or shifting including soil conditions which cause settling, cracking or other disarrangement of foundations or other parts of realty. Soil conditions include contraction, expansion, freezing, thawing, erosion, improperly compacted soil and the action of water under the ground surface.

. . . .

H. Property Definitions

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11. "Specified Causes of Loss" means the following:

Fire; lightning; explosion; windstorm or hail; smoke; aircraft or vehicles; riot or civil commotion; vandalism; leakage from fire extinguishing equipment; sinkhole collapse; volcanic action; falling objects; weight of snow, ice or sleet; water damage.

a. Sinkhole collapse means the sudden sinking or collapse of land into underground empty spaces created by the action of water on limestone or dolomite. This cause of loss does not include:

(1) The cost of filling sinkholes; or

(2) Sinking or collapse of land into manmade underground cavities.

The policy also contained a water exclusion endorsement:

A. The exclusion in Paragraph **B.** replaces the **Water** Exclusion under **Section I-Property.**

B. Water

1. Flood, surface water, waves (including tidal wave and tsunami), tides, tidal water, overflow of any body of water, or spray from any of these, all whether or not driven by wind (including storm surge);

2. Mudslide or mudflow;

3. Water that backs up or overflows or is otherwise discharged from a sewer, drain, sump, sump pump or related equipment;

. . . .

This exclusion applies regardless of whether any of the above . . . is caused by an act of nature or is otherwise caused. An example of a situation to which this exclusion applies is the situation where a dam, levee, seawall or other boundary or containment system fails in whole or in part, for any reason, to contain the water.

Defendant hired National Forensic Consultants, Inc. (NFC) to determine the cause of the damage. Two NFC engineers, Michael L. Black and Harris Gross, examined the property on August 30, 2011. At the time of their inspection, the hole in the property was approximately sixty feet long, twenty feet wide, and with varying depths up to eight feet. One of plaintiffs' representatives, Anthony Ginesi, informed Black and Gross that a previously existing crack in the floor slab had been repaired after the August 14, 2011 storm but had reopened at the time of the inspection. Ginesi also informed the engineers that a "small depression" in the area of the hole, which existed before the August storms, had worsened between the first and second storms.

The engineers also noted that a stream located on the east side of plaintiffs' property drained into another stream via a pipe that ran under plaintiffs' property.

Black concluded that the cause of damage was the result of "progressive soil erosion arising from the partial failure of the buried pipe." In his report, Black described the erosion process:

The pipe failure produced an opening for erosion of the soil overburden into the pipe. This erosion gradually resulted in the depression observed by Mr. Ginesi about four months ago. Once a conduit for soil transport into the pipe was established, recurring rains progressively increased the rate of erosion into the pipe. The accumulation of debris observed at this location may be related to sediment buildup in this area, from the reduced pipe diameter or a combination of both. The choked-off pipe produced diminished flow capacity, which, during sustained, intense rain storms, resulted in overflowing the creek bed and inundating the rear yard. That inundation saturated the soil, increasing soil loading to the pipe and the erosive flows into the existing opening (or openings). A progressive and destructive cycle ensued, carrying large quantities of soil away and undercutting the building foundation.

Black also ruled out a sinkhole as the possible cause for the damage. In his report, he stated, "No evidence of mineral deposits of a soluble nature (limestone or dolomite) was

observed in the excavated debris or the areas within the eroded pit."

In an initial report, dated November 2, 2012, plaintiffs' expert, Kris Kluk, concluded that a section of the underground pipe collapsed after the first storm, undermining a portion of the building's foundation. Immediate action was taken to stabilize the building. When Hurricane Irene struck two weeks later, the collapsed pipe "was compromised further and the entire rear foundation of the existing building was undermined."

In a subsequent report, dated June 27, 2013, Kluk referred to the hole as a "sinkhole" and concluded that it developed as the result of the collapse of the 72 [inch] corrugated metal culvert at the rear of the building" Kluk found that "[t]he cause of the culvert collapse was determined to be corrosion and deterioration of the metal culvert."

The motion judge rejected the suggestion that a sinkhole caused the loss:

The undisputed facts therefore before this Court clearly establish that a sinkhole collapse, as that term is defined within the policy, was not a cause of the losses. The cause was earth movement pursuant to the four expert reports, including soil erosion caused by the action of water under the ground's surface. The cause was also surface water and water that overflowed or was otherwise discharged from a drain and those causes are not a definition of sinkhole underneath the policy.

Plaintiffs' first argument is that summary judgment was improper because there was a dispute as to what caused the loss. "A ruling on summary judgment is reviewed de novo." Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 405 (2014). In determining whether summary judgment is proper, we "apply the same standard governing the trial court," Murray v. Plainfield Rescue Squad, 210 N.J. 581, 584 (2012), and do not defer to the trial court's interpretation of "the meaning of a statute or the common law." Nicholas v. Mynster, 213 N.J. 463, 478 (2013).

Summary judgment is proper if, after drawing all inferences in favor of the non-moving party, "no genuine issue as to any material fact" exists. R. 4:46-2(c). "An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." Ibid.

The experts for both parties agreed that the pipe sustained damage after the first August 2011 storm and partially collapsed after Hurricane Irene two weeks later. Plaintiffs do not deny that there was a discharge of water due to the pipe collapse, but argue that the building collapse was directly caused by the collapse of the culvert and not the subsequent soil erosion

resulting from the water discharge. In support of this theory, plaintiffs allege that the culvert was directly beneath the foundation of the building, thus, when the culvert collapsed, so too did the building.

Contrary to plaintiffs' assertions, plaintiffs' expert never concluded that the pipe was located under the foundation. Photographs presented to the motion judge indicate that a small portion of the pipe ran next to the building and underneath an extending staircase, but not under the building's foundation. Moreover, the partial collapse of the culvert occurred approximately twenty feet behind the building. No expert claimed that the damage to the building was directly caused by the partial collapse of the culvert.

Even if the loss was caused, in part, by the direct collapse of the culvert, this fact is immaterial because plaintiffs' expert does not challenge the argument that soil erosion occurred. Although the report by plaintiffs' expert was less specific about the actual cause of loss when compared to the report by defendant's expert, there are no conflicting facts in the reports that would preclude summary judgment. The motion judge noted that the existence of soil erosion was "not disputed by the plaintiff's expert." As the judge explained, "The parties agree that there is this water seepage through the

decayed pipe Clearly, the loss was caused by earth movement, which includes earth sinking, soil erosion, and the action of water under the ground surface."

Therefore, there was no issue of material fact in light of the policy's anti-sequential language and exclusionary language for earth movement. The only issue before the judge was a question of law, namely, whether the policy excluded recovery for this particular type of loss.

Plaintiffs next argue that the trial court misinterpreted the contract by finding that the only coverage allowable under the policy is for damage caused by a sinkhole. They assert that hidden decay of the pipe, which is covered under the policy, caused the damage. The trial judge based her holding on the policy's exclusionary language for soil erosion, the water exclusionary endorsement, and the anti-sequential clause.

We review a trial court's interpretation of a contract de novo. Fastenberg v. Prudential Ins. Co. of Am., 309 N.J. Super. 415, 420 (App. Div. 1998). Insurance policies are contracts, and the terms are interpreted in accordance with their "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 there is an ambiguous phrase in the policy, the ambiguity is resolved in favor of the insured.

Voorhees, supra, 128 N.J. at 175. The court, however, must enforce the contract as written if the terms are clear and unambiguous. Stone v. Royal Ins. Co., 211 N.J. Super. 246, 248 (App. Div. 1986).

Exclusionary clauses that limit coverage are construed narrowly. Gibson v. Callaghan, 158 N.J. 662, 671 (1999). However, exclusionary provisions are presumptively valid if they are "specific, plain, clear, prominent, and not contrary to public policy." Homesite Ins. Co. v. Hindman, 413 N.J. Super. 41, 46 (App. Div. 2010) (citing Princeton Ins. Co. v. Chunmuang, 151 N.J. 80, 95 (1997)).

In a situation where "two or more identifiable causes—one a covered event and one excluded—may contribute to a single property loss," there is coverage absent an anti-concurrent or anti-sequential clause in the policy. See Simonetti v. Selective Ins. Co., 372 N.J. Super. 421, 431 (App. Div. 2004) (citing Assurance Co. of Am., Inc. v. Jay-Mar, Inc., 38 F. Supp. 2d 349, 352-54 (D.N.J. 1999)).

The policy here contains an anti-concurrent/anti-sequential clause and excludes from coverage any loss or damage "regardless of any other cause or event that contributes concurrently or in any sequence to the loss." While loss resulting from "[d]ecay

that is hidden from view" is covered, loss resulting from earth movement and water damage is not.

Even if plaintiffs are correct in asserting that hidden decay was a cause of loss, plaintiffs do not dispute that water leaked from the collapsed culvert also causing soil erosion. Further, there is no dispute that soil erosion is excluded from coverage. Because these causes happened sequentially, the anti-sequential language in the policy excludes recovery.

The trial judge interpreted this policy properly when she granted summary judgment:

The policy at issue that was drafted by the defendant was clearly drafted to eliminate the efficient proximate cause doctrine. Such an exclusion is not inconsistent . . . with public expectations, or commercially acceptable standards. Even Simonetti says that the reason that Court allowed for two or more identical identifiable covered events is because that policy did not contain an anti-concurrent or anti-sequential clause.

. . . .

[T]he loss is . . . specifically excluded by not only the policy language, but by the anti-sequential preamble to the policy language.

We are satisfied that the trial court properly interpreted the insurance policy by finding that the anti-sequential clause and the exclusionary language for earth movement and water damage did not cover plaintiffs' loss. Regardless of any other

cause of loss plaintiffs allege, because plaintiffs do not deny that water seeped through the culvert causing soil erosion, they cannot overcome summary judgment.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION