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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-0

CRUM & FORSTER INSURANCE

COMPANY AND CRUM & FORSTER

SPECIALTY INSURANCE COMPANY,

Plaintiffs-Respondents/

Cross-Appellants,

v.

THE BREESE CORPORATION,

Defendant,

and

LAKESIDE AT NORTH HALEDON

CONDOMINIUM ASSOCIATION, INC.,

« Citation Data

Defendant-Appellant/

Cross-Respondent.

April 13, 2016

Argued October 19, 2015 – Decided

Before Judges Messano and Simonelli.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Docket No. L-1949-12.

John Randy Sawyer argued the cause for appellant/cross-respondent (Stark & Stark, attorneys; Gene Markin, on the brief).

Denise Marra DePekary argued the cause for respondents/cross-appellants (Carroll, McNulty & Kull, LLC, attorneys; Matthew J. Lodge, of counsel and on the briefs; Ms. Marra DePekary and Michael S. Kerr, on the briefs).

PER CURIAM

Defendant Lakeside at North Haledon Condominium Association (Lakeside) appeals from the Law Division's April 14, 2014 order granting summary judgment to plaintiffs, Crum & Forster Insurance Company and Crum& Forster Specialty Insurance Company, declaring that "insurance coverage is precluded as a matter of law" to defendant, The Breese Corporation (Breese), regarding claims made by Lakeside against Breese in an underlying lawsuit (the underlying suit).[1] In the underlying suit, Lakeside alleged that Breese had negligently installed the stucco and an external insulation and finish system (EIFS) on the condominium's buildings.

« Citation Plaintiffs had issued commercial general liability policies to Breese for one-year periods from 2002 to 2006, during which time Breese worked at Lakeside. In seeking summary judgment, plaintiffs relied upon a policy exclusion (the exclusion) that provided:

> This insurance does not apply to . . . Property Damage . . . arising directly or indirectly out of "your EIFS/DEFS product" or "your EIFS/DEFS work" as defined below.
>
> "Your EIFS/DEFS product" means:
>
> The following goods or products manufactured, sold, handled, distributed or disposed of by you, others trading under your name, or by any other or person or entity directly or indirectly for you or on your behalf:
>
> 1. "Exterior insulation and finish system", defined as an exterior cladding or finish system used on any part of any structure, and consisting of:
>
> a. a rigid or semi-rigid insulation board made of expanded polystyrene or other materials; and
>
> b. the adhesive and/or mechanical
>
> fasteners used to attach the insulation board to the substrate; and
>
> c. a reinforced base coat, or base coat and mesh; and
>
> d. a finish coat, providing a surface texture, to which coat color may be added.
>
> 2. "Direct exterior finish system", defined as an exterior cladding or finish system used on any part of any structure, and consisting of:

« Citation Data

a. sheathing applied to a structure's

framing or substrate; and

b. a reinforced base coat or base coat

and mesh; and

c. a finish coat providing surface

texture, to which coat color may be

added.

"Your EIFS/DEFS product" includes:

i. Warranties or representations made

at any time with respect to the fitness, quality, durability, performance of "your product"; and

ii. The providing of or failure to

provide warnings or instructions.

"Your EIFS/DEFS work" means:

The following work or operations performed by you or by any person or entity working directly or indirectly for you or on your behalf:

3. The design, manufacture, construction, fabrication, preparation, installation, application, maintenance, repair, including remodeling, service, correction or replacement of an "exterior insulation and finish system", or a "direct exterior finish system", or any part of either

« Citation Data

> system, or any substantially similar system or any part thereof, including the application or use of conditioners, primers, accessories, flashings, coatings, caulkings or sealants in connection with such a system.
>
> 4. Any work or operations with respect to any exterior component, fixture or feature of any structure if an "exterior insulation and finish system" or a "direct exterior finish system" is used on any part of that structure.

The order was entered following a three-day evidentiary hearing. See R. 4:46-3(b) (providing for adjudication of a summary judgment motion upon "limited testimony"). We briefly review the evidence adduced at the hearing.

I.

Kenneth Lies, an architect specializing in EIFS, testified as an expert witness for plaintiffs. In forming his opinions, Lies relied upon other expert reports, deposition testimony from the underlying suit, pictures from destructive testing conducted on samples and his on-site examination of the structures.[2] He testified that an EIFS is comprised of four elements: (1) insulation board; (2) attached by adhesive or by mechanical means to the substrate; (3) covered with a base coat with reinforcing mesh; and (4) a top finish coat. The American Society for Testing and Materials (ASTM) defined an EIFS in the same manner. According to Lies, the ASTM defined a substrate as the surface to which an EIFS is adhesively or mechanically attached, and that a substrate is not limited to a particular material or product.

Lies examination of the samples provided by Lakeside revealed that they contained the necessary four elements of an EIFS. Using photographs, Lies explained that, depending on the condominium unit model involved, certain areas of the building used an EIFS around the windows, doors, bay windows and chimney boxes. Lies explicitly stated that even though the pictures only portrayed some of the buildings, these features were present on every building. Lies also explained in

detail that around the windows, the substrate for the EIFS was stucco, and for the chimney boxes and bay windows, it was wood sheathing.

« Citation

Lies opined that the EIFS he examined met the definition contained in the exclusion. He also testified that, although test cuts used for destructive testing were only taken from some of the buildings, he found the presence of the EIFS on each of the buildings during his examination by tapping on them with a blunt instrument. Lies also opined that the architectural drawings and construction plans did not accurately reflect how the EIFS was actually installed on site.

Niko Markanovic, a foreman for Breese who was on site during the work in question, testified for plaintiffs. Markanovic stated that Breese and its subcontractor installed the EIFS on the buildings, and he personally witnessed all four elements of the EIFS being installed.

Ronald Wright, a civil engineer, testified as an expert on behalf of Lakeside. Based on visual inspections, invasive sampling, moisture readings, project plans and manufacturer instructions, Wright testified that the installation was inconsistent with the project's design. Wright also testified that according to a contract between the developer and another contractor, not Breese, the exterior sheathing for the buildings was to be plywood OSB sheathing, and that the wood sheathing was the intended substrate.

Wright disputed Lies conclusions, instead opining that the stucco was designed to be the exterior cladding system and the design intended aesthetic foam trim on the fenestrations. Instead, the foam trim was "installed over the stucco . . . ." Wright concluded that the foam was not an EIFS, intended as a barrier system to keep out water, but rather an aesthetic component of the buildings.

The motion judge, Ralph L. DeLuccia, Jr., issued a written decision that began by succinctly framing the issue:

> The core dispute between the parties is whether the rigid board insulation utilized on the project was merely an aesthetic and architectural detail surrounding windows and doors on the buildings or part of a system of exterior cladding serving a utilitarian function regarding weather proofing and insulation, with or without an aesthetic component. Critical to the resolution of this issue is whether the

« Citation Data

insulation board was fastened to a substrate and whether it had a base coat with reinforcing mesh as a component. These issues became primarily a battle of competing and often contradictory expert opinions.

The judge noted that the exclusion's four-part definition of an EIFS was consistent with the ASTM definition.

Judge DeLuccia further observed that "EIFS substrate is defined by ASTM as the surface or structure of a wall to which EIFS is adhesively or mechanically attached." The judge cited literature from Bonsal, the manufacturer of the EIFS in this case, which stated that its product "could be installed over various surfaces, including stucco." He noted a diagram demonstrating how the EIFS could be applied to stucco, which in turn was "attached to sheathing." Judge DeLuccia extensively reviewed the opinions of the competing expert witnesses and concluded, based on the combined testimony of Markanovic and Lies, that insulation board was used on all the buildings and a base coat and mesh was used throughout the project "on all foam board surfaces."

Judge DeLuccia concluded that the exclusion was "unambiguous," and that the work performed at the condominium on the exterior of the buildings "included EIFS, stucco or manufactured stone veneer, and that such work included the application and/or use of caulking or sealants in connection with the EIFS installed." As a result, the policies provided no "coverage for any property damage arising directly or indirectly out of any work or operations concerning the exterior component, fixture or feature of any building where . . . EIFS . . . has been used . . . ."

Of particular relevance to this appeal, the judge concluded that "'substrate' is not limited to one particular, uniform material, but one which can and does include different materials." Citing the dictionary definition of "substrate," as well the definition used by ASTM, the judge took particular note that the EIFS manufacturer recognized stucco was "an acceptable substrate" for its EIFS system.

Judge DeLuccia concluded that stucco served as "'the substrate' for parts of the buildings at Lakeside, while other parts, such as . . . chimney boxes and bay windows, wood OSB sheathing constituted 'the

« Citation Contents

substrate' for the EIFS." He also found by a preponderance of the evidence that the "remaining components of EIFS are present on the system installed at Lakeside."

The judge discounted the deposition testimony of the developer's representative, which claimed that the buildings had no EIFS but rather used stucco as an exterior cladding. Although this testimony was "probative," Judge DeLuccia concluded it was not "dispositive." He found that "the EIFS installation at Lakeside functions both as an aesthetic trim and protective system," and met the requirements of the exclusion.

Lastly, Judge DeLuccia rejected Lakeside's claim that plaintiffs' proofs failed to demonstrate the EIFS was installed on all the buildings. He concluded that "[g]iven the proofs before the [c]ourt, it is highly unlikely that the method of installation and the function of the EIFS varied from building to building." The judge concluded that the installation of EIFS at the condominium "f[ell] within the penumbra of the exclusion and . . . coverage is precluded as a matter of law." He entered the order under review.

II.

Before us, Lakeside argues that the exclusion is ambiguous, and the judge mistakenly applied the facts to the language of the exclusion to deny coverage, thereby expanding the scope of the exclusion instead of construing it narrowly, as required by basic tenets of insurance contract interpretation. Additionally, Lakeside argues that plaintiffs "failed to carry their heightened burden of proof" to demonstrate that all components of the EIFS were installed on each of the buildings in the condominium. We have considered these arguments in light of the record and applicable legal standards. We affirm substantially for the reasons set forth in Judge DeLuccia's comprehensive written opinion.[3] We add only the following.

Although on appeal from the grant of summary judgment we apply the same standard as the motion judge and conduct our review de novo, Bhagat v. Bhagat, 217 N.J. 22, 38 (2014), we accord significant deference to the factual findings made by the judge following a bench trial. Estate of Ostlund v. Ostlund, 391 N.J. Super. 390, 400 (App. Div. 2007). In general, the judge's factual

"findings . . . should not be disturbed unless 'they are so wholly insupportable as to result in a denial of justice[.]'" Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 483-84 (1974) (quoting Greenfield v. Dusseault, 60 N.J. Super. 436, 444 (App. Div.), aff'd o.b., 33 N.J. 78 (1960)).

"Insurance policies are construed in accordance with principles that govern the interpretation of contracts; the parties' agreement 'will be enforced as written when its terms are clear in order that the expectations of the parties will be fulfilled.'" Mem'l Props, LLC v. Zurich Am. Ins. Co., 210 N.J. 512, 525 (2012) (quoting Flomerfelt v. Cardiello, 202 N.J. 432, 441 (2010). "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." Flomerfelt, supra, 202 N.J. at 441. "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)).

Nevertheless, "when considering ambiguities and construing a policy, courts cannot write for the insured a better policy of insurance than the one purchased." Flomerfelt, supra, 202 N.J. at 441 (quoting Walker Rogge, Inc. v. Chelsea Title & Guar. Co., 116 N.J. 517, 529 (1989)). "Exclusionary clauses are presumptively valid and are enforced if they are 'specific, plain, clear, prominent, and not contrary to public policy.'" Ibid. (quoting Princeton Ins. Co. v. Chunmuang, 151 N.J. 80, 95 (1997)). Exclusions are generally narrowly construed, and the burden is on the insurer to bring the claim within the exclusionary language. Id. at 442.

Lakeside argues the exclusion defined an "EIFS" so as to require that the expanded polystyrene or other material be attached to "the substrate." It contends that instead, the judge found there were multiple substrates at the project and concluded the exclusion applied because the foam was attached to "a substrate." Lakeside cites the testimony of its own expert and the project plans, arguing the only substrate intended was the wood sheathing. In reality, Lakeside's argument attacks the judge's factual findings which accepted, in large part, the testimony of Lies. The experts' disagreement does not make the language of the exclusion ambiguous.

« Citation

Additionally, it was undisputed that the installation was not made in accordance with the plans, and so Lakeside's reliance on using the plans to define "the" only permissible "substrate" is misplaced. Also, contrary to Lakeside's assertion, there was support in the record for Judge DeLuccia's conclusion that Bonsal, the manufacturer of the EIFS, listed stucco as an approved surface upon which its product could be applied.

The only disputed issue was whether plaintiffs proved that an EFIS, as defined by the policy, had been installed on Lakeside's buildings by plaintiffs' insured. In this regard, both experts accepted the exclusion's definition of an EIFS. Judge DeLuccia listened to the testimony, had the opportunity to observe the witnesses, and his factual findings were based upon substantial, credible evidence in the record. We find no reason to disturb them. The legal conclusion that flowed from those findings was inescapable, i.e., the exclusion applied.

Lakeside also argues that plaintiffs were required to shoulder a heavier burden than a preponderance of credible evidence and prove that every building contained an EIFS that fit the definition. Asserting that the issue is one of "first impression," and acknowledging no reported case in New Jersey has ever held an insurer to a heavier burden of proof, Lakeside nevertheless contends that "a slightly heavier weight [is] required for proof of exclusions." (Quoting 17A Couch on Insurance § 254.14).

As noted, the insurer bears the burden of proving that an affirmative defense accorded by a policy exclusion applies. Flomerfelt, supra, 202 N.J. at 442. In a slightly different context, we held that an insurer, seeking subrogation from its insured by way of a counterclaim, need not prove an affirmative defense under the policy other than by a preponderance of the evidence. Italian Fisherman, Inc. v. Commercial Union Assurance Co., 215 N.J. Super. 278, 282 (App. Div.), certif. denied, 107 N.J. 152 (1987).

We see no reason to deviate from our prior reasoning in this case. Plaintiffs' burden was to prove by a preponderance of credible evidence that Breese installed an EIFS on Lakeside's buildings. We reject Lakeside's claim that plaintiffs failed to prove an EIFS was installed on all the buildings.

For the reasons explained by Judge DeLuccia, the testimony and documentary evidence convinced him that plaintiffs had met their burden of proof as to all the buildings.

« Citation Data

Lastly, as a court of intermediate appellate jurisdiction, we do not presume to adopt an enhanced burden of proof for every insurer attempting to prove that a policy exclusion applies in a particular case. If an enhanced burden of proof is required, such a decision is more appropriately made by our Supreme Court. See, e.g., Riley v. Keenan, 406 N.J. Super. 281, 297 (App. Div.) (noting that an appellate court "should normally defer to the Supreme Court with respect to the creation of a new cause of action") (citing Tynan v. Curzi, 332 N.J. Super. 267, 277 (App. Div. 2000)), certif. denied, 200 N.J. 207 (2009).

Affirmed. The cross-appeal is dismissed.

1 In their declaratory judgment complaint, plaintiffs alleged that they sent Breese a reservation of rights letter, that Breese was "defunct and d[id] not have any operations or assets" and that plaintiffs were representing Breese in the underlying suit pursuant to the reservation.

« Citation
Date

2 The condominium consists of forty-five residential structures and one clubhouse.
« Citation

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3 As a result of our disposition on appeal, we need not consider plaintiff's cross-appeal, which challenges an interlocutory order limiting discovery. We dismiss the cross-appeal.

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