SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0846-15T3

S.M. ELECTRIC COMPANY, INC.,

Plaintiff,

v.

TORCON, INC., VITETTA GROUP INCORPORATED, COSENTINI ASSOCIATES, INC., JONATHON MICHAELI, P.E., and TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA,

Defendants.

TORCON, INC.,

Third-Party Plaintiff-Appellant,

v.

SAFECO INSURANCE COMPANY OF AMERICA, and NEW JERSEY ECONOMIC DEVELOPMENT AUTHORITY,

Third-Party Defendants,

and

GREENWICH INSURANCE COMPANY, XL INSURANCE AMERICA, INC.,

Third-Party Defendants-Respondents.

S.M. ELECTRIC COMPANY, INC.,

Third-Party Plaintiff,

v.

CORPORATE SECURITY SOLUTIONS, INC. d/b/a NEXUS TECHNOLOGIES GROUP,

Third-Party Defendant.

Argued September 14, 2016 – Decided October 19, 2016

Before Judges Alvarez and Accurso.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Docket No. L-0272-10.

Bruce D. Meller argued the cause for appellant (Peckar and Abramson, P.C., attorneys; Mr. Meller, of counsel and on the briefs; Michael S. Zicherman, on the briefs).

Charles J. Stoia argued the cause for respondent (Porzio, Bromberg & Newman, P.C., attorneys; Mr. Stoia and Eliyahu S. Scheiman, on the brief).

PER CURIAM

Defendant and third-party plaintiff Torcon, Inc., appeals from the August 16, 2013 Law Division judgment denying Torcon's demand for coverage and indemnification under a claims-made professional liability policy issued by third-party defendants Greenwich Insurance Company and XL Insurance America (Greenwich). The Law Division judge also denied Torcon's motion seeking

reconsideration of his decision granting summary judgment to Greenwich and denying summary judgment to Torcon.[1] We affirm.

The relevant facts are essentially undisputed. It is the legal conclusions to be drawn from the facts which are in dispute.

I.

A.

Greenwich issued the one-year claims-made Professional and Pollution Liability-General Contractors policy effective November 11, 2007. It provided coverage (Coverage A) for claims "made against the insured and reported to the company during the policy period[.]" An endorsement to the policy extended coverage to February 1, 2009. Greenwich issued a separate policy for the following term to February 1, 2010.

The policies provide:

> Coverage A – Professional Liability
>
> To pay on behalf of the INSURED all LOSS in excess of the Retention amount . . . as a result of a CLAIM first made against the INSURED and reported to the Company, in writing, during the POLICY PERIOD, . . . by reason of any act, error or omission in PROFESSIONAL SERVICES rendered or that should have been rendered by the INSURED . . . .
>
> Provided always that such act, error or omission must have been committed or alleged to have been committed:

[1] The parties settled the matter on October 26, 2015, however, Torcon reserved the right to address the coverage question on appeal.

1. during the POLICY PERIOD, or
2. prior to the POLICY PERIOD . . . .

The policy defined claims as a "demand received by the INSURED for money or services that arises from PROFESSIONAL SERVICES or CONTRACTING SERVICES." A claim was "not necessarily . . . limited to lawsuits, petitions, arbitrations or other alternative dispute resolution requests filed against the INSURED."

Professional services were "services the insured [wa]s legally qualified to perform for others in the INSURED's capacity as an architect, engineer, land surveyor, landscape architect, or construction manager[.]"

Lastly, Section VIII of the 2009 policy, with regard to notice states:

> B. As a condition precedent to the coverage hereunder, if a CLAIM is made against the INSURED, the insured shall immediately forward to the Company every demand, notice, summons, order or other process received by the INSURED or the INSURED's representative.

The term "policy period" is defined as "the period from the inception date of this Policy to the Policy expiration date as stated in Item 2. of the declarations or its earlier termination date, if any."

Torcon was the construction manager for the New Jersey Economic Development Authority's (NJEDA) construction of new facilities at the Greystone Park Psychiatric Hospital. In that

capacity, on September 28, 2005, Torcon entered into a $25,605,000 electrical subcontract with plaintiff S.M. Electric Company (SME).[2] Because of problems with the electrical work, NJEDA issued a "Notice of Material Breach" to Torcon on May 7, 2008.

On May 14, 2008, Torcon declared SME in default, advising that "due to the severity of the issues involved . . . we are compelled to declare [SME] in default of its subcontract and notify its surety of the existence of this default under a copy of this letter." SME's response enumerated the various factors it attributed as the cause of the delays.

In the letter, SME noted that it had "incurred significant additional costs" which were "further complicated by the inexcusable delay in processing cost/plus change orders[.]" As a result, SME informed Torcon that it "was in the process of preparing a claim seeking compensatory settlement for all damages incurred."

On August 19, 2008, after SME "substantially completed" the electrical work, SME sent a second letter (the 2008 Letter) to Torcon, seeking $15,337,068 "as compensation for the additional cost of performing the work at the [Greystone] project." The letter —— titled "A Request for Equitable Adjustment" (REA) ——

[2] SME was acquired by Matrix Service Company between August 2008 and September 2009.

"request[ed] change orders" for costs resulting from "productivity losses, labor cost overruns, and material cost overruns . . . caused by delays and alterations in SME's work."

Of the total, SME sought $12,550,984 due to Torcon's alleged substandard performance as a Construction Manager. Included were $7,075,284 it attributed to delays caused by "Torcon's direction to forego the installation of PVC conduit within the slabs on deck" despite being allowed to do so "by the contract specifications" resulting in additional labor, material, and non-working foreman costs. SME also demanded $5,475,700 in expenditures allegedly caused by, in part, Torcon's "inaccurate and insufficient" project schedule updates, failure "to create and maintain a reasonable and accurate project schedule[,]" and failure to "properly communicate and coordinate that schedule with the contractors, including SME." SME closed with the statement that it was "justified in requesting $15,337,068 in equitable compensation from Torcon for these issues."

On some unspecified date soon after receipt of the 2008 Letter, Torcon representatives met with SME principals. Torcon included in its submissions on the summary judgment motion a certification from a former employee describing the meeting:

> Considering the totally unsupported nature of the change order request, I asked [Peter] Cheche, III, "what do you want me to do with this without any backup?" The response from

> [Peter] Cheche, III was "nothing". He then took back the document from my hands and advised that the August 2008 Change Order Request was withdrawn and Torcon should not consider it, nor act on it in any fashion.

Almost a year later, on September 17, 2009, SME sent Torcon an "amended claim" for "cost adjustment" in connection with the Greystone project. During the intervening period, Matrix acquired SME.

SME's 2009 amended claim provided "expert analysis regarding SME's cost impacts[,]" since only a "preliminary analysis of SME's impact cost was provided to Torcon in [SME's] August 19, 2008 claim letter[.]" The 2009 amended claim revisited the issues raised in the 2008 Letter. SME referred to it as its "claim letter" and "SME's official claim letter to Torcon."

SME filed a complaint against Torcon and other defendants on January 14, 2010. It asserted various causes of action stemming from the Greystone project. Torcon reported the 2010 filing of the complaint to Greenwich.

On April 29, 2010, Greenwich denied coverage under the 2009 policy. Greenwich considered the claim to have first been made on August 19, 2008, and that the "subsequent lawsuit" was nothing more than SME litigating the claim. Because it was made prior to the current policy period, it was refused. Notice, the condition precedent to coverage, was not satisfied.

Greenwich also advised it considered Torcon to have failed to comply with the notice provision of the 2007 policy, acknowledging that had notice been provided, coverage would have been extended. Greenwich's denial of coverage triggered the third-party complaint, and the motions for summary judgment which followed.

B.

The parties vigorously disagreed at oral argument, as they did at oral argument on appeal, regarding the meaning of the 2008 Letter and whether it was a claim as defined by the policy. Judge Grispin found that the "practical and logical" interpretation of the letter, "in the context of the overall dispute" among the parties, "can lead to no other conclusion but that it was a demand for money arising out of professional services." Since the letter was a claim for which notice should have been provided under the 2007 policy, Torcon was prevented from seeking coverage in the 2009 term.

In denying the motion for reconsideration, the judge explained that he "utilized the pre-August 2008 letters and even some of the post[-]correspondence that put everything in context." In his view, the only possible reading of the letter was "as a claim."

Torcon filed an application seeking to amend its third-party complaint to include a count for violation of the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -198, along with its motion for reconsideration. The judge denied this motion as well, concluding that Torcon had failed to establish Greenwich misrepresented the coverage, and that the factual predicates had been addressed when summary judgment was granted to Greenwich.

Citing to Cox v. Sears Roebuck & Company, 138 N.J. 2, 18 (1994), the judge reiterated that a breach of contract alone —— assuming one had occurred —— did not establish a consumer fraud violation "without substantial aggravating circumstances[,]" which were not present in this case. Neither the website material nor the insurance contract itself were misleading, neither the policy nor the website statements were deceptive; thus "it would be futile" to allow an amendment to the complaint given this context.

On appeal, Torcon raises the following points for our consideration:

> POINT I
>
> THE COURT ERRED IN GRANTING GREENWICH SUMMARY JUDGMENT BY IMPERMISSIBLY DETERMINING ISSUES OF DISPUTED FACT AND WEIGHING THE MERITS OF THE EVIDENCE.
>
> A. The Statement Of Facts In The Court's Decision Was Adopted Directly From Greenwich's Statement Of Undisputed Material Facts Despite Being Disputed By Torcon.

B. The Court Improperly Weighed The Evidence To Determine that SME's 2008 Change Order Request Was A CLAIM.

1. It Is Irrefutable That The Court Engaged In An Improper Weighing Of The Evidence.

2. The Court Improperly Determined SME's Subjective Intent From The Documents In The Record.

3. The Court Impermissibly Determined That The August 2008 Letter Was An REA And Not A Change Order.

4. The Court Improperly Discounted Torcon's Unrebutted Certifications.

POINT II

THE TRIAL COURT ERRED IN DENYING TORCON'S MOTION FOR SUMMARY JUDGMENT AND HOLDING THAT SME'S 2008 CHANGE ORDER REQUEST WAS A CLAIM UNDER THE POLICY THAT WAS REQUIRED TO BE REPORTED TO GREENWICH DURING THE 2007 POLICY PERIOD.

A. The Definition of CLAIM In The Policy Is Ambiguous And Should Have Been Construed Against Greenwich, And In Favor Of Coverage, Entitling Torcon To Summary Judgment.

B. SME's 2008 Change Order Request Is Unambiguously Not A Claim As Defined By The Policy.

POINT III

THE COURT ERRED BY NOT HOLDING THAT SME'S WITHDRAWAL OF ITS 2008 CHANGE ORDER REQUESTS OBVIATED THE NEED FOR TORCON TO PROVIDE NOTICE TO GREENWICH DURING THE 2007 POLICY PERIOD.

POINT IV

PURSUANT TO THE TERMS OF THE POLICY, THE 2008 CHANGE ORDER REQUEST DOES NOT MAKE THE SAME CLAIM AS EITHER THE 2009 AMENDED CLAIM OR THE JANUARY 2010 COMPLAINT.

POINT V

THE COURT'S DECISION IS CONTRARY TO NEW JERSEY LAW AND ITS INTERPRETATION OF INTERRELATED ACTS PROVISIONS CONTAINED IN INSURANCE POLICIES.

POINT VI

THE COURT ERRED IN DENYING TORCON LEAVE TO AMEND TO ASSERT A CAUSE OF ACTION AGAINST TORCON FOR VIOLATIONS OF THE CONSUMER FRAUD ACT.

II.

A.

"[W]e review the trial court's grant of summary judgment de novo under the same standard as the trial court." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co., 224 N.J. 189, 199 (2016). "That standard mandates that summary judgment 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.'" Ibid. (quoting R. 4:46-2(c)). "If there is no genuine issue of material fact, we must then 'decide whether the trial court correctly interpreted the law.'" Depolink Court

Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013) (quoting Massachi v. AHL Servs., Inc., 396 N.J. Super. 486, 494 (App. Div. 2007), certif. denied, 195 N.J. 419 (2008)). We review issues of law de novo. Nicholas v. Mynster, 213 N.J. 463, 478 (2013). Applying the standards, we see no reason to disturb the judge's grant of summary judgment, denial of reconsideration, and denial of leave to file an amended complaint.

Since both Torcon and Greenwich filed motions for summary judgment, and Judge Grispin found in favor of Greenwich, we will consider the facts in the light most favorable to Torcon. See Sahli v. Woodbine Bd. of Educ., 193 N.J. 309, 319 (2008) (citing R. 4:46-2c) ("[b]ecause both parties filed motions for summary judgment, and the Appellate Division found in favor of defendants on this issue, we consider the facts in the light most favorable to plaintiff.").

Denial of a motion for reconsideration is a matter left to a judge's sound discretion. Fusco v. Bd. of Educ. of City of Newark, 349 N.J. Super. 455, 462 (App. Div.), certif. denied, 174 N.J. 544 (2002). Such decisions are reviewed employing an abuse of discretion standard. Ibid.

B.

"The interpretation of an insurance policy is one of law." Nat'l Union Fire Ins. Co. v. Transp. Ins. Co., 336 N.J. Super. 437, 443 (App. Div. 2001). We are obliged to give words and terms in a policy "'their plain, ordinary meaning.'" President v. Jenkins, 180 N.J. 550, 562 (2004) (quoting Zacarias v. Allstate Ins. Co., 168 N.J. 590, 595 (2001)). When policy terms are clear, we interpret them "as written and avoid writing a better insurance policy than the one purchased." Ibid.; Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am., 195 N.J. 231, 238 (2008) ("if the language is clear, that is the end of the inquiry"). In this case, the policy defined claims as a "demand received by the INSURED for money or services that arises from PROFESSIONAL SERVICES or CONTRACTING SERVICES." The policy does not define a demand; therefore, we look to the plain meaning. See Killeen Trucking v. Great Am. Surplus Lines Ins. Co., 211 N.J. Super. 712, 714 (App. Div. 1986) ("In the absence of a specific definition in an insurance policy, the words used by the insurer must be interpreted in accordance with their ordinary, plain and usual meaning.").

The Random House College Dictionary, Revised Edition (1988), defines demand as: "to ask for with authority[,]" "claim as a right[,]" and "to call for or require as just, proper, or

necessary[.]" Similarly, Black's Law Dictionary 522 (10th ed. 2014) defines a demand as: "the assertion of a legal or procedural right." Nothing in the definition of claim or demand is "so confusing that the average policy holder" —— let alone a sophisticated business such as Torcon —— "cannot make out the boundaries of coverage." Weedo v. Stone-E-Brick, Inc., 81 N.J. 233, 247 (1979).

Torcon's additional contention that the meaning of "claim" was ambiguous as it was "not necessarily . . . limited to lawsuits, petitions, arbitrations or other alternative dispute resolution requests" is similarly without merit. "Not necessarily limited to" is a common phrase used before providing a non-exhaustive list. See, e.g., Abouzaid v. Mansard Gardens Assocs. LLC, 207 N.J. 67, 81 (2011). The list is restricted, however, by the definition of a claim itself. Therefore, an average policy holder would understand that something other than a lawsuit, petition, or alternative dispute request, so long as it met the definition of a claim, could be considered a claim. There is no ambiguity.

Nothing in the policy's use of the word "claim" is anything other than unambiguous and capable of being correctly understood by a reasonable person. Within the context of the policy, and its reference back to "demand," the usage is clear. Judge Grispin concluded no confusion could possibly have arisen, in the context

of the demand made by NJEDA, Torcon's response and Torcon's demand to SME, followed the 2008 Letter. We agree. In that context, as part of a series, it is abundantly clear that the 2008 Letter was a claim.

That the letter included references to the alleged mismanagement or professional errors and omissions of others does not in any way distract from the unifying theme. And the theme was that Torcon was liable for significant money damages for its management of the project.

Nor does the use of the phrase "change order" in the body of the letter nullify its substance, a claim for more than $15,000,000 to be paid by Torcon. Use of the phrase "change order" throughout the letter in no way defeats the meaning signaled by the caption, a "Request for Equitable Adjustment (REA)."

SME's use of the term "REA" was actually use of a term of art. As the judge said, the term REA is "a legal term of art, historically invoked to protect the contractor in circumstances where the government modifies a contract." The letter clearly conveyed a demand. This was not a request for change orders regarding future conduct, but a claim for equitable compensation by one party seeking, as a matter of right, the payment of money in connection with the other party's alleged wrongdoing.

Having concurred with the judge that the 2008 Letter was a claim, it follows that Torcon was required to provide notice to Greenwich. In a claims-made policy, "the coverage is effective if the negligent or omitted act is discovered and brought to the attention of the insurance company during the period of the policy, no matter when the act occurred." Zuckerman v. Nat'l Union Fire Ins. Co., 100 N.J. 304, 310 (1985). Thus, transmittal of notice is the event that invokes coverage. Id. at 324. The "insured must strictly comply with the policy's notice of claim provision." Medic. Inter Ins. Exch. v. Health Care Ins. Exch., 278 N.J. Super. 513, 518 (App. Div.), certif. denied, 140 N.J. 329 (1995). As the Court in Zuckerman explained,

> In exchange for limiting coverage only to claims made during the policy period, the carrier provides the insured with retroactive coverage for errors and omissions that took place prior to the policy period. Thus, an extension of the notice period in a "claims made" policy constitutes an unbargained-for expansion of coverage, gratis, resulting in the insurance company's exposure to a risk substantially broader than that expressly insured against in the policy.
> [Zuckerman, supra, 100 N.J. at 324.]

Notice requirements of a claims made policy are strictly enforced without regard to an insured's subjective assessment of the merits. See id. at 307 (belief that claim was "minimal" did not excuse untimely notification to carrier). Even if Torcon's subjective perception was relevant to the analysis, it does not

outweigh the evidence supporting the construction of the letter as a claim. See Liberty Surplus Ins. Corp. v. Amoroso, 189 N.J. 436, 447 (2007) ("Subjective intent may not be controlling when the undisputed facts reveal otherwise.").

The claim was made during the 2007 policy term, and Torcon did not provide notice. It was not until the 2009 lawsuit that Torcon conveyed the claim to Greenwich. Greenwich's denial is therefore proper. See Insite-Properties, Inc., v. Jay Phillips, Inc., 271 N.J. Super. 380, 384 (App. Div. 1994).

C.

Torcon's assertion that an interrelated acts provision was required in order to link the 2008 Letter with the 2009 Amended Claim and 2010 Complaint is without merit. Based on Torcon's acts or omissions during the Greystone project, asserted by a single party, SME, there was only a single claim. The 2009 Amended Claim merely provided a more detailed and supported itemization of SME's assertions first raised in the 2008 Letter. The 2009 Amended Claim noted that "[a] preliminary analysis of SME's impact costs" was provided in the 2008 Letter, and that since that time, "SME ha[d] retained [an expert] to provide expert analysis regarding SME's cost impacts." Further, the work was substantially completed prior to the 2008 Letter, and no additional conduct post-dating the 2008 Letter is mentioned in the 2009 claim. The 2010 complaint

itself identified the 2008 Letter as a "Claim[,]" and described the 2009 Amended Claim as merely providing "more detail and additional supporting documentation[.]"

The facts alleged and claims asserted in the 2009 Amended Claim substantially overlap with those asserted in the 2008 Letter. See Fed. Ins. Co. v. Raytheon Co., 426 F.3d 491, 493-499 (1st Cir. 2005) (finding that coverage properly denied in a claims-made policy where two complaints had "substantial overlap" - despite involving different parties and asserting differing theories of recovery - because "the allegations of the second complaint substantially overlap those of the first."). Even if some facts or demands in the 2009 Amended Claim do not overlap those in the 2008 Letter, that is of no consequence. Id. at 500 (acknowledging that "substantial areas of non-overlap does not defeat the fact here that there is substantial overlap between the two complaints.").

Moreover, the policy language merges them into a single claim. The section regarding limits of liability and retention states:

> **Multiple CLAIMS – Coverage A and Coverage B Separately:** The inclusion herein of more than one INSURED or making of CLAIMS by more than one person shall not operate to increase the Company's Limits of Liability. One or more covered CLAIMS for LOSS arising out of the same or related acts, errors, or omissions in PROFESSIONAL SERVICES or the same or related OCCURRENCE resulting from CONTRACTING SERVICES shall be considered a single CLAIM,

> and the Limits of Liability stated in Item 3[] of the Declarations as applicable to each CLAIM for LOSS shall apply and only one Retention amount shall apply thereto.
>
> [(emphasis added).]

Thus, the judge properly granted summary judgement to Greenwich, and properly denied Torcon's motion. No material issues of fact exist, and Greenwich is entitled to judgment as a matter of law.

In addition, the judge's decision to deny reconsideration was not an abuse of discretion. He "re-reviewed everything[,]" again finding that the 2008 Letter constituted a claim. See Fusco, supra, 349 N.J. Super. at 462 (noting that motions for reconsiderations are granted "under very narrow circumstances[,]" such as when decision is "based upon a palpably incorrect or irrational basis" or the court "did not consider, or failed to appreciate the significance of probative, competent evidence").

D.

Torcon also contends that because the August 2008 letter was "withdrawn," giving notice to the insurer was optional. This is a misreading of the policy terms Torcon relies upon in making the argument. Section VIII.c of the policy provides:

> Solely as respects to Coverage A, if the INSURED becomes aware of a circumstance for which this Policy may apply, and if during the POLICY PERIOD, the INSURED gives written notice containing:
>
> 1. details of the alleged act, error or omission by reason of the PROFESSIONAL

> SERVICES rendered on behalf of the INSURED, and
>
> 2. the specific nature and extent of the BODILY INJURY and/or PROPERTY DAMAGE which has been sustained, and
>
> 3. how the INSURED first became aware of such circumstances,
>
> then any CLAIM for that LOSS that may subsequently be made against the INSURED arising out of such circumstance shall be deemed to have been made on the date first written notice of the circumstance was received by the Company.
>
> [(emphasis added).]

This section of the policy creates an opportunity for an insured to disclose a potential claim even where no actual demand has been made. The purpose of that provision is to protect the insured who elects to give early notice so that at the expiration of the policy term, coverage would nonetheless be available. That scenario is entirely different from Torcon's failure to convey the 2008 Letter to the insurer. Obviously, the language does not create some "optional" mechanism of reporting when a claim has been made.

SME's subsequent "withdr[awal of] the claim" did not affect Torcon's responsibility to give notice to the insurer. The letter was withdrawn in the context of an ongoing dispute regarding millions of dollars. It is not credible that anyone would have considered SME's demand for nearly two-thirds of the contract amount in additional payment to have been actually "withdrawn" as

a result of the failure to adequately document their claims. Judge Grispin was unconvinced about this argument; so are we. Once the letter was presented, at that snapshot of a moment, it was Torcon's responsibility under the terms of the policy to provide notice to Greenwich.

III.

Finally, Torcon contends that Judge Grispin improperly denied its motion to amend the complaint to allege CFA violations. This argument is based on Torcon's position, however, that the 2008 Letter was not a claim. Since we do not agree, the argument fails. If the letter was a claim, Greenwich did not "hid[e] behind" the policy language or in any way mislead the building industry, individual construction industry insureds, or consumers in its advertising.

By denying coverage, Greenwich was not deceptive. It adhered to the policy as written, expecting its insureds to do the same.

While a motion to amend is to be granted liberally, "the granting of a motion to file an amended complaint always rests in the court's sound discretion." Notte v. Merchs. Mut. Ins. Co., 185 N.J. 490, 501 (2006). The "exercise of discretion requires a two-step process: whether the non-moving party will be prejudiced, and whether granting the amendment would nonetheless be futile." Ibid.

When newly asserted claims "are based on the same underlying facts and events set forth in the original pleading[,] there is no prejudice. Ibid. Here, the purported CFA cause of action is based on the same circumstances in the original pleading.

In determining whether the amendment is futile, we decide "whether the amended claim will nonetheless fail and, hence, allowing the amendment would be a useless endeavor." Ibid. While such motions are assessed "without consideration of the ultimate merits of the amendment," those decisions must be made 'in light of the factual situation existing at the time each motion is made.'" Ibid. (quoting Interchange State Bank v. Rinaldi, 303 N.J. Super. 239, 256 (App. Div. 1997)). Courts "are free to refuse leave to amend when the newly asserted claim is not sustainable as a matter of law." Ibid. (quoting Rinaldi, supra, 303 N.J. Super. at 256-57).

Since the 2008 Letter was a claim that should have been reported, Judge Grispin had a basis to refuse leave to amend. The CFA claim was not sustainable as a matter of law. Allowing the amendment would be an exercise in futility, as Torcon's failure to give notice enabled Greenwich to deny coverage.

Affirmed.