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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-1975-10T1

RESTORATION RISK RETENTION  
GROUP, INC. and MITIGATION  
SERVICES, INC. d/b/a SERVPRO  
OF CHERRY HILL,

Plaintiffs-Appellants,

v.

SELECTIVE WAY INSURANCE  
COMPANY,

Defendant-Respondent.

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Argued September 19, 2011 - Decided October 12, 2011

Before Judges Ashrafi and Fasciale.

On appeal from Superior Court of New Jersey,  
Law Division, Burlington County, Docket Nos.  
L-2851-07 and L-1299-09.

Steven I. Lewbel argued the cause for  
appellants (Melito & Adolfsen, PC,  
attorneys; Mr. Lewbel, of counsel and on  
the brief).

Margaret F. Catalano argued the cause for  
respondent (Carroll McNulty & Kull, LLC,  
attorneys; Ms. Catalano and Heather E.  
Simpson, of counsel and on the brief).

PER CURIAM

In this declaratory judgment action, plaintiff Restoration  
Risk Retention Group, Inc. seeks shared insurance coverage with

defendant Selective Way Insurance Company for defense and indemnification of their insured, Mitigation Services, Inc. d/b/a/ Servpro of Cherry Hill ("Servpro"). The trial court granted summary judgment to Selective dismissing Restoration Risk's complaint. Restoration Risk now appeals from a December 7, 2010 order denying reconsideration of the summary judgment order. We affirm.

Restoration Risk issued to Servpro a Contractor's Pollution Liability Policy for a one-year period beginning October 1, 2006. Selective issued a Commercial General Liability Policy to Servpro for the same time period. Servpro's business included mold remediation services. In October 2007, Michael and Andrea Meltzer filed a lawsuit against Servpro alleging negligence and other causes of action arising out of mold remediation in their Mount Laurel home.

The Meltzers' complaint alleged that in September 2006 a rainstorm caused water to infiltrate into their basement. They contacted Servpro to remove the water and clean the basement. Servpro found mold in two areas and advised the Meltzers to obtain the services of an industrial hygienist to test for mold and to devise a plan for mold remediation. The Meltzers hired industrial hygienist Chris Macri, who prepared a report and mold

remediation plan. Servpro agreed to follow Macri's plan in removing the mold.

In October 2006, the Meltzers and their children temporarily moved out of their house when Servpro began its work, which included "fogging" in the living areas of the house. After the work was completed, Macri returned to perform post-remediation testing. He detected a strong odor, which he identified as a chemical named Sporidicin. Macri saw residue on many surfaces in the living areas of the home. He advised the Meltzers that the use of Sporidicin was not included in his mold remediation plan and that he would never recommend the fogging of living spaces with that chemical. When Mrs. Meltzer entered the home to retrieve personal belongings, she suffered a severe headache and throat irritation.

Macri devised a further plan to remove the Sporidicin odor and residue from the home, and Servpro undertook to remedy the contamination. After Servpro's additional work was completed, the Meltzers retained Michael M. Lynch, Ph.D., to inspect the house and report on its condition. Lynch noted that strong odors of chemical disinfectant were prevalent throughout the house, and he observed windows, mirrors, carpeting, and other porous surfaces covered with a heavy film. His report outlined yet another remediation plan. The Meltzers provided Servpro

with Lynch's report and asked whether Servpro would perform the additional work. Servpro did not respond.

In March 2007, the Meltzers retained a realtor to assess the value of their house. The realtor determined that the market price without contamination would have been between \$400,000 and \$425,000. In the contaminated state of the house, the realtor recommended a listing price of \$275,000 and full disclosure of the problem to potential buyers.

In April 2007, the Meltzers hired another company, Insurance Restoration Specialists, to execute the remediation plan recommended by Lynch. Despite the further remediation efforts, odors remained, and the Meltzers never moved back into their home. They sold the house in December 2009 for \$250,000.

In their lawsuit against Servpro, the Meltzers claimed the following damages: Lynch's fee of \$10,880; clean-up and remediation fees of almost \$40,000 charged by Insurance Restoration Specialists; living expenses of \$75,000 because they were displaced from their home; replacement of the contents of the home independently valued at \$110,000; carrying costs of \$78,266 for the home; and \$180,000 reduction in its market value. The total damages they claimed approached \$500,000.

The Contractor's Pollution Liability Policy issued by Restoration Risk had a limit of one million dollars per claim.

It provided coverage for bodily injury or property damage caused by a "pollution incident," which was defined as "emission, discharge, release or escape of 'pollutants' into or upon land, the atmosphere, . . . provided that such emission, discharge, release or escape results in 'environmental damage.'"

Restoration Risk did not dispute that the Meltzers' claims fell within the definitions and coverage of its policy. Restoration Risk provided a defense to Servpro in the Meltzer lawsuit, but it also sought participation and joint coverage by Selective under its general liability policy.

Selective declined coverage on the basis of two exclusions in its policy. A "Fungi or Bacteria" exclusion provides as follows:

**[A.] 2. Exclusions**

This insurance does not apply to:

Fungi or Bacteria

- a. "Bodily injury" or "property damage" which would not have occurred, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of any "fungi" or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage.

- b. Any loss, cost or expenses arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the effects of, "fungi" or bacteria, by any insured or by any other person or entity.

. . . .

- c. The following definition is added to the **Definitions** Section:

"Fungi" means any type or form of fungus, including mold or mildew and any mycotoxins, spores, scents or byproducts produced or released by fungi.

A "business risk" exclusion in the Selective policy provides that Servpro is not insured for:

[I.2.j.] "Property damage" to:

. . . .

- (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or
- (6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

In April 2009, Restoration Risk commenced this action seeking a declaratory judgment that Selective was also obligated to defend and indemnify Servpro in the Meltzer lawsuit and must share equally in the defense and indemnification costs incurred by Restoration Risk. While the declaratory judgment action was pending, Restoration Risk settled the Meltzer lawsuit for \$100,000. The parties in the declaratory judgment action then cross-moved for summary judgment. In July 2010, the Law Division granted Selective's motion for summary judgment. In December 2010, the court denied Restoration Risk's motion for reconsideration. This appeal followed.

Restoration Risk contends the quoted "Fungi or Bacteria" exclusion in the Selective policy does not apply to coverage for the damages alleged in the Meltzer action because it was not the mold that caused the damages alleged but the application of Sporidicin and subsequent remediation efforts. We reject this contention, as did the trial court.

We acknowledge that insurance policies "should be construed liberally in [the insured's] favor to the end that coverage is afforded to the full extent that any fair interpretation will allow." Longobardi v. Chubb Ins. Co., 121 N.J. 530, 537 (1990) (internal quotation marks and citations omitted). Nevertheless, "the words of an insurance policy should be given their ordinary

meaning, and in the absence of an ambiguity, a court should not engage in a strained construction to support the imposition of liability." Ibid. "Although courts should construe insurance policies in favor of the insured, they '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)).

When there is a dispute regarding the applicability of a policy exclusion, "the burden is on the insurer to bring the case within the exclusion." Princeton Ins. Co. v. Chunmuang, 151 N.J. 80, 95 (1997). Strict interpretation is applied to exclusionary clauses. Aetna Ins. Co. v. Weiss, 174 N.J. Super. 292, 296 (App. Div.), certif. denied, 85 N.J. 127 (1980). To be given effect, "[e]xclusionary language in a policy must be plain and clear." Ibid.

In this case, the "Fungi or Bacteria" exclusion consists of two subparts, a and b. In relevant part, subpart a states that Selective will not provide coverage for "'bodily injury' or 'property damage' which would not have occurred, in whole or in part, but for the . . . existence of, or presence of any 'fungi' or bacteria . . . regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage" (emphasis added). Relying upon



Flomerfelt v. Cardiello, 202 N.J. 432 (2010), Restoration Risk argues that "only damages directly caused by the designated instrumentality in the exclusion (in this case mold, in that case controlled substances) are excluded."

In Flomerfelt, the plaintiff had ingested alcohol and drugs, and it was not established whether her injuries were caused by the alcohol, the drugs, or a combination of both. Id. at 437-39. The defendant's homeowners' insurance policy excluded coverage for "claims '[a]rising out of the use, . . . transfer or possession' of controlled dangerous substances." Id. at 439. The Supreme Court concluded that the "arising out of" language was ambiguous in the circumstances of the case. Id. at 454. The Court rejected the insurer's argument that "arising out of" meant "incident to" or "in connection with" because that reading would "expand the phrase . . . to mean that the injury is connected in any fashion, however remote or tangential, to the excluded act, rather than one that 'originates in,' 'grows out of' or has a 'substantial nexus' to the excluded act." Id. at 456.

The Court in Flomerfelt emphasized that the cause of the plaintiff's injuries was in dispute, and that some of the alleged causes were not within the exclusionary language of the policy. Id. at 436, 439-40, 454, 457. For example, the trier

of fact might conclude that alcohol or the defendant's delay in summoning help, rather than illegal drugs, caused the plaintiff's injuries. Id. at 457-58. The Court held the insurer had a duty to defend its insured in the underlying lawsuit because there were potentially covered causes and claims. Id. at 447. The insurer's liability to provide indemnification to the insured had to await the outcome of the trial or other resolution of what caused the plaintiff's injuries. Id. at 458.

This case is different from the facts of Flomerfelt both because the language contained in subpart a of the Selective policy is not the same and also because there is no dispute here about the cause of the Meltzers' losses.

Subpart a does not contain "arising out of" language. Rather, the key language is that the injury would not have occurred "but for" the existence of mold, even if the injuries or damages also had other causes. Restoration Risk argues that a broad reading of that exclusion language would permit Selective to avoid liability for virtually any damage or injury that somehow could be connected to the existence of the mold, including for example, if an invitee or licensee upon the premises tripped and injured himself on a dangerous condition of the property while observing or inspecting the mold. We need

not read subpart a so broadly in order to conclude that the exclusionary language applies in the circumstances of this case. See id. at 455; see also Sealed Air Corp. v. Royal Indem. Co., 404 N.J. Super. 363, 380 (App. Div.) ("[W]here the phrasing of the policy fails to specifically define the boundaries of coverage . . . the policy should be construed to comport with 'the insured's objectively reasonable expectations of coverage.'" ) (quoting Lee v. Gen. Acc. Ins. Co., 337 N.J. Super. 509, 513 (App. Div. 2001)), certif. denied, 196 N.J. 601 (2008). Clearly, the application of Sporidicin was not an event that was only remotely or tangentially connected to the mold. It originated in, grew out of, and had a substantial nexus to the mold. See Flomerfelt, supra, 202 N.J. at 456.

Furthermore, unlike Flomerfelt, the cause of damage to the Meltzer home was not a disputed issue of fact; it was the fogging of the home with excessive amounts of Sporidicin that caused the damages. The Meltzers' losses were a result of the mold contamination leading directly to further damaging remedial measures undertaken by Servpro to remove the mold. The "causal link" and a "substantial nexus" between the mold and the damages were clear and undisputed. See id. at 442, 454-55.

In addition, subpart b of the exclusionary language in the Selective policy explicitly applies to "abating, . . . cleaning

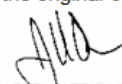
up, removing, . . . neutralizing, [or] remediating" mold. Application of Sporidicin and the subsequent remediation efforts of Servpro clearly fit within that language. Although the exclusion contained in subpart b may not apply to "bodily injury," as the trial court determined, the Meltzers' complaint alleged headaches and throat irritation in passing but otherwise was a claim for losses, costs, and expenses caused by property damage to their home. Thus, their claims also fell within the exclusionary language of subpart b.

We conclude the Meltzers' claims alleging that Servpro's mold remediation work caused property damage to their home, and consequential losses as a result of that damage, were excluded from coverage by the "Fungi and Bacteria" exclusion of Selective's general liability policy issued to Servpro.

Having reached that conclusion, we need not address the "business risks" exclusion of the Selective policy.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION