SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0001-15T3

KEVIN KILLEEN and NOEL KILLEEN,

Plaintiffs-Appellants,

v.

JENSON & MITCHELL, INC., a/k/a J&M NATIONAL SPRING, NATIONAL SPRING COMPANY, INC., a/k/a J&M NATIONAL SPRING, MARK CIMILUCA GREGORY HOFFMAN, UNITED COMMUNITY CORPORATION, MC RALTY, NSC ACQUISITION CORPORATION, J&M ENDEAVORS, LLC d/b/a/ JM NATIONAL SPRING, NATIONAL SPRING & SUSPENSION, INC. NSPC, INC., ASSOCIATED TRUCK SALES COMPANY; J.M.S. CONSTRUCTION CORP. and STANLEY & ORKE, INC.,

Defendants-Respondents,

and

NSPC, INC.,

Third-Party Plaintiff,

v.

TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA,

Third-Party Defendant-

Respondent.

Argued January 31, 2017 – Decided May 2, 2017

Before Judges Reisner, Koblitz and Rothstadt.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-7100-10.

Jason A. Daria argued the cause for appellants (Feldman, Shepherd, Wohlgelernter, Tanner, Weinstock & Dodig LLP, attorneys; John M. Dodig and Mr. Daria, on the brief).

Margaret Raymond-Flood argued the cause for respondents Jenson & Mitchell, Inc., and J&M Endeavors, LLC (Norris, McLaughlin & Marcus, PA, attorneys; Ms. Flood and Annmarie Simeone, on the brief).

Frank E. Borowsky argued the cause for respondent Travelers Property Casualty Company of America (Borowsky & Borowsky, LLC, attorneys; Mr. Borowksy and Stuart M. Berger, on the brief).

PER CURIAM

Plaintiff Kevin Killeen,[1] a firefighter, responded to a fire and was injured after falling through a glass panel on the roof of 38-58 Branford Street (Branford Street Property). Plaintiff filed a complaint against defendants NSPC, Inc. (NSPC), the owner,

[1] Noel Killeen is a derivative plaintiff. We refer to plaintiff in the singular to refer to Kevin Killeen.

and Jenson & Mitchell, Inc. (J&M),[2] the tenant of the property, alleging negligent maintenance of the property. Under the terms of the lease between NSPC and J&M, J&M was required to obtain general liability insurance, naming NSPC as an additional insured against liability on the premises. J&M procured such insurance through Travelers Property Casualty Company of America (Travelers).[3] The policy's additional insured provision provided coverage to NSPC for "liability arising out of the ownership, maintenance or use" of the premises leased by J&M. NSPC filed a third-party complaint against Travelers, seeking coverage under the policy. Travelers disclaimed coverage.

NSPC moved for summary judgment, seeking an order declaring that Travelers owed it coverage under the insurance policy, or, in the alternative, a ruling that J&M breached their contract by failing to procure insurance coverage. On March 2, 2012, Travelers filed a cross-motion for summary judgment, seeking an order that NSPC was not entitled to coverage under the insurance policy.

The motion court entered a July 11, 2012 order denying NSPC's motion for summary judgment against Travelers and granting summary judgment in favor of Travelers, dismissing the third-party

[2] Jensen & Mitchell and its affiliated entities are collectively referred to as "J&M."

[3] Plaintiff, J&M and Travelers are the only parties in this appeal.

complaint against Travelers. The court held that NSPC was not entitled to coverage because the lease obligated NSPC to maintain the roof. We reverse because the roof was a part of the "premises" leased by J&M and was therefore covered under the Travelers policy, regardless of the lease.

The motion court's ruling relied on Pennsville Shopping Center Corporation v. American Motorists Insurance Company, 315 N.J. Super. 519 (App. Div. 1998), certif. denied, 157 N.J. 647 (1999). The motion court stated:

> [T]he general liability portion of the policy provides coverage only for "liability arising out of the ownership, maintenance, and use of that part of any premises leased to J&M." The lease between NSPC and J&M provides not only that NSPC is responsible for the maintenance and repairs to the roof but, also, that it is NSPC who has to indemnify J&M against any and all claims based on bodily injury caused by NSPC's negligence.
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> Plaintiff's complaint alleges that NSPC was negligent in its maintenance or repair of the roof. The lease between the parties allocates this potential liability to NSPC and expressly provides that NSPC is to indemnify J&M for any such liability. Thus, the lease cannot be read as obligating J&M to obtain insurance coverage protecting NSPC from this liability and the Travelers policy, in turn, does not provide such coverage.

After the court's ruling, plaintiff and NSPC entered into a consent judgment, where they agreed that NSPC's assets would be immune from judgment, and which resulted in an arbitrated final

judgment in favor of plaintiff and against NSPC for $2,296,000. As part of the agreement, plaintiff was assigned all of NSPC's rights under the insurance policy issued by Travelers to J&M, including the right to appeal the July 11, 2012 order.

The facts underlying this dispute are as follows. A fire occurred in a building located on Sherman Avenue in Newark at about 9:00 p.m. on Sunday, July 26, 2009. Adjacent to this property is the Branford Street Property. Plaintiff, a Newark Fire Department battalion chief, climbed a ladder to access the roof of the Branford Street Property. On the roof, he stepped through a translucent-glass roofing panel and fell twenty-five feet onto the concrete floor below, sustaining serious injuries to his back, shoulder, pelvis and hip.

At the time of the incident, the Branford Street Property was leased by J&M for the purpose of operating a truck repair business. J&M assumed the lease without modification from the prior tenant of the property.

Under the lease, NSPC, as landlord, was responsible for the roof:

> 2. IMPROVEMENTS: The Landlord shall be responsible for the structural shell of the Premises which is limited to the exterior walls [and] the roof. . . .
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> . . . .

> 21. REPAIRS AND MAINTENANCE: Tenant shall not be responsible for repairs and replacements to the structural shell of the Premises which is limited to the exterior walls [and] the roof . . . .

The lease also required J&M to obtain general liability insurance naming NSPC as an additional insured:

> 9. LIABILITY INSURANCE
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> During the term of this Lease, Tenant, at its sole cost and expense, shall maintain for the benefit of Tenant and Landlord, and naming Landlord as an additional insured (for coverage purposes only, with no obligations on the part of the Landlord or any mortgagee to pay premiums), comprehensive general liability and property damage insurance (including a contractual indemnity endorsement) . . . in an amount not less than Three Million ($3,000,000) Dollars combined single limit per occurrence. Such policies shall cover the Premises, including, but not limited to, the Building, sidewalks, parking areas, driveways and all grounds appurtenant thereto.

The lease also included a mutual indemnification clause in which both NSPC and J&M agreed to defend and indemnify the other for any liabilities arising from their respective negligence.

The policy provided for several forms of coverage including commercial property coverage and commercial general liability coverage. The commercial general liability coverage policy included the following additional insured endorsement:

> D. BLANKET ADDITIONAL INSURED – MANAGERS OR LESSORS OF PREMISES

> WHO IS AN INSURED (Section II) is amended to include as an insured any person or organization (referred to below as "additional insured") with whom you have agreed in a written contract, executed prior to loss, to name as an additional insured, but only with respect to liability arising out of the ownership, maintenance or use of that part of any premises leased to you, subject to the following provisions:
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> 1. Limits of Insurance. The limits of insurance afforded to the additional insured shall be the limits which you agreed to provide, or the limits shown on the Declarations, whichever is less.
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> [Emphasis added.]

J&M's Vice President testified at a deposition that J&M procured general liability insurance from Travelers "[w]ith the intent of fulfilling the terms of the lease." He did not recall providing his insurance agent with a copy of the lease, however he testified that he had lengthy discussions with his agent about the need to have the building insured. His understanding was that NSPC was covered as an additional insured. It was also his understanding that the policy conformed to the requirements of the lease. He understood that if someone was injured on the property, the liability insurance would cover J&M and NSPC.

NSPC's principal testified at a deposition that it was his intention for NSPC to have insurance coverage, as expressed in the lease. He never read the Travelers policy, but understood that NSPC was named as an additional insured under the Travelers policy

and that NSPC would therefore be insured against injuries sustained by anyone who came on to the Branford Street Property.

Plaintiff argues on appeal that Travelers covers NSPC as an additional insured under the policy. He contends the policy's "Blanket Additional Insured" Endorsement for "Lessors of Premises" provides coverage to NSPC for "liability arising out of the ownership, maintenance or use of that part of any premises" leased to J&M. Plaintiff argues that the roof of the Branford Street Property was a part of the premises leased to J&M and, as owner of the property, NSPC's liability for plaintiff's injuries arose from its ownership and maintenance of the premises. Therefore, plaintiff's injuries fall within the scope of protection afforded to NSPC as an additional insured under the Travelers policy.

Plaintiff further argues that the motion court erred by looking first at the lease between NSPC and J&M to determine whether NSPC was entitled to coverage under the policy. Plaintiff contends that the Travelers insurance policy is clear and unambiguous; therefore, reference to the lease was unnecessary. Plaintiff also argues that any ambiguity in the policy must be construed in favor of coverage for NSPC.

Travelers argues that the motion court was correct because the insurance policy requires reference to the lease between NSPC and J&M to resolve the question of whether NSPC is covered under

the policy. It is Travelers' contention that the lease does not obligate additional insured coverage for a condition over which NSPC retained sole responsibility - the roof - and for which it agreed to indemnify J&M where liability arose out of NSPC's negligence.

We review the trial court's grant of summary judgment de novo and apply the same standard as the trial court. Cypress Point Condo. Ass'n v. Adria Towers, LLC, 226 N.J. 403, 414 (2016). Summary judgment must be granted if there is no genuine issue of material fact challenged and the moving party is entitled to judgment as a matter of law. R. 4:46-2. No special deference is afforded to the legal determinations of the trial court when no issue of fact exists. Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016).

"[I]nsurance policies are contracts of adhesion 'between parties who are not equally situated.'" Pizzullo v. New Jersey, Mfrs. Ins. Co., 196 N.J. 251, 270 (2008) (citation omitted). With this in mind, New Jersey courts consider public policy when interpreting insurance contracts so as to conform to principles of fairness. Ibid. (quoting Gibson v. Callaghan, 158 N.J. 662, 669-70 (1999)).

Generally, insurance policies are interpreted according to their plain and ordinary meaning. Progressive Cas. Ins. Co. v.

Hurley, 166 N.J. 260, 272-73 (2001). When the language of the policy is clear and unambiguous, courts "will enforce it as written and will not make a better contract for either of the parties." Botti v. CNA Ins. Co., 361 N.J. Super. 217, 225 (App. Div. 2003). The extent of coverage in an unambiguous insurance policy is determined by the relevant policy terms, not the terms of an underlying contract, in this case the lease, that mandates insurance coverage. Jeffrey M. Brown Assocs., Inc. v. Interstate Fire and Cas. Co., 414 N.J. Super. 160, 171-72 (App. Div.), certif. denied, 204 N.J. 21 (2010).

In reaching its decision, the motion court relied on Pennsville. Pennsville, supra, 315 N.J. Super. at 519. In that case, a landlord shopping center and a tenant supermarket disputed insurance coverage for injuries incurred when a supermarket customer fell in the shopping center's parking lot, a "common area." Id. at 521. The landlord was named as an additional insured under the tenant's insurance policy. Id. at 521. The parties' lease provided that the "landlord would indemnify [the] tenant from loss or liability for damages 'resulting from [the] Landlord's failure to carry out repairs or maintenance of the common areas.'" Id. at 521-22 (emphasis added). The lease also provided that the tenant "would indemnify [the] landlord from loss or liability for damages 'occurring on the demised premises except

[for those] due to Landlord's negligence.'" Id. at 521. Another term of the lease required the tenant to pay a pro rata share (with all other tenants) of the cost of maintaining the common areas of the shopping center, including the parking lot. Id. at 522.

In determining coverage, because we deemed the policy unclear, we relied upon the lease agreement, "which clarifies the intendments of the parties in apportioning responsibility and providing for insurance coverage." Id. at 523. We found that the tenant's insurer was not required to provide coverage to the landlord because the tenant was only obligated, under the lease, to indemnify the owner for damages caused by conditions on the demised premises, not in a common area such as the parking lot. Ibid.

Plaintiff relies on three cases in which we found coverage for the landlord under additional insured endorsements, similar to the one in this case. In the first case, Franklin Mutual Insurance Company v. Security Indemnity Insurance Company, a patron of the commercial tenant, a luncheonette, fell on exterior steps while exiting the premises. 275 N.J. Super. 335, 337 (App. Div.), certif. denied, 139 N.J. 185 (1994). The exterior steps led to the luncheonette, but were not a part of the leased premises. The landlord was responsible for the maintenance and

repair of the exterior steps. The landlord was an additional insured under the tenant's general liability insurance, which provided coverage for the landlord only with respect to liability arising out of the ownership, maintenance or use of the premises leased by the tenant. Id. at 338-39.

The trial court held that the landlord was entitled to coverage for the accident under the tenant's insurance. Id. at 339. We affirmed, deciding that, although the accident did not occur within the leased premises, it occurred from the use of the premises leased by the tenant because there was a relationship between the occurrence and the use of the premises leased by the tenant. Id. at 340-41. We reasoned that:

> The key phrase "arising out of the . . . use" must be interpreted or construed in a broad and comprehensive sense to mean "originating from the use of" or "growing out of the use of" the premises leased to [the tenant]. Thus, there need be shown only a substantial nexus between the occurrence and the use of the leased premises in order for the coverage to attach. The inquiry, therefore, is whether the occurrence which caused the injury, although not foreseen or expected, was in the contemplation of the parties to the insurance contract a natural and reasonable incident or consequence of the use of the leased premises and, thus, a risk against which they may reasonably expect those insured under the policy would be protected.
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> [Id. at 340-41.]

Here, the roof was integral to the leased premises and the accident was "a reasonable incident or consequence of the use of the leased premises."

In the second case, Harrah's Atlantic City, Incorporated v. Harleysville Insurance Company, a negligence suit was brought against Harrah's Atlantic City, Inc. (Harrah's) by both a patron and an employee of Harrah's tenant, Talk of the Walk Inc. (TOW), who were struck by an automobile driven by one of Harrah's parking valets after they left TOW and were crossing the street in front of Harrah's. 288 N.J. Super. 152, 154 (App. Div. 1996). As the situation here, Harrah's was an additional insured under a general liability insurance policy issued by TOW's insurer. Ibid. The lease between Harrah's and TOW required TOW to purchase general liability insurance for the benefit of Harrah's and TOW. Id. at 155. The endorsement provided coverage to Harrah's as an additional insured "only with respect to liability arising out of the . . . use of that part of the premises leased to TOW." Id. at 156. The lease also contained a separate indemnification clause, which required TOW to indemnify Harrah's under certain circumstances. Ibid.

Harrah's filed a declaratory judgment suit against TOW's insurer, claiming the insurer was obligated to defend and indemnify it in the negligence suit. Id. at 155-56. The trial judge held

that Harrah's was not entitled to coverage, finding that interpreting the "arising out of" language to cover this situation was too broad. Id. at 157. We reversed, holding that "Harrah's liability arose out of the risk generated by TOW's business on the premises." Id. at 159. We further held that "[t]he insurer cannot reasonably contend that it did not anticipate having to insure against an accident occurring in the course of such conduct by an invitee of TOW." Ibid. We concluded: "[W]here the landlord can trace the risk creating its liability directly to the tenant's business presence, it is not unreasonable for the landlord to expect coverage, inasmuch as it can be truly said that the accident originated from or grew out of the use of the leased premises." Id. at 158-59.

We also noted that finding coverage for Harrah's was not inconsistent with the determination that TOW was not contractually obligated to indemnify Harrah's for the accident because entirely different legal principles apply to the interpretation of an indemnification agreement than apply to an insurance policy. Id. at 159. Similarly here, we need not resolve indemnification, just coverage.

In the third case, Liberty Village Associates v. West American Insurance Company, a commercial tenant obtained insurance coverage for the benefit of the landlord, pursuant to the lease. 308 N.J.

Super. 393, 395-96 (App. Div. 1998). Under the policy, as here, the landlord was named as an "additional insured," but only with respect to liability arising "out of the ownership, maintenance or use" of premises leased to the tenant. Id. at 397. The issue presented to us in Liberty Village was the applicability of the landlord's coverage to an accident which occurred off the tenant's premises, but close to the premises, and involved a prospective customer approaching the tenant's store. Id. at 396.

We affirmed the decision that the landlord was entitled to coverage under the tenant's policy, concluding that the injury fell within the scope of the coverage afforded to the landlord as an additional insured because the injury arose out of the use of the leased premises. Id. at 402. We stated that "insurance coverage for the landlord is not contingent upon a finding of tenant's liability." Ibid.

Here, the additional insured endorsement under the Travelers policy provides NSPC coverage "with respect to liability arising out of the ownership, maintenance or use of that part of any premises leased to [J&M]." The roof, a vital part of the Branford Street Property, is a part of the "premises" leased to J&M. This case is distinguishable from Pennsville because the injuries here were sustained on the leased premises and not in the "common area." The policy was clear and unambiguous, therefore resort to the

lease was unnecessary. NSPC is entitled to coverage under the terms of the Travelers policy.

Reversed and remanded for the entry of an order granting summary judgment to plaintiff on behalf of NSPC. We do not retain jurisdiction.