SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0120-15T1

JACKIE LINDEBORN,

Plaintiff,

v.

WAWA, INC.,

Defendant,

AND

ULTRA FLOW IRRIGATION, L.L.C., t/a GREEN THUMB GARDENS,

Defendant/Third-Party Plaintiff-Respondent/ Cross-Appellant,

v.

FARM FAMILY CASUALTY INSURANCE COMPANY,

Third-Party Defendant-Appellant/ Cross-Respondent.

Argued October 6, 2016 – Decided April 6, 2017

Before Judges Lihotz, Hoffman, and O'Connor.

On appeal from Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-2560-12.

Edward R. Murphy argued the cause for appellant (Law Offices of Michael J. Dunn, L.L.C., attorney; Mr. Murphy, on the briefs).

Deborah A. Plaia argued the cause for respondent (The Law Offices of John J. Novak, P.C., attorney; John J. Novak, of counsel; Ms. Plaia, on the briefs).

PER CURIAM

Third-party defendant Farm Family Casualty Insurance Company (Farm) appeals from the June 6, 2014, June 5, 2015, and August 5, 2015 Law Division orders, addressed below. Defendant and third-party plaintiff, Ultra Flow Irrigation, LLC, t/a Green Thumb Gardens (Green), cross appeals from the August 5, 2015 order. Having considered Farm's and Green's contentions in light of the applicable legal principles, we affirm.

I

Plaintiff Jackie Lindeborn filed a complaint against defendant Wawa, Inc. (Wawa), and Green, alleging she had been injured when she slipped and fell on ice in the parking lot of one of Wawa's stores. Approximately two months before her fall, Green and Wawa entered into a service agreement (agreement), in which Green agreed to plow and salt the subject lot after a

certain accumulation of snow or ice. Green last serviced the parking lot the day before plaintiff's fall.

In Section 7 of the agreement, Green agreed to indemnify and hold Wawa harmless from any actions arising out of Green's breach of the agreement, and for any injuries any person sustained arising out of or relating to Green's performance of its services. The subject language in Section 7 is as follows:

> (a) [Green] agrees to indemnify, hold harmless and defend Wawa . . . from and against any and all claims, demands, actions, proceedings, lawsuits, fees, costs and expenses (including reasonable attorney's fees and expenses) of any kind:
>
> > (gg) arising out of or pertaining to any breach by [Green] of any of its representations and warranties contained in this Agreement or other breach of this Agreement by [Green]; or
> >
> > (ii) . . . for or because of the injury . . . of any person, . . . (including, without limitation, any judgment rendered against or settlement paid by or on behalf of Wawa in any such action), that arises out of or relates to the performance of the Services, whether or not such Claims are based upon Wawa's alleged active or passive negligence or participation in the injury, illness, death or loss or upon any alleged breach of any statutory duty or obligation on the part of Wawa.

Section 5 of the agreement also provided Green was to secure liability insurance for itself and to add Wawa as an additional insured to that insurance policy. The policy Green

was to obtain was one that covered all claims against Wawa "arising out of negligence or liability of [Green]." Green secured liability insurance from Farm that provided liability insurance coverage for itself but, for reasons that are not clear from the record, Farm was unwilling to add Wawa as an additional insured to Green's policy.

In the Farm policy, there was an exclusion provision that precluded coverage for parties with which Green had agreed to indemnify pursuant to a contract; however, this exclusion provision specifically salvaged "insured contracts" from exclusion. We recite the subject language from the policy:

> B. EXCLUSIONS
>
> 1. APPLICABLE TO BUSINESS LIABILITY COVERAGE
>
> The insurance does not apply to: . . .
>
> b. "Bodily Injury" or "property damage" for which the insured [is] obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:
>
> (1) Assumed in a contract or agreement that is an "insured contract" . . . .

The policy defined "insured contract" as

> (g) That part of any other contract or agreement pertaining to (your) business under which you assume the tort liability of

> another pay damages because of "bodily injury" . . . (to a) third person or organization, if the contract or agreement (was) made prior to the "bodily injury" . . . Tort liability means a liability that would be imposed by law in (the) absence of any contract or agreement.

In October 2013, Wawa filed a cross-claim against Green, asserting Green was obligated to indemnify Wawa if plaintiff secured a judgment against it. Wawa also claimed Green breached their agreement because it failed to ensure Wawa was named as an additional insured under the Farm policy.

In June 2014, Wawa filed a motion for summary judgment seeking a determination Green breached the service agreement and owed Wawa a defense and indemnification. Green cross-moved, seeking a determination Green was not liable to plaintiff or to Wawa on its cross-claim. The court granted Wawa's motion and denied Green's motion. In an order entered on June 6, 2014, the court directed Green to provide Wawa with a defense and indemnification, and to reimburse Wawa for the defense costs it had incurred from the day Wawa attempted to tender its defense to Green.

Approximately three weeks later, Farm sent Green a letter noting Green was "now personally exposed to the claims by Wawa," and recommended Green retain personal counsel at its own expense

"for representation on the defense and indemnification issues by Wawa."

In August 2014, Green retained personal counsel who, among other things, commenced a third-party action against Farm. In its third-party complaint against Farm, Green alleged breach of contract, and sought a declaratory judgment establishing Farm was required to provide Green with a defense against and coverage for Wawa's claims.

In February 2015, the underlying personal injury action was tried on the issue of liability only. Before trial, the parties stipulated plaintiff's damages were $120,000. The jury found there was no cause for action against Green, but found Wawa sixty percent negligent and plaintiff forty percent negligent. Wawa paid plaintiff its share of the damage award and promptly demanded indemnification from Green. Three weeks later, Wawa advised all parties it was not going to pursue its cross-claim against Green.

Green moved to vacate the June 6, 2014 order and for summary judgment against Farm on the third-party complaint. Farm cross-moved for summary judgment against Green. On June 5, 2015, the court entered an order vacating the provision in the June 6, 2014 order that required Green to defend and indemnify Wawa and required Green to reimburse Wawa for the defense costs

it had previously incurred. The June 2015 order further declared the Farm policy required Farm to defend and indemnify Wawa. Finally, the order provided Green's personal counsel could file an application for costs and counsel fees.

In its written opinion, among other findings, the court determined the service agreement did not obligate Green to defend and indemnify Wawa, because the jury found Green was not responsible for plaintiff's fall. The court noted Section 7 of the agreement provided Green would indemnify Wawa for the injuries of any person that arose out of or related to the performance of Green's services. However, because the jury absolved Green of liability, the court reasoned Green was not compelled to indemnify or defend Wawa, as plaintiff's injuries did not arise out of or relate to Green's performance of its services.

The court further noted that, before trial, it was not known whether plaintiff's injuries arose out of or were related to Green's services; concomitantly, it was not known if Green was obligated to defend and indemnify Wawa. Accordingly, until it was determined what Green's obligations to Wawa were under the agreement, Farm had a duty to defend and indemnify Green against Wawa's cross-claim, as well as defend and indemnify Wawa.

Finally, on August 5, 2015, the court entered an order awarding Green $47,775 in counsel fees and $211.49 in costs.

II

On appeal, Farm contends the trial court erred when it (1) declared in its June 6, 2014 order Green must provide a defense and indemnify Wawa against plaintiff's claims; (2) declared in its June 5, 2015 order the Farm policy requires Farm to provide Wawa with a defense and indemnification, and found Farm must reimburse Green for the costs and counsel fees it paid to personal counsel; and (3) failed to review Green's application for counsel fees in accordance with "established guidelines."

In its cross-appeal, Green's principal contention is the trial court failed to award it all of the fees to which it was entitled. Green also seeks leave to file a motion for counsel fees in the event the trial court's decision is affirmed.

Turning to Farm's contentions, we need not address the argument the June 6, 2014 order contains a provision Farm considers erroneous, because that order has been vacated. "Courts normally will not decide issues when a controversy no longer exists, and the disputed issues have become moot." Betancourt v. Trinitas Hosp., 415 N.J. Super. 301, 311 (App. Div. 2010). The subject order no longer has any legal effect; in fact, because it has been vacated, the provisions in the

order no longer exist. There is no order to reverse, modify, vacate, or affirm. Even if we were to consider and decide Farm's contentions, we would be doing so only hypothetically and our decision would have no consequence.

Farm next argues the court erred when it found Farm was responsible for providing Wawa with a defense and indemnification and, further, ordered Farm to pay Green's personal counsel fees and costs. First, the trial court did not in fact order Farm to pay for Wawa's defense or to indemnify Wawa. Wawa did not seek such relief from Farm and, in fact, Wawa never filed a complaint or claim against Farm. Second, the trial court's findings about Farm's obligations to Wawa are immaterial to the issues on appeal. The pertinent issue is whether Farm is obligated to reimburse Green for the expenses it incurred because it retained personal counsel to defend itself against Wawa's cross-claim. We concur with the trial court Farm must reimburse Green for these expenses.

Green agreed to indemnify and defend Wawa for the injuries any person sustained arising out of or relating to its services, regardless of whether Wawa was negligent. The Farm policy provided Green with coverage in the event Green had to indemnify Wawa under these circumstances. The indemnification provision in the agreement is recognized and accepted in the policy as an

"insured contract." The policy defines an "insured contract" as one that provides coverage to an insured who has assumed "the tort liability of another pay damages because of bodily injury . . . (to a) third person," as long as the contract was made before the injury. "Tort liability" is defined as "a liability that would be imposed by law in the absence of any contract or agreement." There is no question the service agreement was an insured contract, which the policy specifically did not exclude from coverage.

Green was not obligated to defend and indemnify Wawa under the service contract unless plaintiff's injuries arose from or related to Green's maintenance of the subject parking lot. In hindsight, there is no evidence plaintiff's injuries did so, but for a period of time during the litigation, that question was unresolved and, while it remained so, Wawa's cross-claim against Green was viable and Green had to contend with it.

Under the circumstances, Farm was obliged to provide Green with a defense in connection with the cross-claim. "An insurer is contractually obliged to provide the insured with a defense against all actions covered by the insurance policy." Abouzaid v. Mansard Gardens Assocs., LLC, 207 N.J. 67, 79 (2011) (citing Hartford Accident & Indem. Co. v. Aetna Life & Cas. Ins. Co., 98 N.J. 18, 22 (1984)). "The duty to defend is triggered by the

filing of a complaint alleging a covered claim." Ibid. "It is now well settled that the insured's right to a defense is, at least initially, determined by the allegations of the complaint against it, even if meritless or frivolous, and that the insurer is obliged to provide a defense if the claims of damage are within the policy's covenant to pay, i.e., the coverage of the policy." Muralo Co., Inc. v. Emp'rs Ins. of Wausau, 334 N.J. Super. 282, 289-90 (App. Div. 2000) (citing Burd v. Sussex Mut. Ins. Co., 56 N.J. 383, 388-89 (1970); Hartford Ins. Grp. v. Marson Constr. Corp., 186 N.J. Super. 253, 257 (App. Div. 1982), certif. denied, 93 N.J. 247 (1983)), certif. denied, 167 N.J. 632 (2001).

There are some exceptions to the principles we cite above, see ibid., but none apply here. Farm provided a liability policy to Green to provide coverage for, among other things, Green's negligence. The policy also afforded coverage to Green when it assumed the liability of another under an insured contract. After plaintiff filed her complaint, Green endeavored to defend itself not only against plaintiff's direct claim but also against Wawa's claim that it was entitled to indemnification from Green. Both claims were within the policy's covenant to pay. Therefore, Farm was required to provide Green with a defense when Wawa's cross-claim was filed.

When Farm failed to do so, Green was forced to incur the expense of providing its own defense.

We have considered the arguments Farm and Green raise on the counsel fees and costs awarded to Green. We note "fee determinations . . . will be disturbed only on the rarest of occasions, and then only because of a clear abuse of discretion." Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 444 (2001) (quoting Rendine v. Pantzer, 141 N.J. 292, 317 (1995)). After reviewing the record, we discern no abuse of discretion warranting appellate intervention.

To the extent any argument raised by the parties has not been explicitly addressed in this opinion, it is because we are satisfied the argument lacks sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Finally, Green seeks leave to file a motion to seek counsel fees for having to respond to Farm's appeal. Green does not require leave to file such a motion. See R. 2:11-4.

Affirmed.