SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1015-15T3

SELECTIVE INSURANCE
COMPANY OF AMERICA,

Plaintiff-Respondent,

v.

TRH BUILDERS, INC., JAMES
MEEHAN, KATHLEEN MEEHAN, and
J. RICHARD CARNALL,

Defendants,

and

ROBERT "BOB" MEYER and
BOB MEYER COMMUNITIES,

Defendant-Appellant.

Submitted February 16, 2017 – Decided September 11, 2017

Before Judges Hoffman, O'Connor and Whipple.

On appeal from Superior Court of New Jersey, Law Division, Burlington County, Docket No. L-2239-12.

The Killian Firm, PC, attorneys for appellant (Ryan Milun and Eugene Killian, Jr., on the brief).

Hill Wallack, LLP, attorneys for respondent (Todd J. Leon, of counsel and on the brief; Jonathan D. Pavlovcak, on the brief).

PER CURIAM

Defendant Bob Meyer Communities, Inc., (BMC) appeals from a September 25, 2015 order denying its motion for reconsideration of a December 9, 2013 order, which had denied its and granted plaintiff Selective Insurance Company of America's motion for summary judgment. We reverse and remand for further proceedings.

I

In or about 2000, BMC was the general contractor for an entity that built residential dwellings. BMC contracted with various subcontractors to perform the necessary work, one of which was defendant TRH Builders, Inc. (TRH). TRH framed and installed doors and windows in the dwellings. At the time it performed its work, TRH was insured under commercial general liability (CGL) policies issued by plaintiff. One policy was in effect from March 16, 2001 to March 16, 2002, and the other from March 16, 2002 to August 29, 2002.

Well after the second policy expired, the homeowners of five of the homes discovered some of the wood in the walls of their homes was rotting. The homeowners eventually filed complaints against BMC, which in turn filed complaints against

TRH. In its complaints, BMC alleged the manner in which TRH constructed the doors and windows of the subject homes permitted water to infiltrate inside of the walls, causing the subject damage. TRH failed to respond to any of BMC's complaints; BMC eventually obtained default judgments against TRH, which the court found partly responsible for the damage.

TRH, which went out of business in or about 2005, did not satisfy those judgments. BMC requested plaintiff pay the judgments in accordance with the policies plaintiff issued to TRH, but plaintiff refused. Plaintiff then filed a complaint seeking a declaratory judgment it did not have a duty to indemnify or defend TRH for the complaint filed by one of the homeowners. In response, BMC filed a counterclaim seeking a declaratory judgment the subject policies provided coverage for the damages caused by TRH's defective work, including those that were the subject of the judgments entered against BMC.

After the close of discovery, both parties filed competing motions for summary judgment. Among other things, plaintiff argued there was no evidence either BMC or the homeowners were actually damaged when either policy was in effect. Relying upon one of its expert's reports, BMC countered there was conclusive evidence damage to the property occurred during the policy periods.

Among other things, engineer Thomas R. Kulp, BMC's expert, stated improper flashing around the doors and windows caused water to infiltrate through the stucco and stone cladding on the homes. He claimed water infiltrated as soon as the homes were constructed, and became trapped inside the walls. Within four to six weeks of infiltration, mold developed. In a certification submitted in support of BMC's motion and in opposition to plaintiff's motion for summary judgment, Kulp noted all of the subject homes were completed well within the period TRH's insurance policies with plaintiff were in effect.

Each policy provided, in pertinent part:

> 1.b. This insurance applies to . . . "property" damage only if:
>
> > (1) The . . . "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; and
> >
> > (2) The . . . "property damage" occurs during the policy period.

The policies defined "occurrence" and "property damage" as follows:

> 12. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions . . . .
>
> 15. "Property damages" means:

> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
>
> b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

When it granted plaintiff's and denied BMC's respective summary judgment motions, the trial court framed the issue as whether the infiltrated water caused actual damage when the policies were in effect. The court recognized it was BMC's position the damage occurred when mold formed four to eight weeks after water infiltrated, and that such infiltration began once each home was constructed.

However, the court concluded the law governing the subject CGL policies did not mandate coverage "when the wrongful act itself is committed[,] which [here] is the installation of the windows[,]" but at "the time when the complaining party . . . was actually damaged." The court acknowledged "[Kulp's report] clearly identified and provided evidence that the mechanism for the water intrusion was there," but then determined his report failed to provide evidence of "any water intrusion, when it occurred, or even if mold developed." Thus, because in its view

no actual damage was sustained during either policy period, the court held plaintiff did not have to provide coverage for the subject damage, and granted plaintiff's and denied BMC's motion for summary judgment.

BMC filed a motion for reconsideration, essentially contending the court overlooked key evidence. The court reconsidered the evidence, but again found there was no evidence of any actual damage occurring during the subject policy periods, and denied the motion. In addition, the court held because the damage was discovered after both policies expired, plaintiff did not have to provide coverage.

II

On appeal, BMC asserts the following for our consideration:

> POINT I: THE TRIAL COURT INCORRECTLY HELD THAT THE PROPERTY DAMAGE TO THE VARIOUS LIBERTY PLACE RESIDENTS CAUSED BY THE FAULTY WORKMANSHIP OF TRH DID NOT MANIFEST DURING THE APPLICABLE POLICY PERIOD.
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> POINT II: THE TRIAL COURT FAILED TO CONSIDER THE EXPERT REPORT PROVIDED BY BMC INCORRECTLY HOLDING THAT IT WAS A "NET OPINION."
>
> POINT III: AT A MINIMUM THERE WAS AN ISSUE OF FACT AS TO WHETHER THE PROPERTY DAMAGE MANIFESTED DURING THE SELECTIVE POLICY PERIOD AS BMC PRODUCED AN EXPERT REPORT ON THIS ISSUE AND SELECTIVE HAD USED CIRCUMSTANTIAL DATA RELATED TO THE DISCOVERY OF DAMAGE BY THE VARIOUS HOMEOWNERS.

POINT IV: NONE OF THE OTHER DEFENSES OR EXCLUSIONS IN THE INSURANCE POLICY RAISED BY SELECTIVE ARE APPLICABLE TO BAR COVERAGE AND THEREFORE, CANNOT SUPPORT SUMMARY JUDGMENT.

POINT V: THE TRIAL COURT INCORRECTLY FAILED TO CONSIDER OR APPLY THE CONTINUOUS TRIGGER THEORY IN CONNECTION WITH THE TIME OF THE OCCURRENCE; PARTICULARLY GIVEN THE RECENT DECISION OF THE NEW JERSEY SUPREME COURT IN POTOMAC.

POINT VI: BMC IS PROPERLY "STANDING IN THE SHOES" OF TRH IN THIS LITIGATION, AS VARIOUS JUDGMENTS HAVE BEEN ENTERED AGAINST TRH AND BECAUSE TRH IS DEFUNCT AND NO LONGER IN BUSINESS, BMC MAY PROPERLY SEEK A RECOVERY DIRECTLY FROM TRH'S INSURANCE CARRIER, SELECTIVE.

It is undisputed the subject policies are what are known as "occurrence" policies. Such policies provide coverage for "property damage" claims the insured becomes legally obligated to pay if the property damage is caused by an occurrence that takes place during the policy period. An "occurrence" is defined in both policies as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." BMC maintains the damage occurred during either one of the policy periods; plaintiff argues the damage did not occur until the problems caused by the deficient workmanship were discovered.

It is well established "the time of the occurrence of an accident within the meaning of an indemnity policy is not the

time the wrongful act was committed but the time when the complaining party was actually damaged." Hartford Accident & Indem. Co. v. Aetna Life & Cas. Ins. Co., 98 N.J. 18, 27 (1984) (quoting Miller Fuel Oil Co. v. Ins. Co. of N. Am., 95 N.J. Super. 564, 578 (App. Div. 1967)). In Hartford, the Court found the defendant carrier had no duty to indemnify its insured against a claim the insured had negligently failed to warn of the dangers of a drug ingested by the minor plaintiff in the underlying liability action, because there was no evidence the plaintiff suffered any bodily injury during the policy period. The Court held it is when damage has been sustained that triggers coverage. Id. at 27-29.

As explained in the treatise Appleman on Insurance, a:

> CGL policy will be triggered if the injury is determined to have "actually" occurred within the CGL policy period, irrespective of when the injury first manifested itself or when the third-party claimant was initially exposed to the injurious substance. The main issue is when the injury actually occurred. The injury need not be manifest, but the injury must exist in fact. The insurers' obligations to indemnify the insured arise when the real injury occurs during the policy period.
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> [20 Eric M. Holmes, Appleman on Insurance § 129.2 at 204-05 (2d ed. 2002).]

Here, through its expert, BMC provided evidence the mold and rot formed during the policy period. According to the

expert, that mold and rot caused the damage to the wood about which the homeowners later complained and formed the basis for the actions they brought against BMC. The evidence provided in the expert's report raised a genuine, material issue of fact sufficient enough to defeat plaintiff's motion for summary judgment, see R. 4:46-2(c), at least with respect to plaintiff's claim the actual damage did not occur during the policy period. Thus, the trial court erred when it failed to recognize on BMC's motion for reconsideration it had overlooked the significance of probative, competent evidence. See D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990).

Further, we do not agree the expert's opinion was net. "The net opinion rule is a 'corollary of [N.J.R.E. 703] . . . which forbids the admission into evidence of an expert's conclusions that are not supported by factual evidence or other data.'" Townsend v. Pierre, 221 N.J. 36, 53-54 (2015) (quoting Polzo v. Cty. of Essex, 196 N.J. 569, 583 (2008)). "Simply put, the net opinion rule 'requires an expert to give the why and wherefore of his or her opinion, rather than a mere conclusion.'" State v. Townsend, 186 N.J. 473, 494 (2006) (quoting Rosenberg v. Tavorath, 352 N.J. Super. 385, 401 (App. Div. 2002)). The witness's conclusions can be based on his qualifications and personal experience, with or without citation

to academic literature. Id. at 495. We are satisfied from our review of the subject expert's report there was sufficient evidence within that document to overcome the claim the opinion was net.

Accordingly, we reverse the September 25, 2015 order denying BMC's motion for reconsideration of the December 9, 2013 order, and vacate that portion of the December 9, 2013 order that granted plaintiff summary judgment. For the reasons provided, there is a question of fact whether actual damages were sustained during the policy periods.

However, we do not vacate the provision in the December 9, 2013 order that denied BMC's motion for summary judgment, because plaintiff raised arguments in support of its motion for summary judgment that were not considered and decided by the trial court. Accordingly, we remand this matter to the trial court so that it may consider those remaining arguments.

Finally, we do not consider the arguments raised in Points IV, V, and VI, because the trial court did not address such arguments and, therefore, we decline to do so in the first instance. See Ins. Co. of N. Am. v. Gov't Emps. Ins. Co., 162 N.J. Super. 528, 537 (App. Div. 1978).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.