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Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3827-14T4

ROSA PEN, INC. and PARK
COURT PROPERTIES, L.L.C.,

Plaintiffs-Appellants,

v.

SELECTIVE WAY INSURANCE
COMPANY,

Defendant-Respondent.

Argued January 31, 2017 – Decided February 21, 2017

Before Judges Yannotti, Fasciale and Gilson.

On appeal from Superior Court of New Jersey,
Law Division, Bergen County, Docket No. L-
5530-12.

Richard J. Allen, Jr. argued the cause for
appellants (Kipp & Allen, L.L.P., attorneys;
Mr. Allen and Karen A. Beerbower, of counsel
and on the briefs).

Joyce E. Boyle argued the cause for respondent
(McElroy, Deutsch, Mulvaney & Carpenter,
L.L.P., attorneys; Kevin MacGillivray and Ms.
Boyle, of counsel and on the brief).

PER CURIAM

Rosa Pen, Inc. (Rosa Pen) and Park Court Properties, L.L.C. (Park Court) (collectively plaintiffs) appeal from a March 5, 2015 order dismissing their complaint and granting summary judgment to defendant Selective Way Insurance Company (Selective). We affirm.

Park Court owns the property and Rosa Pen is a tenant on the property. Selective insures the property. On August 27, 2011, the property was damaged. At the time, Hurricane Irene had made landfall and caused severe flooding to the surrounding area.

Rosa Pen tendered a property damage claim to Selective seeking compensation. On September 14, 2011, Selective retained Team One Adjusting Services, L.L.C. (Team One) to inspect the property. Team One's report stated that the damages were caused "as a result of surface water intrusion," and there were "approximately [thirty-six] inches of water in [the] first story." The report specified that "[w]ater backed up through the drain and surface water entered the building causing damage to the electrical system, door, carpet, and walls."

On September 17, 2011, Selective denied insurance coverage because "flooding and/or surface water" caused the damage. Selective relied on the Causes of Loss-Special Form (causes of loss form) which stated it excluded coverage for damage caused solely or in part by flooding.

Plaintiffs disputed what caused the flooding. They maintained that the property damage was caused solely by a sewage back-up. Plaintiffs conceded, however, that the area surrounding their building was flooded.

Plaintiffs filed this declaratory judgment complaint seeking insurance coverage for the loss. Selective filed its motion for summary judgment, the court conducted oral argument, and entered the order under review. The court found that while no one saw flooding in the property, the area around the property was flooded. The court drew a favorable inference that part of the damage was caused by a sewer back-up, but concluded that floodwaters infiltrated the first floor of the property causing damage. The court explained that plaintiffs provided no evidence contrary to Selective's evidence that the building was flooded, other than "Mr. Rosa's own self-serving affidavit that he, himself, did not see any water at the [property]."

The court also found that the insurance policy was not ambiguous and plaintiffs never alleged what was ambiguous about the policy. The court stated that plaintiffs understood the bounds of their coverage and conceded their claims would be excluded if they resulted from flooding. The court also stated there was no allegation that the policy contained conflicting terms or sections

perceivable of two equally plausible interpretations and therefore the policy was not ambiguous.

On appeal, plaintiffs argue that there is a genuine issue of material fact as to whether their property was damaged by flood or a sewer back-up. They maintain that the damage from the sewer back-up constitutes a covered loss. Plaintiffs assert that the judge misapplied the summary judgment standard by failing to view the evidence in the light most favorable to the non-moving party because they state the court determined that part of the damage to the building was caused by flood.

Summary judgment may be granted when, considering the evidence in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. R. 4:46-2(c); see also Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). When reviewing an order granting summary judgment, this court applies the same standards that the trial court applies when ruling on the motion. Oyola v. Xing Lan Liu, 431 N.J. Super. 493, 497 (App. Div.), certif. denied, 216 N.J. 86 (2013).

When considering the evidence in the light most favorable to plaintiffs, the court properly concluded that flooding also caused the damage. Selective produced evidence showing a neighbor saw the property flooded with about three feet of water; a contractor

repairing the damage found mud and dirt in the interior of the premises; a tenant at Park Properties stated that the water was knee deep at the property on August 28, 2011; and the expert engineer report stating that "the combination of surface water and area-wide flooding" at or around the property caused the water damage. When viewing the facts in the light most favorable to plaintiffs, the court correctly determined that plaintiffs failed to provide any evidence disputing that a flood in part caused damage to the property.

Plaintiffs contend that the water exclusion endorsement form (water exclusion) in Selective's insurance policy does not apply and damages resulting from a sewer back-up are covered under their policy. They argue that even if the water exclusion applies, the water exclusion is ambiguous and should be construed against the insurer.

The interpretation of insurance contracts is a matter of law and subject to de novo review. Sealed Air Corp. v. Royal Indem. Co., 404 N.J. Super. 363, 375 (App. Div.), certif. denied, 196 N.J. 601 (2008). We afford no special deference to "[a] trial court's interpretation of the law and the legal consequences that flow from the established facts[.]" Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

"Insurance policies are construed in accordance with principles that govern the interpretation of contracts; the parties' agreement 'will be enforced as written when its terms are clear in order that the expectations of the parties will be fulfilled.'" Mem'l Props., LLC v. Zurich Am. Ins. Co., 210 N.J. 512, 525 (2012) (quoting Flomerfelt v. Cardiello, 202 N.J. 432, 441 (2010)). "The terms of insurance contracts are given their 'plain and ordinary meaning,' with ambiguities resolved in favor of the insured." Ibid. (quoting Flomerfelt, supra, 202 N.J. at 441).

"[I]nsurance contracts are to be construed in a manner that recognizes the reasonable expectation of the insured." Simonetti v. Selective Ins. Co., 372 N.J. Super. 421, 429 (App. Div. 2004). "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.'" Longobardi v. Chubb Ins. Co., 121 N.J. 530, 537 (1990) (quoting Walker Rogge, Inc. v. Chelsea Title & Guar. Co., 116 N.J. 517, 529 (1989)). Moreover, "[w]hen an insurance carrier puts in issue its coverage of a loss under a contract of insurance by relying on an exclusionary clause, it bears a substantial burden of demonstrating that the loss falls outside the scope of coverage." United Rental Equip. Co. v. Aetna Life & Cas. Ins. Co., 74 N.J. 92, 99 (1977).

The Building and Personal Property Coverage Form provides that Selective will pay for "direct physical loss of or damage to Covered Property . . . resulting from any Covered Cause of Loss."

The causes of loss form states:

A. Covered Causes Of Loss

When Special is shown in the Declarations, Covered Causes of Loss means Risks Of Direct Physical Loss unless the loss is:

1. Excluded in Section B., Exclusions; or
2. Limited in Section C., Limitations, . . .

B. Exclusions

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

. . . .

g. Water

- (1) Flood, surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not;
- (2) Mudslide or mudflow;
- (3) Water that backs up or overflows from a sewer, drain or sump; or
- (4) Water under the ground surface pressing on, or flowing or seeping through:
 - (a) Foundations, walls, floors or paved surfaces;

(b) Basements, whether paved or not;
or

(c) Doors, windows or other
openings.

But if Water, as described in g.(1) through g.(4) above, results in fire, explosion or sprinkler leakage, we will pay for the loss or damage caused by that fire, explosion or sprinkler leakage.

[(Emphasis added).]

The water exclusion modified part G of the Covered Causes of Loss section and states:

A. The exclusion in Paragraph B. replaces the Water Exclusion in the Coverage Part or Policy.

B. Water

1. Flood, surface water, waves (including tidal wave and tsunami), tides, tidal water, overflow of any body of water, or spray from any of these, all whether or not driven by wind (including storm surge);

2. Mudslide or mudflow;

3. Water that backs up or overflows or is otherwise discharged from a sewer, drain, sump, sump pump or related equipment;

4. Water under the ground surface pressing on, or flowing or seeping through:

(a) Foundations, walls, floors or paved surfaces;

(b) Basements, whether paved or not;
or

(c) Doors, windows or other openings; or

5. Waterborne material carried or otherwise moved by any of the water referred to in Paragraph 1., 3., or 4., or material carried or otherwise moved by mudslide or mudflow.

This exclusion applies regardless of whether any of the above, in Paragraphs 1. through 5., is caused by an act of nature or is otherwise caused.

Plaintiffs also purchased the ElitePac Property Extension Manufacturers Endorsement (ElitePac), which modified the Building and Personal Property Coverage Form and causes of loss form. The ElitePac form states:

This endorsement modifies insurance provided under the following:

BUILDING AND PERSONAL PROPERTY COVERAGE FORM
CAUSES OF LOSS-SPECIAL FORM
BUSINESS INCOME COVERAGE FORM

The insurance provided by this form is primary as respects any other insurance provided by this company except, if the insured has specifically scheduled or described the property under another form then that more specific coverage form shall be primary as respects the insurance provided by this coverage form. If a loss covered under this endorsement form also involves a loss under another coverage form that is made part of this policy, then the broadest coverage will apply except, if the property is specially scheduled or described under another coverage form then the valuation provisions of that more specific coverage form will apply. All other terms and conditions in the policy for

which this endorsement is attached remain unchanged.

SECTION I

The BUILDING AND PERSONAL PROPERTY COVERAGE FORM is amended as follows:

SECTION A. COVERAGE

. . . .

Broadened Water - Direct Damage

You may extend the insurance provided by this Coverage Form to pay for direct loss or damage caused by:

- a. Water that backs up or overflows or is otherwise discharged from a sewer, drain, sump, sump pump or related equipment; or
- b. Water under the ground surface pressing on, or flowing or seeping through foundations, walls, floors or paved surfaces.

. . . .

SECTION II

The CAUSES OF LOSS - SPECIAL FORM is amended as follows:

1. The following EXCLUSIONS:

- a. Earth Movement;

. . . .

do not apply to:

- a. The Valuable Papers and Records - Cost of Research Coverage Extension;

. . . .


[(Emphasis added).]

Selective's insurance coverage is unambiguous. As stated previously, the causes of loss form states "We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss." (Emphasis added). This portion of the causes of loss form was not altered by the water exclusion or the ElitePac form. The causes of loss form, as modified by the water exclusion, specifically excludes "(1) Flood, surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not[.]"

Although the Broadened Water-Direct Damage section of the ElitePac policy does not reference the anti-concurrent clause listed within Part B of the causes of loss form, the ElitePac form did not modify the anti-concurrent clause. Therefore, the court properly found that the policy was unambiguous and did not afford coverage to plaintiffs for the property damages.

Affirm.

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


CLERK OF THE APPELLATE DIVISION