SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4784-15T4

MATCHAPONIX ESTATES, INC.
and NCV DEVELOPERS,

Plaintiffs-Respondents,

v.

FIRST MERCURY INSURANCE COMPANY,

Defendant-Appellant.

Argued May 24, 2017 – Decided July 10, 2017

Before Judges Manahan and Lisa.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-4399-15.

Daniel Pickett argued the cause for appellant (Carroll, McNulty & Kull, LLC, attorneys; Kristin V. Gallagher and Mr. Pickett, of counsel and on the briefs).

David M. Hutt argued the cause for respondents (Hutt & Shimanowitz, P.C., attorneys; Mr. Hutt and Bryan D. Plocker, of counsel and on the brief).

PER CURIAM

In this insurance coverage dispute, First Mercury Insurance Company (First Mercury) appeals from an order denying its motion

for summary judgment, as well as a second order granting summary judgment in favor of Matchaponix Estates, Inc. (Matchaponix) and NCV Developers (NCV). We affirm.

We discern the following facts and all reasonable inferences drawn therefrom in the light most favorable to the party against whom summary judgment was entered. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523-24 (1995). The underlying personal injury action involves Jeannine Bleich, who claimed to be injured while riding her bicycle along the roadway in a development built by Matchaponix and NCV. Bleich attributed her accident and resulting injury to a sinkhole, which caused her to be propelled forward onto the pavement.

In November 2014, Bleich and her husband filed a complaint naming NCV as a defendant. The complaint was thereafter amended to add Matchaponix as a defendant. The complaint alleged Matchaponix and NCV were negligent in their management and maintenance of the development.

At the time of the accident, Matchaponix and NCV were insured under a commercial general liability policy (CGL) issued by First Mercury. The CGL included an endorsement-subsidence exclusion, which provided,

> This insurance does not apply to:

> "Bodily injury" or "property damage" directly or indirectly arising out of[,] caused by, resulting from, contributed to, aggravated by or related to the subsidence, settling, settlement, expansion, sinking, slipping, falling away, tilting, caving in, shifting[,] eroding, rising, heaving, landslide, flood or mud flow, earthquake, volcanic eruption or other tectonic processes or any other movement, of land or earth, however caused, and whether by natural, manmade, accidental or artificial means. This exclusion applies regardless of any other cause or event that contributes concurrently or in any sequence to the "bodily injury" or "property damage."
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> We shall have no duty or obligation on our part under this insurance to defend, respond to, investigate or indemnify any insured against any loss, claim, "suit," or other proceeding alleging damages arising out of or related to "bodily injury" or "property damage" to which this endorsement applies.
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> This exclusion also applies to any obligation to, share damages with, repay or indemnify someone else who must pay damages because of such "bodily injury" or "property damage."

In response to the underlying action, Matchaponix and NCV submitted a claim to First Mercury.[1] By letter dated January 8, 2015, First Mercury disclaimed coverage based on the CGL's subsidence exclusion provision.

[1] Matchaponix and NCV filed a claim prior to the commencement of the underlying action for which First Mercury denied coverage.

In July 2015, Matchaponix and NCV commenced a declaratory judgment action. First Mercury filed its answer and affirmative defenses in September 2015. Matchaponix and NCV, as well as First Mercury, simultaneously filed motions for summary judgment. On April 27, 2016, the trial court issued a preliminary ruling on the parties' motions granting summary judgment in favor of Matchaponix and NCV.

At the conclusion of oral argument held on May 6, 2016, the court granted Matchaponix and NCV's motion for summary judgment and denied First Mercury's motion for summary judgment. On the same day, the court entered orders memorializing its decision. The orders stated in part:

> 2. First Mercury shall pay on behalf of Matchaponix and NCV all sums that Matchaponix and/or NCV become legally obligated to pay, through judgment settlement or otherwise, in connection with the [Underlying Litigation;]
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> 3. First Mercury shall pay on behalf of Matchaponix and NCV all costs, including attorneys' fees, and related litigating expenses that Matchaponix and NCV incur in the defense of the Underlying Litigation;

The court entered a consent order for final judgment in connection with its summary judgment rulings on June 9, 2016. Pursuant to the order, the parties agreed upon the amount of legal fees incurred by Matchaponix and NCV, totaling $37,927.94. The

order reserved First Mercury's right to appeal the May 6, 2016 orders. This appeal followed.

First Mercury raises the following argument on appeal:

[POINT I]

THE TRIAL COURT IMPROPERLY LIMITED THE APPLICATION OF THE SUBSIDENCE EXCLUSION TO "CATASTROPHIC" EVENTS.

A. STANDARD OF REVIEW.

B. THE PLAIN TERMS OF THE SUBSIDENCE EXCLUSION DOES NOT LIMIT ITS APPLICATION TO "CATASTROPHIC" EVENTS.

C. THE SUBSIDENCE EXCLUSION PRECLUDES COVERAGE FOR NCV DEVELOPERS AND MATCHAPONIX.

D. THE SUBSIDENCE EXCLUSION IS UNAMBIGUOUS.

First Mercury raises the following argument in its reply brief:

[POINT I]

LEGAL ARGUMENT.

A. THE SUBSIDENCE EXCLUSION PRECLUDES COVERAGE FOR THE UNDERLYING ACTION.

B. COURTS HAVE FOUND THE SUBSIDENCE EXCLUSION TO BE UNAMBIGUOUS AND ENFORCEABLE AND THE TRIAL COURT AND [MATCHAPONIX AND NCV] FAILED TO CITE TO ANY CASE HOLDING TO THE CONTRARY.

C. [MATCHAPONIX AND NCV'S] READING OF THE EXCLUSION RENDERS ITS TERMS MEANINGLESS AND INEXPLICABLE.

D. [MATCHAPONIX AND NCV] PROVIDE NO EVIDENTIARY SUPPORT OF WHAT THEIR EXPECTATIONS WERE.

E. THE SUBSIDENCE EXCLUSION IS NOT RENDER AMBIGUOUS BECAUSE IT MIGHT NOT APPLY TO A HYPOTHETICAL, ALTERNATIVE SITUATION.

F. BASED UPON THE ALLEGATIONS OF THE COMPLAINT[,] FIRST MERCURY HAD NO DUTY TO DEFEND.

Our review of a ruling on summary judgment is de novo, applying the same legal standard as the trial court. Coyne v. N.J. Dep't of Transp., 182 N.J. 481, 491 (2005); Tymczyszyn v. Columbus Gardens, 422 N.J. Super. 253, 261 (App. Div. 2011), certif. denied, 209 N.J. 98 (2012). Thus, we consider "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007) (quoting Brill, supra, 142 N.J. at 536). "Summary judgment must be granted if 'the pleadings, depositions, answers to interrogatories[,] and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.'" Town of Kearny v. Brandt, 214 N.J. 76, 91 (2013) (quoting R. 4:46-2(c)).

Here, the factual record is not in dispute. If there is no genuine issue of material fact, we must then "decide whether the trial court correctly interpreted the law." Massachi v. AHL Servs., Inc., 396 N.J. Super. 486, 494 (App. Div. 2007), certif. denied, 195 N.J. 419 (2008). We review de novo the trial court's legal determinations, including its construction of an insurance contract. Polarome Int'l, Inc. v. Greenwich Ins. Co., 404 N.J. Super. 241, 260 (App. Div. 2008), certif. denied, 199 N.J. 133 (2009).

Matchaponix and NCV's expert's opinion was undisputed. See D'Alessandro v. Hartzel, 422 N.J. Super. 575, 581 (App. Div. 2011) (requiring expert testimony concerning construction or design defects). The expert opined that that this sinkhole was caused by underground leakage from a storm-water pipe leading to a nearby inlet installed by Matchaponix and NCV. First Mercury did not present its own expert. As such, the only issue on appeal before us is the trial court's interpretation of the CGL and whether this condition falls within the subsidence exclusion.

The interpretation of an insurance policy upon established facts is a question of law for the court to determine. Simonetti v. Selective Ins. Co., 372 N.J. Super. 421, 428 (App. Div. 2004). Our standard of review is plenary. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). "Generally, '[w]hen

interpreting an insurance policy, courts should give the policy's words their plain, ordinary meaning.'" Nav-Its, Inc. v. Selective Ins. Co. of Am., 183 N.J. 110, 118 (2005) (quoting President v. Jenkins, 180 N.J. 550, 562 (2004)). "An insurance policy is a contract that will be enforced as written when its terms are clear in order that the expectations of the parties will be fulfilled." Flomerfelt v. Cardiello, 202 N.J. 432, 441 (2010) (citing Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 43 (1960)).

In construing the CGL, the court held:

> To determine the cause of the hole . . ., [Matchaponix and NCV] retained an expert, who concluded that "[b]ased on the location of the pavement failure and the shape of the hole, it is our opinion, based on a reasonable degree of engineering certainty, that the formation of the hole is attributed to a loss of support from soil migration into a potential break or crack within the [storm-water] pipe below the area of interest. The pavement failure is, based on a reasonable degree of engineering certainty, the result of a construction related deficiency in the utility installation." Notably, First Mercury admits that it has not retained an expert to contradict [] the opinions of [Matchaponix and NCV's] expert.
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> Matchaponix and NCV argue that First Mercury should be required to defend and indemnify them under the [CGL] because Bleich alleges bodily injuries resulting from riding her bicycle into a hole in [the] roadway caused by a construction-related deficiency. Because the hole was not caused by the subsurface movement of the Earth, such as a tectonic shift of the plates, the Subsidence

> Exclusion of the [CGL] is not applicable, and to the extent that the exclusion is applicable, that provision is ambiguous, thus requiring those doubts to be resolved in favor [of] the insured.
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> . . . .
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> The language of the Subsidence Exclusion plainly envisions a scenario in which solid Earth collapses downward because of a natural occurrence, such as a floor or an earthquake, or human activities, such as industrial mining or ground water pumping. It is abundantly clear that the exclusion does not apply to a scenario in which solid Earth seeps into a break or crack in a [storm-water] pipe resulting from a construction related deficiency, thus causing a hole in the pavement of a roadway. To conclude otherwise would lead to [a] jarringly anomalous result, running contrary to the fundamental principles of fairness and common sense. Because [Matchaponix and NCV's] expert has opined that the pavement failure is the result of a faulty installation of the [storm-water] pipe below [the roadway], which is neither disputed nor refuted by First Mercury, the Subsidence Exclusion does not apply, and thus, [Matchaponix and NCV] are entitled to coverage under the [CGL], and reimbursement for monies expended in their defense.

While we affirm the order of summary judgment in favor of Matchaponix and NCV, we do so for different reasons than those articulated by the court. Because we review judgments, not decisions, we may affirm on any ground. Serrano v. Serrano, 367 N.J. Super. 450, 461 (App. Div. 2004) (quoting Isko v. Planning Bd. of Livingston Twp., 51 N.J. 162, 175 (1968)) ("Although we

affirm for different reasons, a judgment will be affirmed on appeal if it is correct, even though 'it was predicated upon an incorrect basis.'"), rev'd on other grounds, 183 N.J. 508 (2005).

Exclusions in insurance policies are construed narrowly. Princeton Ins. Co. v. Chunmuang, 151 N.J. 80, 95 (1997). They will be enforced if the language is "specific, plain, clear, prominent, and not contrary to public policy." Ibid. (quoting Doto v. Russo, 140 N.J. 544, 559 (1995)). Because an insurance policy is a contract of adhesion, ambiguous policy language is interpreted in favor of the insured to give effect to the insured's reasonable expectations. Doto, supra, 140 N.J. at 555-56. Ambiguity is present when "the phrasing of the policy is so confusing that the average policyholder cannot make out the boundaries of coverage." Nunn v. Franklin Mut. Ins. Co., 274 N.J. Super. 543, 548 (App. Div. 1994) (quoting Weedo v. Stone-E-Brick, Inc., 81 N.J. 233, 247 (1979)). On numerous occasions, our courts have resolved unclear policy language in favor of the insured. See, e.g., Sparks v. St. Paul Ins. Co., 100 N.J. 325, 336 (1985); Search EDP, Inc. v. Am. Home Insurance, 267 N.J. Super. 537, 542 (App. Div. 1993), certif. denied, 135 N.J. 466 (1994); and Progressive Cas. Ins. Co. v. Hurley, 166 N.J. 260, 273-74 (2001).

However, "[i]f the words used in an exclusionary clause are clear and unambiguous, 'a court should not engage in a strained

construction to support the imposition of liability.'" Flomerfelt, supra, 202 N.J. at 442 (quoting Longobardi v. Chubb Ins. Co., 121 N.J. 530, 582 (1990)). "[T]he burden is on the insurer to bring the case within the exclusion." Ibid. (quoting Am. Motorists Ins. Co. v. L-C-A Sales Co., 155 N.J. 29, 41 (1998)).

We have also extended coverage where the language is unambiguous, but the denial of coverage would frustrate the insured's reasonable expectations. Sparks, supra, 100 N.J. at 338. Thus, even when the policy language is clear, but denial of coverage contravenes the insured's reasonable expectations, our courts have ruled for the insured.

In Werner Industries, Inc. v. First State Insurance. Co., 112 N.J. 30 (1988), our Supreme Court explained the underlying rationale for the reasonable expectations doctrine. That doctrine is triggered despite unambiguous language where "the insurance contract is inconsistent with public expectations and commercially accepted standards." Id. at 35 (quoting Sparks, supra, 100 N.J. at 338). In such instances, "judicial regulation of insurance contracts is essential in order to prevent overreaching and injustice." Ibid. (quoting Sparks, supra, 100 N.J. at 338).

We disagree with the court that the exclusion language was ambiguous. From our reading of the CGL language, its literal language plainly excludes from coverage any losses from the

movement of land or earth "however caused, and whether by natural, manmade, accidental or artificial means." By its literal terms, the subsidence exclusion's application is not limited, as the court determined, to soil migration by natural causes. Here, the factual predicate for the occurrence was the manmade movement of earth. Despite our finding as to the issue of ambiguity, our determination as to whether the exclusionary language should be applied does not end here. Id. at 35 (quoting Sparks, supra, 100 N.J. at 338).

We next turn to the issue of the reasonable expectations of Matchaponix and NCV. Ibid. In doing so, we apply "an objective standard of reasonableness" in determining what a policyholder's reasonable expectations are. Clients' Sec. Fund of the Bar of N.J. v. Sec. Title & Guar. Co., 134 N.J. 358, 372 (1993); see also Progressive, supra, 166 N.J. at 274. Due to "the stark imbalance between insurance companies and insureds in their respective understanding of the terms and conditions of insurance policies[,] . . . '[t]he objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.'" Zacarias v. AllState Ins. Co., 168 N.J. 590, 594-95 (2001) (quoting Sparks, supra, 100 N.J. at 338-39).

As the court noted at oral argument, by interpreting the exclusion in the manner argued for by First Mercury, the exclusion would apply to the mere act of putting a shovel in the ground, digging a hole, and then failing to cover it up. The court held that given the potential applicability of the exclusion to the "shovel in the ground" occurrence, it rendered the exclusion ambiguous. While, we disagree with the court's holding on the issue of ambiguity, we conclude that the potential, if not actual, applicability of the exclusion to such an occurrence would clearly have not been aligned with the indemnity coverage that Matchaponix and NCV believed they procured.[2]

"[C]ourts have a special responsibility to prevent the marketing of policies that provide unrealistic and inadequate coverage." Sparks, supra, 100 N.J. at 341. This "unrealistically narrow" interpretation of the subsidence exclusion would be entirely in discord with Matchaponix and NCV's reasonable expectations as land developers regarding the type of coverage provided to them under the CGL. Ibid.

Affirmed.

[2] First Mercury's counsel was non-committal in response to the court's "shovel in the ground" hypothetical and its application to the exclusion. We received a similar response from counsel when we inquired about the "shovel in the ground" scenario during oral argument.