SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5474-14T4

WAYNE HALL,

Plaintiff-Appellant,

v.

CUMBERLAND MUTUAL FIRE INSURANCE COMPANY,

Defendant-Respondent.

Submitted December 8, 2016 – Decided August 17, 2017

Before Judges O'Connor and Whipple.

On appeal from Superior Court of New Jersey, Law Division, Cape May County, Docket No. L-0368-14.

Claims Worldwide, LLC, attorneys for appellant (Daniel W. Ballard, on the brief).

Methfessel & Werbel, attorneys for respondent (Richard A. Nelke and Christian R. Baillie, on the brief).

PER CURIAM

Plaintiff Wayne Hall appeals from a July 6, 2015 Law Division order denying his motion for reconsideration of an

order granting defendant Cumberland Mutual Fire Insurance Company summary judgment dismissal. We affirm.

I

In August 2013, plaintiff's home was damaged during a wind storm. Plaintiff submitted a claim under his homeowner's insurance policy issued by defendant. Both parties retained independent adjusters to appraise and provide estimates of the cost to repair or replace various parts of the building. It was not disputed the roof had to be replaced and portions of the home's interior repaired.

Plaintiff's adjuster estimated the cost to restore the property, referred to as the replacement cost value, was $24,356.57. Defendant's adjuster estimated the replacement cost value was $21,781.77. Defendant took the position that, after removing $5771.25 for depreciation, plaintiff was entitled to $16,010.52, referred to as the actual cash value. After subtracting the $1000 deductible, defendant maintained plaintiff was entitled to $15,010.52.

Despite the differences between the two adjustors about the overall replacement cost value, plaintiff ultimately signed a "Sworn Statement in Proof of Loss" (proof of loss), attesting the replacement cost value of $16,010.52 and the depreciation value of $5771.25 was

accurate. Defendant then paid plaintiff $15,010.52, the actual cash value minus the deductible. Plaintiff hired a contractor who replaced the roof, but plaintiff did not arrange for any other work to be done on the house.

The cost to replace the roof was $10,100. Defendant had estimated that, for the roof, the replacement cost value was $9059.98 and the value of the depreciation was $3351.10, making the actual cash value of the roof $5708.88. Plaintiff claimed the policy required that, if an insured repaired or replaced a component of a building, such as a roof, and the actual cost exceeded the actual cash value of such component, defendant was obligated to pay the insured the difference between the actual cost and the actual cost value. Thus, plaintiff demanded defendant pay him $4391.12, the difference between the cost to replace the roof ($10,100) and the roof's actual cash value ($5708.88). He also asserted he was entitled to the depreciation attributable to the roof and insisted defendant pay him $3351.10, as well.

Plaintiff referred to the following language in support of his position:

> 2. Buildings covered . . . at replacement cost without deduction for depreciation, [are] subject to the following:

> a. [W]e will pay the cost to repair or replace, after application of any deductible and without deduction for depreciation, but not more than the least of the following amounts:
>
> > (1) The limit of liability under this policy that applies to the building;
> >
> > (2) The replacement cost of that part of the building damaged with material of like kind and quality and for like use; or
> >
> > (3) The necessary amount actually spent to repair or replace the damaged building.
>
> . . . .
>
> d. We will pay no more than the actual cash value of the damage until actual repair or replacement is complete. Once actual repair or replacement is complete, we will settle the loss as noted in 2.a. and b. above.

[(Emphasis added).]

Defendant disputed the language supported plaintiff's demands. Defendant maintained that, at best, plaintiff was eligible to recover the value of the depreciation, but not until plaintiff had spent the entirety of the actual cash value provided to him on his claim, or $15,010.52. Therefore, defendant refused to pay plaintiff either the

$4391.12 or the $3351.10 he requested. Plaintiff responded by filing suit.

In his complaint, plaintiff asserted a claim for breach of contract, alleging defendant failed to indemnify him as required under the policy. He also maintained defendant breached the implied covenant of good faith and fair dealing contained in every insurance contract, see Wood v. N.J. Mfrs. Ins. Co., 206 N.J. 562, 577-78 (2011). After the close of discovery, defendant sought summary judgment dismissal of the complaint. Plaintiff did not oppose the motion. Finding the language in the policy dispositive, the trial court granted defendant's motion and dismissed the complaint.

Plaintiff filed a motion for reconsideration, claiming he had never been served with the motion for summary judgment. He also contended a question of fact and the court's misinterpretation of the policy language precluded summary judgment. As he was required to show that, one, he had never been served with the motion and, two, his response to the original motion would have resulted in the denial of the motion, plaintiff provided the evidence and arguments he believed would have defeated such motion.

On reconsideration, the court declined to resolve the factual question whether plaintiff had been properly served with the motion. Instead, the court considered the evidence and arguments plaintiff submitted and considered whether they would have defeated the original motion for summary judgment. Determining they would not have, the court denied the motion for reconsideration.

II

On appeal, plaintiff contends the trial court erred because it failed to (1) consider his motion for reconsideration; (2) recognize there were material issues of fact in dispute that precluded summary judgment; and (3) correctly interpret the policy language. We reject these contentions and affirm.

We review a decision to grant summary judgment "in accordance with the same standard as the motion judge." Globe Motor Co. v. Iqdalev, 225 N.J. 469, 479 (2016) (quoting Bhagat v. Bhagat, 217 N.J. 22, 38 (2014)). Summary judgment must be granted if "the pleadings, depositions, answers to interrogatories and admissions on file, together with 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." R. 4:46-2(c). Of course, the trial court must grant all legitimate inferences in favor of the non-moving party. Ibid.

First, it is obvious from the record the court did review plaintiff's motion for reconsideration, taking into to consideration the evidence and arguments plaintiff would have presented had he responded to defendant's original motion. Nevertheless, plaintiff did not prevail, but not because the court failed to consider plaintiff's position. Plaintiff's motion was denied because there were no questions of fact barring summary judgment, and, more important, as a matter of law, the policy language supported defendant's position.

In his brief, plaintiff contends there exists a question of fact that warranted the denial of the motion. Specifically, plaintiff notes his adjustor had claimed in his certification that both he and plaintiff disagreed with defendant about the replacement cost value to restore the entire house. Plaintiff did not assert there were any other material facts in dispute which the trial court overlooked.

The certification of the adjustor to which plaintiff refers states "[n]either myself nor plaintiff ever agreed

to [defendant's] determination of the replacement cost o[r] actual cash value of plaintiff's claim." However, only the plaintiff's consent was required, and his signing of the proof of loss — under oath no less — created the requisite proof plaintiff did accede and agreed with defendant's estimates, and there is no competent evidence indicating otherwise. Further, plaintiff did not submit his own certification in support of the reconsideration motion setting forth how his representations in the proof of loss were erroneous. He merely submitted his adjustor's certification, which was insufficient.

As for plaintiff's argument the court misinterpreted the policy language, he maintains the policy language is ambiguous. He argues the trial court should have heeded his adjustor's assertion it is standard within the insurance industry to release to an insured the value of the depreciation attributable to a component part of a project once that component is repaired or replaced. Plaintiff maintains because replacement cost value, depreciation, and actual cash value are broken down in an estimate for each repair or replacement job, the depreciation amount for each job is easily ascertainable. Thus, according to him, defendant was compelled to pay the

value of the depreciation after each job and not upon the completion of the entire project.

First, the expert opinion provided by the adjustor in his certification was not provided to defendant before the discovery end date, and plaintiff had not, as required by Rule 4:17-7, certified the adjustor's expert opinion was not reasonably available or discoverable by the exercise of due diligence prior to the discovery end date. In the absence of such a certification, the court was required to disregard the adjustor's expert opinion. See R. 4:17-7. Second, and more important, the policy language here is not ambiguous. As with other contracts, the terms of an insurance policy define the rights and responsibilities of the parties. N.J. Citizens United Reciprocal Exch. v. Am. Int'l Ins. Co. of N.J., 389 N.J. Super. 474, 478 (App. Div. 2006). "The interpretation of an insurance contract is a question of law for the court to determine, and can be resolved on summary judgment." Adron, Inc. v. Home Ins. Co., 292 N.J. Super. 463, 473 (App. Div. 1996). The court's standard of review regarding conclusions of law is de novo. Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 385 (2010).

"Generally, an insurance policy should be interpreted

according to its plain and ordinary meaning." Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165, 175 (1992). If the plain language of the policy is clear and unambiguous, then there is no need for further inquiry. Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am., 195 N.J. 231, 238 (2008). Certainly, "an insurance policy is not ambiguous merely because two conflicting interpretations have been offered by the litigants." Simonetti v. Selective Ins. Co., 372 N.J. Super. 421, 428 (App. Div. 2004). "A genuine ambiguity arises only where the phrasing of the policy is so confusing that the average policyholder cannot make out the boundaries of coverage." Passaic Valley Sewerage Comm'rs v. St. Paul Fire & Marine Ins. Co., 206 N.J. 596, 608 (2011) (quoting Progressive Cas. Ins. Co. v. Hurley, 166 N.J. 260, 274 (2001)).

Here, section 2.d. of the policy language states defendant "will not pay more than the actual cash value of the damage until actual repair or replacement is complete." Then, once the actual repair or replacement is complete, defendant will "settle the loss as noted in 2.a. and b. above." Section 2.b. is not implicated here, but 2.a.(3)[1] states defendant will pay the cost of the repairs or

[1] Section 2.a.(1) and (2) are not applicable.

replacement and the depreciation, minus the deductible, after the necessary amount to fix the damaged building has been actually spent.

Read together, section 2.a.(3) and section 2.d. require all of the repairs or replacements in the building be completed before any depreciation can be released to the insured. (Here, the actual cost to repair had been previously provided to plaintiff before he commenced work on the house). Section 2.a.(3) does not state depreciation on a component part of a building may be released to an insured once that part is repaired or replaced but, rather, when the amount necessary to repair and replace "the damaged building" has been spent. Defendant is not compelled to make periodic payments from the depreciation reserve as various repairs or replacement work is completed on a piecemeal basis, but only when the work on the entire building has been completed.

Here, plaintiff fixed the roof but did not complete any of the other work on the building for which he had been provided $15,010.52. Therefore, he is not yet eligible to receive the value of any depreciation, or entitled to any other payments, from defendant.

We have considered plaintiff's remaining arguments and conclude they are without sufficient merit to warrant discussion in a written opinion. See R. 2:11-3(e)(1)(E).

Affirmed.