SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4164-14T1

PEDRO MORAN-ALVARDO,[1]

Plaintiff,

v.

NEVADA COURT REALTY, LLC,
EZ DONUTS, T/A DUNKIN' DONUTS,

Defendants,

and

NEVADA COURT REALTY, LLC,

Defendant/Third-Party
Plaintiff-Respondent,

v.

EZ DONUTS, INC. AND M&M
LANDSCAPING,

Third-Party Defendants,

and

TRAVELERS INSURANCE COMPANY,

Third-Party Defendant-
Appellant.

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[1] Plaintiff is also referred to in the record as Pedro Moran-Alvarado.

Argued October 26, 2016 – Decided March 1, 2018

Before Judges Fuentes, Simonelli and Gooden Brown.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-9756-10.

John M. Bowens argued the cause for appellant (Schenck, Price, Smith & King, LLP, attorneys; John M. Bowens and Cynthia L. Flanagan, on the briefs).

Lane M. Ferdinand argued the cause for respondent.

The opinion of the court was delivered by

FUENTES, P.J.A.D.

On December 24, 2008, plaintiff Pedro Moran-Alvarado slipped and fell on snow in the parking lot of a strip mall owned by Nevada Court Realty, LLC (Nevada). EZ Donuts, Inc., d/b/a Dunkin Donuts, was a commercial tenant in the mall. Nearly two years later, plaintiff filed a civil action against Nevada and EZ Donuts to recover compensatory damages for injuries he allegedly sustained as a result of this fall. Nevada filed a third-party claim against EZ Donuts for contractual indemnification and a third-party claim for insurance coverage against EZ Donuts' insurance carrier, third-party defendant Travelers Insurance Company (Travelers).

The legal issue in this appeal concerns only the claim for contractual indemnification made by Nevada against Travelers as the insurer for EZ Donuts. This is the second time this case has

been before this court. In Moran-Alvarado v. Nev. Court Realty, LLC, No. A-3443-12 (App. Div. June 27, 2014), we issued a consolidated opinion addressing: (1) Nevada's appeal from the order of the Law Division that granted summary judgment to EZ Donuts and dismissed the contractual indemnification claim with prejudice; and (2) Travelers' appeal from the order of the Law Division that granted summary judgment to Nevada and required Travelers to provide insurance coverage to Nevada.

After reviewing de novo the record presented to the Law Division and applying the standard established by the Court in Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995) and codified in Rule 4:46-2(c), we reversed both orders and remanded the matter for further proceedings. We concluded there "were genuine issues of material fact" that precluded granting summary judgment to EZ Donuts:

> EZ Donuts' contractual indemnification obligations, and the amount of any indemnification payment under the lease, are dependent on resolution of factual disputes, such as: whether the accident occurred on or about the premises; the negligence percentage of the parties, including whether Nevada Court was solely, willfully, or grossly negligent; and whether the amount of the settlement was reasonable in light of the injuries plaintiff sustained. These disputed factual issues should be resolved in Nevada Court's third-party action against EZ Donuts.
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> [Moran-Alvarado v. Nev. Court Realty, LLC, slip op. at 7-8.]

With respect to Travelers' appeal, we held that "Travelers indemnification exposure is coextensive with the scope of EZ Donuts' liability." Id. at 10. We thus concluded that summary judgment was improperly granted against Travelers "because: (1) there are disputed factual issues regarding whether the accident occurred on or about the leased 'premises'; and (2) if yes, then whether the accident occurred due to Nevada's sole, gross, or willful negligence." Id. at 12. Finally, we noted that "Nevada Court would only be entitled to indemnification and insurance coverage for EZ Donuts' percentage." Ibid.

On remand, the parties agreed to stipulate: (1) to the location of the accident; and (2) that the landlord was contractually obligated to remove ice or snow in the area where plaintiff fell. Under these stipulated facts, the trial court concluded that Nevada's failure to clear the parking lot area of snow and ice three days after the last snow fall constituted gross negligence, relieving EZ Donuts from its contractual responsibility to indemnify landlord against any claims arising from the use of the tenant's premises.

The judge noted that the lease agreement indemnified Nevada for negligence, not for gross negligence or willful misconduct. The judge found that Nevada's failure to clear the parking lot of snow and ice amounted to gross negligence based on plaintiff's

deposition testimony, which was admitted into evidence and read into the record. According to plaintiff, the snow and ice had not been "touched." The judge ultimately found that "there is gross negligence in this case by Nevada." Based on these uncontested facts, the judge concluded that "Nevada is not entitled to indemnification on the basis that the clear language of the lease says we will cover you for negligence, but we will not cover you for gross negligence or willful misconduct[.]" The parties did not appeal this aspect of the trial court's ruling.

In this appeal, Travelers challenges the trial judge's decision finding Nevada was entitled to coverage under the additional insured policy endorsement. Stated differently, the issue is whether Travelers must provide coverage to Nevada under the additional insured endorsement, notwithstanding the court's unchallenged finding that Nevada's conduct amounted to gross negligence. Travelers urges us to reverse the trial court's order because it is irreconcilable with the trial court's finding of gross negligence by Nevada and contravenes our holding in Pennsville Shopping Ctr. Corp. v. Am. Motorists Ins. Co., 315 N.J. Super. 519, 523 (App. Div. 1998), in which we held that the obligation of the tenant's insurance company to provide coverage to a named additional insured landlord "must be . . . coextensive with the scope of [the] tenant's own liability."

We agree with Travelers' argument and reverse. The lease agreement obligated EZ Donuts to procure and maintain a general commercial liability policy naming Nevada as an additional insured. The Travelers policy satisfied this obligation. The policy also expressly excluded coverage for an insured's acts or omissions that constitute gross negligence or willful misconduct. This exclusion is stated using ordinary language and must be enforced as written. Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 200 (2016). The trial court's unchallenged finding that Nevada's conduct amounted to gross negligence is sufficient, in and of itself, to defeat its claim for coverage with respect to plaintiff's accident.

Reversed.