SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2711-21

JAMES VISCONTI and
KATHLEEN VISCONTI,
his wife,

Plaintiffs-Respondents,

v.

HARMON COVE IV
CONDOMINIUM ASSOCIATION,
INC., THE WILKIN MANAGEMENT
GROUP, INC.,

Defendants/Third-Party
Plaintiffs-Respondents,

and

FC IMPROVEMENTS, A Division
of Wilkin Management Group,

Defendant,

v.

PREFERRED POOL
MANAGEMENT, INC.,

Third-Party Defendant-

Appellant.

Argued October 18, 2022 – Decided November 18, 2022

Before Judges Messano, Gilson and Rose.

On appeal from interlocutory orders of the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-4639-19.

Edward M. Koch argued the cause for appellant (Michael J. Palma (Law Offices of Viscomi & Lyons) and White and Williams LLP, attorneys; Michael J. Palma, Edward Koch and Marc Penchansky, on the briefs).

Mark Vespole argued the cause for respondent (Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, attorneys; Mark Vespole, Jennifer Moran and Adam Levitsky, of counsel and on the brief).

PER CURIAM

Plaintiff James Visconti, an employee of third-party defendant Preferred Pool Management, Inc. (PPM), was injured when a set of wooden stairs leading to the pump room of a pool at the Harmon Cove condominium complex collapsed underneath him.[1] Defendant The Wilkin Management Group, Inc. (Wilkin) managed the property on behalf of defendant Harmon Cove IV

[1] The claims of plaintiff's wife, Kathleen Visconti, are wholly derivative of her husband's claims. We therefore use the singular "plaintiff" throughout this opinion.

Condominium Association, Inc. (the Association) (collectively, defendants), which owned the common elements of the condominium, including the pool and surrounding area. Plaintiff filed suit, claiming defendants were negligent in their maintenance of the property.

The Association's contract (the Contract) with PPM to provide maintenance and other services regarding the pool was "contingent upon the Association's approval of [PPM's] insurance coverage." There is no indication in the record that the Association ever objected to the insurance provided. The Contract also included the following relevant provisions:

> [PPM] shall secure and maintain for the duration of the Contract such insurance as will protect it from claims under the Worker[s'] Compensation Statute for the state in which the work is located and from such claims for bodily injury, death or property damage as may arise in the performance of [PPM's] services under this Agreement, such coverage to be equal or greater than the minimum limits as defined below . . . .

PPM was required to obtain a "Comprehensive General Liability Business Package with Broad Form Endorsement and Contractual Liability" for "Bodily Injury" with a $1 million limit for each occurrence, and "Umbrella Excess Liability" coverage in the amount of $5 million. The Contract also provided that defendants "shall be named as an additional insured on the policy of insurance

obtained by [PPM] with regard to comprehensive general liability for this project on a primary, non-contributory basis." (Emphasis added).

Additionally, the Contract provided:

> [PPM] shall save and indemnify and keep harmless the Association[and] its agents . . . from and against all claims arising out of the performance or non-performance of the work hereunder . . . in the nature of negligence, workmanship, unfinished work, punch [-]list or any other claims of any nature which indemnification shall include damages, reasonable attorney fees, court costs and interest.
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> [PPM] . . . agrees and covenants to assume the entire responsibility and liability for any and all injuries or death of any and all persons and any and all losses or damage to property caused by or resulting from or arising from the performance or non-performance of the work hereunder, whether covered by the insurance specified herein or not. [PPM] shall indemnify, defend and save harmless the Association[and] its agents . . . from any and all claims, losses, damages, . . . legal suits or actions including reasonable attorney's fees, expenses and costs arising from the performance or non-performance of the work hereunder, except claims resulting from the sole negligence of the Association[and] its agents . . . .
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> . . . .
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> This indemnity from [PPM] shall extend to and include, but shall not be limited to, matters as to which [PPM] and [the] Association each may be alleged to be or found liable for negligence or other fault or liability arising from the same incident, accident or state of facts except where the Association is found solely negligent.

[(Emphasis added).]

PPM secured a comprehensive commercial general liability insurance policy from Liberty Mutual Insurance with the policy limits required under the Contract.[2] The policy "include[d] as an insured any person or organization whom [PPM] ha[d] agreed to add as an additional insured in a written contract." In addition, the policy provided:

> If an additional insured's policy has an Other Insurance provision making its policy excess, and you have agreed in a written contract . . . to provide the additional insured coverage on a primary and noncontributory basis, this policy shall be primary and we will not seek contribution from the additional insured's policy for damages we cover.
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> [(Emphasis added).]

However, the policy did not insure against claims for bodily injury "arising from the sole negligence of the additional insured." The policy also excluded from coverage any claim for bodily injury to "[a]n 'employee' of the insured arising out of and in the course of [e]mployment by the insured and [p]eforming duties related to the conduct of the insured's business."

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[2] The Liberty policy in the record expired several days before plaintiff's accident. However, at oral argument before us, PPM's counsel advised that the policy was extended and was in force on the date of plaintiff's accident.

Plaintiff filed his complaint against defendants on December 2, 2019, and on January 13, 2020, defendants filed an answer.[3] On May 28, 2020, defendants filed a third-party complaint against PPM alleging it breached the Contract by failing to obtain the required insurance; the complaint also sought both common law and contractual indemnification for plaintiff's claims. It was not until June 23, 2020, however, that defendants demanded PPM provide a defense and indemnify them from plaintiff's claims. The appellate record is not entirely clear, but it is apparently undisputed that Liberty Mutual agreed to provide a defense to PPM but declined coverage to defendants; its declination letter is not in the record.[4]

Defendants moved for partial summary judgment on their third-party complaint, and PPM cross-moved for summary judgment seeking to dismiss defendants' claims for breach of contract and contractual indemnification.[5] The

[3] On August 27, 2020, plaintiff subsequently amended the complaint to add FC Improvements, an affiliated entity of Wilkin, as a defendant.

[4] Additionally, two other insurers, Indian Harbor Insurance Company (Indian Harbor) and Scottsdale Insurance Company (Scottsdale), which had issued policies to PPM, declined to defend and indemnify defendants against plaintiff's claims. Their declination letters are in the record, although only Scottsdale's policy is in the record.

[5] The parties consented to dismissal of defendants' common law indemnification claim.

parties waived oral argument, and on March 25, 2022, the judge issued his decision on the record. He concluded PPM breached the Contract because it had not "obtain[ed] basic additional insurance coverage for comprehensive general liability . . . on a primary noncontributory basis," noting "the additional insured coverage that was specifically required was ultimately disclaimed even though there was an injury while . . . plaintiff was engaged with the specified project work."

Turning to the Contract's indemnification provisions, the judge found plaintiff's claim "does not result from the sole negligence of the [A]ssociation because of the potential contributory negligence of each of these parties" and "[t]he factual basis for both of these claims were well supported by the evidential record." Crediting defendants' version of the facts, the judge noted that PPM's employees were not authorized to use the wooden steps because another entrance to the pump room with a single concrete step was made available. He also observed "the nature of the [wooden] steps" did not appear to be disputed, but that did not "change the legal analysis and the supporting evidence that the parties were contributorily negligent, something that would . . . trigger the indemnity provisions of the [C]ontract." The judge went on to find "there is

contributory negligence and certainly . . . PPM is potentially negligent that would otherwise trigger the indemnification provisions."[6]

On March 25, 2022, the judge issued two orders, one denying PPM's cross-motion for summary judgment and the other granting defendants' motion. The order granting defendants' motion provided that PPM "must reimburse [d]efendants for all past and present reasonable attorneys' fees and costs incurred in defense of [plaintiff's] lawsuit," and "reimburse . . . [d]efendants for any damages that must be paid on their behalf by either a settlement or jury verdict at trial." The order also required that defendants submit their fee application by April 4, 2022. PPM sought leave to appeal, which we granted by order dated May 9, 2022.[7]

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[6] Plaintiff filed a letter indicating he was not participating in this appeal with respect to PPM's claims or issues regarding insurance coverage, however, he disputed defendants' assertions that he was contributorily negligent.

[7] After filing its motion for leave to appeal, PPM also sought reconsideration and a stay from the motion judge. Defendants in the interim had submitted a fee application for $229,541.78. The judge held oral argument on May 3, 2022, and denied PPM's requests. If he entered an order, it is not before us, nor is any order granting defendants' fee application. We only consider, therefore, the two March 25, 2022 orders entered on cross-motions for summary judgment because they are the only orders contained in PPM's Notice of Appeal. See, e.g., Kornbleuth v. Westover, 241 N.J. 289, 298–99 (2020) (noting that appellate courts review "'only the judgment or orders designated in the notice of appeal.'" (quoting 1266 Apartment Corp. v. New Horizon Deli, Inc., 368 N.J. Super. 456, 459 (App. Div. 2004))).

PPM argues it obtained a policy of insurance that met the requirements of the Contract because it added defendants as additional insureds and provided insurance on a primary, non-contributory basis. PPM contends that if defendants wanted coverage under the Liberty Mutual or other policies, they should have filed a declaratory judgment action challenging the insurers' declination of coverage. Additionally, PPM argues the judge erred by ordering it to defend and indemnify defendants under the provisions of the Contract because he "improperly accepted [defendants'] contentions as true," and there is no evidence that PPM was negligent. PPM contends it is entitled to summary judgment on defendants' contractual indemnification claim, or at worst, the matter should be remanded until there is a determination by the factfinder that PPM was negligent.

Defendants seemingly contend that PPM breached the contract because it did not procure a policy that provided comprehensive general liability (CGL) insurance to them as additional insureds on a primary, non-contributory basis. Additionally, defendants argue that the Contract's indemnification provisions are broad enough to cover any claim that arose out of PPM's "performance or non-performance" of its work, and, at the least, because the duty to defend is

broader than the duty to indemnify, PPM was required to provide defendants with a defense to plaintiff's claim because it arose from PPM's work.

Having considered these arguments and applicable legal standards, we reverse the order granting defendants' summary judgment, affirm the order denying PPM's motion for summary judgment, and remand for further proceedings.

I.

We review de novo the grant of summary judgment to defendants applying the same standard as the motion judge. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021) (citing Barila v. Bd. of Educ. of Cliffside Park, 241 N.J. 595, 611 (2020), and Townsend v. Pierre, 221 N.J. 36, 59 (2015)). That standard requires us to "determine whether '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.'" Ibid. (quoting R. 4:46-2(c)). "To decide whether a genuine issue of material fact exists, the trial court must 'draw[] all legitimate inferences from the facts in favor of the non-moving party.'" Friedman v. Martinez, 242 N.J. 449, 472

(2020) (alterations in original) (quoting Globe Motor Co. v. Igdalev, 225 N.J. 469, 480 (2016)).

II.

Breach of Contract

It is well established that the failure of a party to a contract to procure insurance pursuant to its contractual obligations can sustain a claim for breach of contract by the non-breaching party. See Antenucci v. Mr. Nick's Mens Sportswear, 212 N.J. Super. 124, 130–31 (App. Div. 1986); Robinson v. Janay, 105 N.J. Super. 585, 591 (App. Div. 1969). Here, the judge determined that PPM breached the Contract because it failed to provide a CGL policy adding defendants as additional insureds on a primary, contributory basis. He reached that conclusion because PPM's insurers declined coverage to defendants for plaintiff's claims.

"When a trial court's decision turns on its construction of a contract, appellate review of that determination is de novo." Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 115 (2014) (citing Kieffer v. Best Buy, 205 N.J. 213, 222 (2011)). "Accordingly, we pay no special deference to the trial court's interpretation and look at the contract with fresh eyes." Kieffer, 205 N.J. at 223.

Here, it is undisputed that PPM obtained CGL insurance that included defendants as additional insureds. It is also undisputed that by its terms, the Liberty Mutual policy provided primary, non-contributory coverage for covered claims. Reduced to its essence, defendants' breach of contract claim was and remains simply that PPM breached the Contract because the insurers declined defense and indemnification for plaintiff's claims against defendants.

However, the judge never analyzed the terms of the policies and did not venture any opinion about whether the insurers' declinations were justified under the policies' terms. And that issue is not before us because defendants have since filed a declaratory judgment action against the insurers.[8] Indeed, at oral argument, defendants' counsel acknowledged that if they succeed in that litigation, PPM did not breach the Contract's insurance provisions.

As we see it, without resolution of the coverage claim, PPM also was not entitled to summary judgment dismissing defendants' breach of contract claim.

Contractual Indemnification

"The objective in construing a contractual indemnity provision is the same as in construing any other part of a contract—it is to determine the intent of the

[8] On August 26, 2022, defendants filed a declaratory judgment action against Liberty Mutual, Indian Harbor and Scottsdale demanding defense and indemnification for plaintiff's claims.

parties." Kieffer, 205 N.J. at 223 (citing Mantilla v. NC Mall Assocs., 167 N.J. 262, 272 (2001)). "The judicial task is simply interpretative; it is not to rewrite a contract for the parties better than or different from the one they wrote for themselves." Ibid. (citing Zacarias v. Allstate Ins. Co., 168 N.J. 590, 595 (2001)).

While the usual rules of interpretation generally apply, "indemnity provisions differ from provisions in a typical contract in one important aspect. If the meaning of an indemnity provision is ambiguous, the provision is 'strictly construed against the indemnitee.'" Ibid. (citing Mantilla, 167 N.J. at 272). Two reasons support this "strict-construction approach." Id. at 224.

> One is that a party ordinarily is responsible for its own negligence[] and shifting liability to an indemnitor must be accomplished only through express and unequivocal language. Another is that, under the American Rule, absent statutory or judicial authority or express contractual language to the contrary, each party is responsible for its own attorney's fees.
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> [Ibid. (citing Am. Bldg. Maint. Co. v. L'Enfant Plaza Props., Inc., 655 A.2d 858, 861–62 (D.C.1995)).]

"'[A] contract will not be construed to indemnify the indemnitee against losses resulting from its own negligence unless such an intention is expressed in unequivocal terms.'" Mantilla, 167 N.J. at 272–73 (quoting Ramos v. Browning Ferris Indus. of S. Jersey, Inc., 103 N.J. 177, 191 (1986)). In Mantilla, the Court

concluded that as a matter of public policy, "absent explicit contractual language to the contrary, an indemnitee who has defended against allegations of its own independent fault may not recover the costs of its defense from an indemnitor." Id. at 275.

The indemnification provisions of the Contract were very broad and required PPM to defend and indemnify defendants in "matters as to which [PPM] and the Association each may be alleged to be or found liable for negligence." However, there was an exception: PPM had no such obligations "where the Association is found solely negligent." In other words, PPM owed a duty to defend and indemnify the Association, unless the Association was solely negligent.

PPM argues the judge violated summary judgment standards by making factual findings that led him to conclude plaintiff was contributorily negligent and therefore defendants could not be "solely negligent." We agree with PPM that the motion record was replete with disputed facts, including, for example, plaintiff's authority to use the wooden stairs to perform his duties. The grant of summary judgment in favor of defendants on their claim for contractual defense and indemnification was premature.

In Mantilla, the Court "adopt[ed] the 'after-the-fact' approach . . . , which permits an indemnitee to recover counsel fees if the indemnitee is adjudicated to be free from active wrongdoing regarding the plaintiff's injury[] and has tendered the defense to the indemnitor at the start of the litigation." Id. at 273 (citing Cent. Motor Parts Corp. v. E.I. duPont deNemours & Co., 251 N.J. Super. 5, 11 (App. Div. 1991)). We modify the Court's statement to apply it to the indemnification provisions in this case: the Association, having tendered its defense to PPM at the start of plaintiff's lawsuit, may recover its counsel fees and be indemnified against any recovery by plaintiff unless it is adjudicated to be solely negligent for plaintiff's injuries. Given the judge's mistaken application of summary judgment standards to disputed facts in the record, there has not yet been an adjudication of whether the Association was "solely negligent." For the same reasons, PPM was not entitled to summary judgment dismissing the contractual indemnification claim in defendants' third-party complaint.

We reverse the order granting defendants summary judgment and vacate those provisions of the order declaring PPM had a duty to defend, indemnify and reimburse defendants for the costs already incurred in their defense of plaintiff's complaint. We affirm the order denying PPM summary judgment on

defendants' third-party complaint. We remand to the trial court for further proceedings.

Reversed in part; affirmed in part; remanded. We do not retain jurisdiction.

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

CLERK OF THE APPELLATE DIVISION