SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NOS. A-0517-22
A-0518-22

SCOTT RUCH,

Plaintiff-Respondent,

v.

ESAU MORALES, TIM BERLAND, DENA[1] HOCHMAN, TOWNSHIP OF LITTLE EGG HARBOR, ANIMAL CONTROL OF LITTLE EGG HARBOR, and POLICE DEPARTMENT OF LITTLE EGG HARBOR,

Defendants-Respondents,

and

DYMS CAPITAL, LLC,

Defendant/Third-Party Plaintiff-Appellant,

v.

[1] Dena is referred to as "Dina" in the second amended complaints and orders under review. We refer to her as Dena in our opinion.

SUPREME MANAGEMENT, LLC,
AARON GREEN, DBH
MANAGEMENT, DENA HOCHMAN,
and CERTAIN UNDERWRITERS
AT LLOYDS, LONDON
("UNDERWRITERS") UNDERWRITERS,

Third-Party Defendants-
Respondents.

COLIN WALKER,

Plaintiff-Respondent,

v.

ESAU MORALES, TIM
BERLAND, DENA HOCHMAN,
TOWNSHIP OF LITTLE EGG
HARBOR, ANIMAL CONTROL
OF LITTLE EGG HARBOR and
POLICE DEPARTMENT OF
LITTLE EGG HARBOR,

Defendants-Respondents,

and

DYMS CAPITAL, LLC,

Defendant/Third-Party
Plaintiff-Appellant,

v.

SUPREME MANAGEMENT, LLC,
AARON GREEN, DBH

MANAGEMENT, DENA HOCHMAN,
and CERTAIN UNDERWRITERS
AT LLOYDS, LONDON
("UNDERWRITERS") UNDERWRITERS,

Third-Party Defendants-
Respondents.

Argued March 15, 2023 – Decided September 8, 2023

Before Judges Accurso, Vernoia, and Firko.

On appeal from the interlocutory orders of the Superior Court of New Jersey, Law Division, Ocean County, Docket Nos. L-1504-21 and L-1505-21.

Daniel Zemel argued the cause for appellant (The Zemel Law Firm PC, attorneys; Fred Zemel and Daniel Zemel, on the briefs).

Christopher J. Sulock argued the cause for respondent Certain Underwriters at Lloyds, London (Chartwell Law Offices, LLC, attorneys; Michael J. Alivernini and Christopher J. Sulock, on the brief).

PER CURIAM

In these back-to-back dog bite and insurance coverage cases, plaintiffs Scott Ruch and Colin Walker allege they were bitten by three dogs owned by defendants Esau Morales and/or Tim Berland. Ruch and Walker sued Morales and Berland as well as Morales's landlord, third-party plaintiff DYMS Capital, LLC (DYMS). DYMS sought coverage from its liability insurer, third-party

defendant Certain Underwriters at Lloyds, London (Underwriters). Underwriters declined to provide coverage under DYMS's Dwelling Policy (the Policy).

DYMS appeals, on leave granted, from three Law Division orders. The first granted Underwriter's motion to dismiss count five of DYMS's third-party complaint seeking a declaratory judgment on the issue of coverage and indemnification for failure to state a claim pursuant to Rule 4:6-2(e).[2] The second denied DYMS's cross-motion for summary judgment seeking coverage and indemnification from Underwriters. The third denied DYMS's motion for reconsideration. DYMS argues the trial court erred dismissing its claims for contribution and indemnification because Ruch and Walker pled alternative theories of liability against DYMS in counts three and four of their second amended complaints.

Ruch and Walker allege the dogs were owned by Morales or Berland and housed at DYMS's rental premises. In count three, plaintiffs allege it was

[2] The court's July 8, 2022 and August 26, 2022 orders inconsistently state "DENIED" above the word "ORDER" and then state DYMS's cross-motion for summary judgment pursuant to Rule 4:46 is "granted" and judgment is entered in favor of DYMS and against Underwriters on count five of its third-party complaints. Based on the record, we construe the orders as denying DYMS's cross-motions for summary judgment and motions for reconsideration.

foreseeable the dogs would roam in the yard owned by DYMS and escape through a broken fence into the neighborhood. Plaintiffs claim DYMS was negligent for failing to maintain the fence in a safe condition. In count three, plaintiffs also allege DYMS was negligent for failing to enforce compliance with Morales to remove the dogs, which were known to be aggressive and had attacked and bitten an individual prior to plaintiffs' dog bites.

In count four, plaintiffs allege DYMS did not take reasonable steps to remediate the fencing used to contain the dogs and failed to enforce the "no dog" policy put into effect as a result of the prior dog bite incident with another individual.

DYMS contends the trial court erred by relying on the "designated animal exclusion" in the Policy excluding coverage for certain dogs "owned by the 'insured' or for which the 'insured' is responsible." DYMS argues it does not own the dogs in question; the dogs—Cane Corsos—are not on the designated animal list; and DYMS was not "responsible" for the dogs. DYMS asserts the court mistakenly found that because the second amended complaints allege DYMS knew of the dogs' vicious propensities, DYMS was responsible for the dogs, as a matter of law.

After reviewing the parties' contentions in light of the Policy and the applicable law, we conclude Underwriters owes a defense and indemnification to DYMS for the claims under the terms of its Policy. We accordingly vacate the trial court's grants of dismissal to Underwriters, reverse the denial of DYMS's cross-motions for summary judgment, and direct entry of summary judgment to DYMS on the issue of coverage for plaintiffs' claims.

I.

Morales is a tenant at 202 Lake Placid Drive in Little Egg Harbor. The property is owned by DYMS. Third-party defendants Aaron Green, the owner and principal of Supreme Management, LLC, and Dena Hochman, the owner and principal of DBH Management, provided property management services for DYMS.[3] Ruch claims he was bitten by three Cane Corso dogs on February 3, 2020, while walking on Twin Lakes Boulevard in Little Egg Harbor, the street where he lives. That same day, Walker was looking at a potential rental located at 115 Lake Winnipesaukie Drive in Little Egg Harbor when he claims he was

[3] The record is unclear as to why DYMS has two different property management companies and what their respective services entail. The first amended complaint alleges Hochman was the property manager, and the third-party complaint alleges that Green and Hochman were the property managers. No other information or documents are contained in the record about Green, Supreme Management, LLC, Hochman, or DBH Management.

also bitten by three Cane Corso dogs that were roaming freely. The dogs are allegedly owned by Morales and/or his friend Berland. Ruch and Walker allege in the alternative that Berland "misrepresented himself" as the dogs' owner. Berland lives in Toms River.

At the time of the alleged dog bites, DYMS had liability insurance with Underwriters. Here, the Policy issued to DYMS provides in pertinent part:

> If a claim is made or a suit is brought against an "insured" for damages because of "bodily injury" or "property damage" caused by an "occurrence" to which this coverage applies, we will:
>
> 1. Pay up to our limit of liability for the damages for which the "insured" is legally liable. Damages include prejudgment interest awarded against the "insured."
>
> 2. Provide a defense at our expenses by counsel of our choice, even if the suit is groundless, false or fraudulent. We may investigate and settle any claim or suit that we decide is appropriate. Our duty to settle or defend ends when the amount we pay for damages resulting from the "occurrence" equals our limit of liability.

The Policy defines "insured" as follows:

> 3. "insured" means you and residents of your household who are:
>
> a. your relatives;

b. other persons under the age of 21 and in the care of any person named above;

c. with respect to animals or watercraft to which this [P]olicy applies, any person or organization legally responsible for these animals or watercraft which are owned by you or any person included in 3a or 3b above. A person or organization using or having custody of these animals or watercraft in the course of any "business" or without consent of the owner is not an "insured."

[(Emphasis added).]

The Policy defines "occurrence" as follows:

5. "occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results during the [P]olicy period, in:

a. "bodily injury;" or

b. "property damage."

Additionally, the Policy states:

We cover:

1. the dwelling on the Described Location shown in the Declarations, used principally for dwelling purposes, including structures attached to the dwelling;

. . . .

We do not cover other structures:

. . . .

2. rented or held for rental to any person not a tenant of the dwelling, unless used solely as a private garage.

. . . .

Coverage L – Personal Liability and Coverage M – Medical Payments to Others are restricted to apply only with respect to "bodily injury" and "property damage" arising out of the ownership, maintenance or use of the premises shown below.

Underwriters's counsel sent a letter to DYMS advising that Underwriters has "no obligation under the Policy to defend or indemnify" DYMS and "will not pay any damages assessed" against DYMS arising out of the two dog bite incidents. The letter also states Underwriters was disclaiming coverage under the Policy's "Additional Liability Exclusion Endorsement," which provides:

It is understood and agreed that:

A. Coverages (Personal liability) and Coverage (Medical Payments) do not apply to "bodily injury" or "property damage."

1. Arising out of or caused directly or indirectly by any Designated Animal <u>owned</u> by the "insured" or for which the "insured" is responsible.

Designated Animal List

Pit Bull Terriers
Doberman Pinschers
Rottweilers
Staffordshire Terriers
German Shepherds
Chows
Bull Mastiffs
Huskies
Alaskan Malamutes
Wolf — Dog Hybrids
Great Danes
St. Bernards
Akitas
Rhodesian Ridgebacks
Farm and Ranch Animals
Any attack non-domesticated or guard dog
Any non-domestic or exotic animal

A mixed breed which includes any of the above

Any animal with a past history of bites or attacks

In its letter, Underwriters took the position that DYMS was aware of prior incidents involving the three dogs, advised Morales he was no longer allowed to have dogs at its premises, and "media reports" confirm the dogs were involved in "several attacks" before the dog bites at issue here, warranting denial of coverage, and thus absolving it of any duty to defend or indemnify DYMS.

Ruch and Walker filed separate second amended complaints in the Law Division, the operative pleadings here. In count one, Ruch and Walker allege Morales and/or Berland "negligently" allowed the dogs to "roam the neighborhood" and bite them, and misrepresented where they kept the dogs. Plaintiffs allege Morales and/or Berland, among others, were responsible for creating a "dangerous and hazardous situation" by failing to control the dogs, which were known to be aggressive and had bitten at least one individual previously. In count two, Ruch and Walker allege Morales and/or Berland "failed to supervise and maintain the dogs," and are strictly liable under the dog bite statute, N.J.S.A. 4:19-16.

Counts three and four of the second amended complaints, pled on information and belief, are directed at DYMS and are the subject of these interlocutory appeals. Count three alleges DYMS owned and "maintained and/or leased" 202 Lake Placid Drive to Morales, and its lease agreement allowed Morales "to have dog(s) at the subject premises." Ruch and Walker allege DYMS, Hochman, and Green knew Morales owned dogs at the premises and failed to maintain the "interior and exterior of the subject premises in a safe manner," including maintaining a proper fence to keep the dogs in the yard.

Ruch and Walker also allege DYMS failed to enforce its lease agreement with Morales regarding the dogs.[4]

Ruch and Walker allege in count three that DYMS "knew, or should have known," that Morales as a leasee "would foreseeably allow the dogs to roam freely in the fenced yard" and they "would foreseeably escape the fenced yard that was in disrepair," as a result of "negligent maintenance," resulting in the dogs biting them on a public street. The third count also avers that DYMS "failed to enforce any agreement(s), or confirm any representation(s)" by Morales "from and after [at least one dog bite incident in] December 2019 that the dogs had been removed from the subject premises."

The fourth count alleges DYMS, its employees, and/or Hochman knew or should have known that as of December 2019, Morales was "advised" by DYMS that he was "no longer allowed to have dog(s) at the subject premises," and DYMS should have known Morales was "reckless, incompetent, not credible, negligent and/or irresponsible." Ruch and Walker also allege DYMS "did not take reasonable steps to repair or remediate the fencing" used to "contain the dogs," failed to enforce the "no dog policy" after December 2019, and was

[4] The lease agreement between DYMS and Morales is not contained in the record.

negligent in allowing Morales to continue to have dogs at its premises, resulting in the dogs escaping and biting them. Ruch and Walker further allege DYMS and Hochman knew the authorities had removed the dogs from Morales's care after the December 2019 incident, but they failed to ensure Morales did not return the dogs to DYMS's property.

DYMS filed answers denying liability and asserting separate defenses, cross-claims, as well as third-party complaints against Underwriters seeking a declaratory judgment obligating Underwriters to defend and indemnify it in the underlying actions. DYMS alleges that Underwriters wrongfully denied coverage for the personal injury claims brought by Ruch and Walker; breached its contract of insurance with DYMS; and acted in bad faith.

In lieu of filing an answer, Underwriters moved to dismiss the third-party declaratory judgment actions pursuant to Rule 4:6-2(e), arguing DYMS's claims were barred by the designated animal exclusion clause in the Policy. In the alternative, Underwriters sought dismissal under the "no action clause" provisions in the Policy, contending DYMS is precluded from making Underwriters a party in the two actions and was required to file separate lawsuits.

DYMS opposed the motions to dismiss and cross-moved for summary judgment on its defense and indemnity claims. In DYMS's statement of undisputed material facts in support of its motion for summary judgment, DYMS asserted plaintiffs' causes of action rest on two theories: (1) DYMS was negligent in the maintenance of the premises; and (2) DYMS was negligent in renting the premises to Morales. DYMS claimed these matters arise out of an "occurrence" under the Policy—the dogs allegedly escaped and bit plaintiffs—which resulted in alleged "bodily injury," which triggers coverage under the Policy. DYMS also contended the designated animal exclusion only applies to animals "owned" by the insured or the animals that the insured was "responsible for."

DYMS also added that the Cane Corsos involved are not listed on the designated animal list as excluded from coverage; DYMS did not own the dogs in question; DYMS did not have any control over the dogs in question; there is no evidence DYMS "was responsible for feeding, grooming, training, walking, cleaning up after, [or] caring for the Cane Corso[s]; and DYMS did not have any responsibilities whatsoever that could be attributed" to the dogs.

Following oral argument, the court granted Underwriters's motions to dismiss and denied DYMS's cross-motions for summary judgment. The court stated:

> [T]he clear intent here is if you own a dog or if you're responsible for that dog and responsibility comes . . . once you're on notice that this dog is vicious.
>
> And these owners, if they knew, they're responsible, and consequently this Policy does not cover that risk.
>
> That's the finding of this court. That's the way I read the Policy, and consequently I feel compelled to dismiss the complaint[s] against . . . Underwriters.
>
> [The court does not] see that [Underwriters] [has] any duty to defend and/or cover any damages under the circumstances.

The court did not make specific findings of fact or conclusions of law as required by Rule 1:7-4(a).[5] DYMS moved for reconsideration asserting the court erred in finding the designated animal exclusion clause precluded coverage and reiterating its arguments in support of summary judgment because DYMS did not own the dogs, and DYMS was not "responsible" for the dogs in any way.

[5] Rule 1:7-4(a) requires the court "shall, by an opinion or memorandum decision, either written or oral, find the facts and state its conclusions of law thereon in all actions tried without a jury, on every motion decided by a written order that is appealable as of right."

DYMS further argued Ruch and Walker were allegedly injured by Cane Corsos, which are not on the designated animal list as a breed that would trigger exclusion of coverage. DYMS also argued that the court made no findings regarding the "no action clause."[6] Following oral argument, DYMS's motion for reconsideration was denied, again lacking in Rule 1:7-4(a) findings. These interlocutory appeals followed.

II.

Before us, DYMS reprises the same arguments it raised in the trial court. Specifically, DYMS contends Underwriters has a duty to defend and indemnify DYMS under the third count of the second amended complaints because the designated animal exclusion clause does not apply, and Ruch's and Walker's alternatively pleaded claims in the third and fourth counts fall squarely within the plain language of the Policy, rendering dismissal of count five of DYMS's

[6] We note the "no action clause" did not preclude DYMS from filing its third-party complaints seeking a declaratory judgment regarding coverage and indemnification. See McNally v. Providence Wash. Ins. Co., 304 N.J. Super. 83, 90 (App. Div. 1997) ("[T]he no-action clauses prohibited naming the insurer as a defendant in the underlying litigation but did not interdict the filing of a declaratory judgment action regarding coverage."); Kielb v. Couch, 149 N.J. Super. 522, 528 (Law Div. 1977) ("One of the purposes of a 'no-action' clause is to prevent suit against the insurer by the insured until the damages have been ascertained by final judgment in a third-party proceeding against the insured.").

third-party complaints premature. DYMS also argues the court did not apply the correct standard of review for assigning a duty to defend and interpreting insurance contract ambiguity.

III.

"We review a grant of a motion to dismiss a complaint for failure to state a cause of action de novo, applying the same standard under Rule 4:6-2(e) that governed the motion court." Wreden v. Twp. of Lafayette, 436 N.J. Super. 117, 124 (App. Div. 2014). Our review of a grant or denial of a motion for summary judgment is de novo. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021) (citations omitted).

As we have noted on many occasions, an insurer's duty to defend is broad. Polarome Int'l Inc. v. Greenwich Ins. Co., 404 N.J. Super 241, 272-73 (App. Div. 2008) (citations omitted). An insurer has a duty to defend its insured even if the claims asserted against the insured have no merit. Sears Roebuck & Co. v. Nat'l Union Fire Ins. Co., 340 N.J. Super. 223, 241-42 (App. Div. 2001) (citation omitted). "'[T]he duty to defend comes into being when the [underlying] complaint [of the insured] states a claim constituting a risk insured against.'" Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165, 173 (1992) (quoting Danek v. Hommer, 28 N.J. Super. 68, 77 (App. Div. 1953)) (first

alteration in original). Whether an insurer has a duty to defend is determined by comparing the allegations in the complaint with the language of the policy. Ibid.

"[T]o ascertain whether there is a duty to defend, '[t]he complaint should be laid alongside the policy and a determination made as to whether, if the allegations are sustained, the insurer will be required to pay the resulting judgment,' with any doubts 'resolved in favor of the insured.'" Norman Int'l, Inc. v. Admiral Ins. Co., 251 N.J. 538, 549-50 (2022) (quoting Abouzaid v. Mansard Gardens Assocs., LLC, 207 N.J. 67, 79-80 (2011)). "[I]t is the nature of the claim asserted, rather than the specific details . . . or the litigation's possible outcome, that governs the insurer's obligation." Flomerfelt v. Cardiello, 202 N.J. 432, 444 (2010) (citation omitted).

Doubts are resolved "in favor of reading claims that are ambiguously pleaded, but potentially covered, in a manner that obligates the insurer to provide a defense." Ibid. "[I]f a complaint includes multiple or alternative causes of action, the duty to defend will attach as long as any of them would be a covered claim." Ibid. The potential merit of the claim is irrelevant "even if the asserted claims are 'poorly developed and almost sure to fail.'" Abouzaid, 207 N.J. at 81 (quoting Voorhees, 128 N.J. at 174).

If the allegations in the complaint "correspond" to the "language of the policy," then "the insurer must defend the suit." SL Indus. v. Am. Motorists Ins. Co., 128 N.J. 188, 197 (1992). "A later determination that the claim against the insured is without merit . . . is irrelevant." Hebela v. Healthcare Ins. Co., 370 N.J. Super. 260, 268 (2004). Because it is based on the allegations and not proof of the allegations, the duty to defend is broader than the duty to indemnify. See Polarome Int'l, Inc., 404 N.J. Super. at 272 (citations omitted).

We have compared the allegations set forth in the second amended complaints and the language of the Policy. See Norman Int'l, 251 N.J. at 549-50. We conclude Ruch's and Walker's alternatively pleaded claims in the third count of their second amended complaints fall squarely within the plain language of the Policy, triggering Underwriters's duty to defend. See Hebela, 370 N.J. Super. at 268 (finding "the obligation to defend is fixed when a complaint is filed . . . [because] the duty to defend is ascertained by comparing the allegations in the complaint with the language of the policy" providing the duty).

First, the bodily injury claims alleged in the third counts regarding DYMS's failure to maintain the fence arise out of DYMS's ownership, maintenance, or use of the premises, triggering coverage. The actions clearly

arise out of DYMS's ownership of the premises; DYMS's alleged negligent maintenance of the fence that allegedly allowed the dogs to escape and injure Ruch and Walker; and DYMS's use of the premises by virtue of its leasehold with Morales. The same holds true for the allegations pled against DYMS in the third counts regarding its negligent failure to enforce the lease with Morales because this claim similarly arises out of DYMS's ownership, maintenance, and use of the premises, and a tenancy is contemplated by the Policy.

When Underwriters moved to dismiss, the court did not make the side-by-side comparison of the Policy and count three of the second amended complaints because in the court's mistaken view, count four's knowledge allegation—that in December 2019 DYMS and/or Hochman knew or should have known that one or more dogs had escaped the yard through inadequate fencing and bitten at least one individual—applied to count three, which pleads wholly different facts and theories of liability. Count three alleges DYMS negligently maintained the fence, or negligently enforced its lease with Morales, which if proven, independent of whether DYMS knew of the dogs' prior history, may be sufficient for a factfinder to find DYMS liable for Ruch's and Walker's injuries.

DYMS simply had to demonstrate, which it did in its opposition to Underwriters's motions to dismiss and in support of DYMS's cross-motions for

summary judgment, that the allegations fell within the language of the contractual-indemnification provision. As our Supreme Court held in Flomerfelt, "[t]he duty to defend . . . is not dependent upon whether there is a finding that the claim is covered; instead, it attaches because . . . there are potentially covered claims." 202 N.J. at 458. Because the third and fourth counts of the second amended complaints contain claims potentially covered by the contractual-indemnification clause, we conclude Underwriters has a duty to defend those claims.

We also find that the designated animal exclusion clause is inapplicable to Ruch's and Walker's claims because the term "responsible" in the Policy is ambiguous. Courts strictly construe exclusionary provisions, Simonetti v. Selective Insurance Company, 372 N.J. Super. 421, 429 (App. Div. 2004), leaving the burden on the insurer "to bring the case within the exclusion," Flomerfelt, 202 N.J. at 442 (quoting Am. Motorists Ins. Co. v. L-C-A Sales Co., 155 N.J. 29, 41 (1998)); see also 22 Eric Mills Holmes, Holmes' Appleman on Insurance, § 136.4 (2d ed. 2003) ("[T]he insurer has the burden of demonstrating that the allegations of the complaint cast that pleading solely and entirely within the policy exclusions, and, further, that the allegations, in toto, are subject to no other interpretation.").

Saliently, the policy does not define "responsible" in the context of its exclusion. DYMS argues being "responsible" for a dog means being obligated to care for it, and since there is no allegation that DYMS was a caretaker for the dogs, it should be provided coverage. Underwriters, however, claims DYMS is "responsible" for the dogs because it knew or should have known the dogs were vicious but nonetheless allowed them to reside in the premises without enforcing an agreed upon prohibition of the dogs and by failing to ensure the fence in the yard was such that the dogs could not go off the property. If there is more than one possible interpretation of the exclusionary language, we must apply the meaning that supports coverage. Flomerfelt, 202 N.J. at 442. Because there are at least two—if not more—interpretations of what "responsible" could mean here, and one—that the insured was obligated to care for the dogs—would not exclude coverage for Ruch's and Walker's claims against DYMS in the second amended complaints, we conclude Underwriters owes coverage to DYMS under the Policy.

Because the court erred in dismissing count five of DYMS's third-party complaints seeking declaratory judgment, we reverse those orders. Based on our de novo review of the record and being satisfied there are no genuine issues of material fact to preclude summary judgment on the issue of coverage and

indemnification, we also reverse the orders denying DYMS's cross-motions for summary judgment. We also vacate the orders denying DYMS's motions for reconsideration. While Underwriters has a duty to defend DYMS, nothing in our opinion should be construed as an expression of our views regarding the merits of the substantive claims and defenses raised by the parties.

To the extent we have not specifically addressed any of the parties' arguments, it is because we have concluded they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Reversed, vacated, and remanded. We do not retain jurisdiction.