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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1165-21**

MICHAEL HEADLEY,

Plaintiff-Appellant,

v.

**STILLWATER INSURANCE
GROUP,**

Defendant-Respondent.

Submitted May 8, 2023 – Decided May 23, 2023

Before Judges Whipple, Mawla and Walcott-Henderson.

On appeal from the Superior Court of New Jersey, Law Division, Gloucester County, Docket No. L-1290-19.

Buividas Law Group, attorneys for appellant (Stephen J. Buividas, on the brief).

Marshall, Dennehey, Warner, Coleman & Goggin, attorneys for respondent (Walter F. Kawalec, III, and David D. Blake, on the brief).

PER CURIAM

Plaintiff Michael Headley appeals from a November 5, 2021 order granting defendant Stillwater Property and Casualty Insurance Company, improperly pled as Stillwater Insurance Group summary judgment and dismissing plaintiff's complaint with prejudice. We affirm.

Defendant insured plaintiff's property in Minotola. On December 28, 2018, the home's foundation collapsed inward, causing water and earth to enter the basement. A few days later, defendant sent a field adjuster and an independent licensed engineer to inspect the residence.

On January 7, 2019, the engineer issued a report, which defendant recounted in a January 10, 2019 letter disclaiming coverage. Defendant noted the engineer concluded the foundation wall was "displaced inward due to lateral pressure . . . [that] is the result of both earth pressure and hydrostatic pressure acting on the wall." The length of the wall, its unreinforced construction, and "minimal attachment to the overlying structure" made it "susceptible to displacement from lateral pressure." Further,

the foundation walls were made of concrete blocks[, which] had a hollow center and lacked any structural reinforcement to protect against the lateral forces acting against it. Weathered cracks and patch material over them are evidence of the long-term development of the cracks, indicating the lateral pressure has been occurring for a period of years, eventually reaching the

conditions capable of causing the displacement of the wall.

The engineer opined water was the cause of the collapse because there was "ponded water remaining in the basement and adjacent properties discharging water through their sump systems." The ground slopes were inadequate near sections of the property, "allowing excess water to accumulate against the foundation."

Defendant concluded

there is no coverage for repair or replacement of the foundation or any of the damages associated with the failed foundation . . . wear, tear and deterioration nor for faulty/inadequate/defective design, workmanship, construction, materials, or maintenance . . . loss [of] structural integrity, including separation of parts of the property or property in danger of falling down or caving in and there is no coverage for the failure of a footing, foundation, bulkhead, wall, or any other structure or device that supports all or part of a building, or other structure.

The letter continued: "Because your loss was due to the long-term development and eventual failure of the foundation, there is no additional '[c]ollapse' coverage available for the loss. And finally, the policy does not cover land, including land on which the dwelling is located, nor does it cover earth movement." The letter then recited the following policy provisions:

SECTION I—PROPERTY COVERAGES

A. Coverage A – Dwelling

....

2. We do not cover land, including land on which the dwelling is located.

SECTION I—PERILS INSURED AGAINST

A. COVERAGE A – DWELLING and COVERAGE B – OTHER STRUCTURES

....

2. We do not insure, however, for loss:

a. Excluded under Section I – Exclusions;

b. Involving collapse, including any of the following conditions of property or any part of the property:

(1) An abrupt falling down or caving in;

(2) Loss of structural integrity, including separation of parts of the property or property in danger of falling down or caving in; or

(3) Any cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion as such condition relates to (1) or (2) above; except as provided in E.8. Collapse under Section I – Property Coverages;

c. Caused by:

(2) . . . pressure or weight of water
. . . whether driven by wind or not, to
a:

(b) Footing, foundation, . . . ,
wall, or any other structure or
device that supports all or part
of a building, or other
structure;

(6) Any of the following:

(a) Wear and tear, marring,
deterioration;

(b) Mechanical breakdown, latent
defect, inherent vice or any
quality in property that causes
it to damage or destroy itself;

(f) Settling, shrinking, building or
expansion, including resultant
cracking, of . . . footings,
foundations, walls . . . ;

E. Additional Coverages

8. Collapse

a. The coverage provided under this
Additional Coverage – Collapse applies
only to an abrupt collapse.

b. For the purpose of this Additional
Coverage – Collapse, abrupt collapse
means an abrupt falling down or caving
in of a building or any part of a building
with the result that the building or part

of the building cannot be occupied for its intended purpose.

c. The Additional Coverage – Collapse does not apply to:

- (1) A building or any part of a building that is in danger of falling down or caving in;
- (2) A part of a building that is standing, even if it has separated from another part of the building; or
- (3) A building or any part of a building that is standing, even if it shows evidence of cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion.

d. We insure for direct physical loss to covered property involving abrupt collapse of a building or any part of a building if such a collapse was caused by one or more of the following:

- (1) The Perils Insured Against named under Coverage C;
- (2) Decay, of a building or any part of a building, that is hidden from view, unless the presence of such decay is known to an "insured" prior to collapse;

....

(6) Use of defective material or methods in construction, remodeling or renovation if the collapse occurs during the course of construction, remodeling or renovation.

e. Loss [of] . . . foundation, retaining wall, . . . is not included under d.(2) through (6) above, unless the loss is a direct result of the collapse of a building or any part of a building.

.....

Section I – Exclusions

A. We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area.

2. Earth Movement

Earth Movement means:

.....

d. Any other earth movement including earth sinking, rising or shifting.

3. Water

This means:

- a. . . . [S]urface water, . . . all whether or not driven by wind, including storm surge;

. . . .

- c. Water below the surface of the ground, including water which exerts pressure on, or seeps, leaks or flows through a building, sidewalk, driveway, patio, foundation, swimming pool or other structure;

B. We do not insure for loss to property described in Coverages A and B caused by any of the following. However, any ensuing loss to property described in Coverages A and B not precluded by any other provision in this policy is covered.

3. Faulty, inadequate or defective:

- a. Planning, zoning, development, surveying, siting;
- b. Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;
- c. Material used in repair, construction, renovation or remodeling; or
- d. Maintenance; of part or all of any property whether on or off the "residence premises[."]

Plaintiff retained a public adjuster who issued a rebuttal report. The adjuster claimed there was "no evidence for hydrostatic pressure contributing to

the wall falling down." He blamed the collapse on "earth pressure along with hidden decay," namely, the rebar reinforcement inside the block wall of the foundation was "heavily rusted." He explained

it is evident that moisture has been attacking the vertical reinforcement bar for a long time. This hidden rust jacking causes the concrete core fill to receive tremendous pressure as the rod rusts and expands. . . . [I]t is with a high degree of certainty the decay of the reinforcement steel is the change that lowered the resistive strength of the foundation wall and was the sole factor in the wall falling down.

The adjuster noted the soil was composed of "air/gasses, water, minerals, and organic materials We know the weight of water varies constantly within soil due to evaporation or simply infiltration. All the elements combining to make the weight of soil against a foundation wall an ever-changing force known as lateral soil pressure." The deteriorated reinforcement bars inside the blocks meant "the foundation wall was unable to resist lateral soil pressure." He concluded soil pressure, not hydrostatic pressure, caused the collapse and was therefore a covered event.

Plaintiff sued defendant for damages and costs. The complaint alleged the following claims: breach of contract; breach of the implied covenant of good faith and fair dealing; promissory estoppel; equitable estoppel; quasi-contract and unjust enrichment; violation of the New Jersey Consumer Fraud Act,

N.J.S.A. 56:8-1 to -227; fraud; negligence and negligent misrepresentation; breach of express warranty; breach of insurance contract; bad faith; declaratory judgment; and specific performance.

At his deposition, the adjuster elaborated that water caused the decay. The moisture from the soil migrated into the blocks and "caused the rebar to become rusty, expand and eventually lose a lot of its strength. And then the weight of earth pushing against the foundation finally overc[a]me that structural inability of rebar to restrain it."

Following discovery, defendant moved for summary judgment. It argued the adjuster was not a licensed engineer, and as a public adjuster, was pre-disposed to finding the damage was covered by insurance. Further, the adjuster found there was earth pressure, but ignored his finding there was hidden decay in the foundation's blocks. Defendant argued the adjuster admitted water seepage was a contributing cause of the collapse. Therefore, "the water and earth movement exclusions bar[red] coverage due to the policy's anti-concurrent provision."

Plaintiff argued his claim was not barred by the anti-concurrent provision, and the court should construe the policy liberally and the exclusion narrowly to find there was coverage. Furthermore, the public adjuster stated the cause of

the collapse was earth movement, not earth pressure, and defendant misconstrued the adjuster's report to make it fit the earth movement exclusion and deny coverage. Plaintiff argued the adjuster never mentioned water, in the form of seepage, as a cause of the collapse, and defendant "twist[ed]" the adjuster's findings to apply the water exclusion. The hidden decay in the foundation was the cause of the collapse and defendant should have covered it.

Following oral argument, the motion judge issued a written opinion. He pointed out there was no dispute between the parties over the language of the policy, but instead "whether the experts' findings fall within the parameters of that language." The judge found "the insurance policy clearly states that certain 'excluded perils' will not be covered. These perils are also 'anti-concurrent,' meaning that if these perils contributed to damages in addition to covered perils, the claim would be excluded. Included in the list of excluded perils are both earth movement and water"

The judge noted the adjuster was not a licensed engineer. Regardless, the adjuster never denied the engineer's "conclusions particularly as to the metal rods rusting away and their exposure to water. In fact, [the adjuster] stated in his opinion that moisture invasion and water seepage both contributed to the decay of structures that maintained the integrity of the home." Even if the

adjuster and the engineer's ultimate conclusions differed, there was still "no dispute over the existence of water seepage into areas of the home critical in its eventual collapse. . . . Additionally, [p]laintiff has presented no other evidence to dispute [d]efendant's contention that this triggers the anti-concurrent, exclusionary provision of the insurance policy." Therefore, the judge concluded the anti-concurrent provision precluded plaintiff's claims and granted defendant summary judgment.

On appeal, plaintiff argues the motion judge failed to construe the facts most favorably to him and improperly granted summary judgment where the parties disputed the interpretation of the policy, the definition of water seepage, "earth pressure" versus "earth movement," and the cause of the collapse. He contends none of the exclusions applied because earth pressure is not excluded in the policy and is not defined as earth movement, and the policy does not define decay. Plaintiff asserts the engineer's inspection was cursory and defendant failed to perform a soil test to determine the level of soil moisture to corroborate the conclusion there was hydrostatic pressure. He argues the judge erred by not finding defendant in breach of contract or ruling that equity required defendant to cover the claim. Plaintiff notes the insurance policy was an

adhesion contract and the court incorrectly found the anti-concurrent clause was enforceable and applied.

Our review of a trial court's grant of summary judgment is de novo, applying the same legal standard as the trial court. RSI Bank v. Providence Mut. Fire Ins. Co., 234 N.J. 459, 472 (2018) (citing Bhagat v. Bhagat, 217 N.J. 22, 38 (2014)). Summary judgment will be granted when "the competent evidential materials submitted by the parties," viewed in the light most favorable to the non-moving party, show that there are no "genuine issues of material fact" and "the moving party is entitled to summary judgment as a matter of law." Grande v. Saint Clare's Health Sys., 230 N.J. 1, 24 (2017) (quoting Bhagat, 217 N.J. at 38); see also R. 4:46-2(c).

"An issue of material fact is 'genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.'" Grande, 230 N.J. at 24 (quoting Bhagat, 217 N.J. at 38). We owe no special deference to the motion judge's legal analysis. RSI Bank, 234 N.J. at 472 (quoting Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co., 224 N.J. 189, 199 (2016)).

When "interpreting insurance contracts, we first examine the plain language of the policy and, if the terms are clear, they 'are to be given their plain, ordinary meaning.'" Pizzullo v. N.J. Mfrs. Ins. Co., 196 N.J. 251, 270 (2008) (quoting Zacarias v. Allstate Ins. Co., 168 N.J. 590, 595 (2001)). The policy must "be enforced as written when its terms are clear" so "the expectations of the parties will be fulfilled." Flomerfelt v. Cardiello, 202 N.J. 432, 441 (2010). If an insurance policy is ambiguous, courts will construe the terms in favor of the insured. Mac Prop. Grp. LLC & The Cake Boutique LLC v. Selective Fire & Cas. Ins. Co., 473 N.J. Super. 1, 18 (App. Div. 2022) (quoting Oxford Realty Grp. Cedar v. Travelers Excess & Surplus Lines Co., 229 N.J. 196, 208 (2017)). A genuine ambiguity exists only if "the phrasing of the policy is so confusing that the average policyholder cannot make out the boundaries of coverage" Templo Fuente, 224 N.J. at 200 (quoting Progressive Cas. Ins. Co. v. Hurley, 166 N.J. 260, 274 (2001)).

"Exclusions in insurance contracts 'are presumptively valid and will be given effect if [they are] "specific, plain, clear, prominent, and not contrary to public policy.'"" Mac Prop., 473 N.J. Super. at 35 (quoting Princeton Ins. Co. v. Chunmuang, 151 N.J. 80, 95 (1997)). "However, [exclusions] 'must be narrowly construed,'" and "the burden is on the insurer to bring the case within

the exclusion." Ibid. (quoting Princeton Ins. Co., 151 N.J. at 95). Thus, an insured is "entitled to protection to the full extent that any reasonable interpretation of [exclusionary clauses] will permit." Ibid. (alteration in original) (quoting S.N. Golden Ests., Inc. v. Cont'l Cas. Co., 293 N.J. Super. 395, 401 (App. Div. 1996)). "If the language of an exclusion requires a causal link, courts must consider its nature and extent because evaluating that link will determine the meaning and application of the exclusion." Flomerfelt, 202 N.J. at 442-43.

"The fact that two or more identifiable causes—one a covered event and one excluded—may contribute to a single property loss does not necessarily bar coverage." Simonetti v. Selective Ins. Co., 372 N.J. Super. 421, 431 (App. Div. 2004). Generally, "[i]n situations in which multiple events, one of which is covered, occur sequentially in a chain of causation to produce a loss," courts have found "the loss is covered if a covered cause starts or ends the sequence of events leading to the loss." Flomerfelt, 202 N.J. at 447.

However, "if the claimed causes, one covered and one not, combine to produce an indivisible loss," we "have rejected claims for coverage largely because of the allocation of the burden of proof on the insured to demonstrate a covered cause for a loss." Id. at 447-48. "The definitive question is what

predominantly caused the loss, meaning the efficient proximate cause, not where in the sequence the alleged cause of loss occurred." Mac Prop., 473 N.J. Super. at 36 (citing Franklin Packaging Co. v. Cal. Union Ins. Co., 171 N.J. Super. 188, 191 (App. Div. 1979)).

Policies "containing 'an anti-concurrent or anti-sequential clause' ha[ve] been interpreted to unambiguously bar coverage for losses resulting in any manner from an excluded cause." Id. at 37 (quoting Wear v. Selective Ins. Co., 455 N.J. Super. 440, 454-55 (App. Div. 2018)). "Thus, coverage is excluded for a loss attributable to a given cause 'regardless of whether any other cause, event, material or product contributed concurrently or in any sequence' to that loss." Ibid. (quoting Wear, 455 N.J. Super. at 454).

Here, the policy unambiguously excludes coverage for "earth movement" and "water" losses. The exclusion provision states: "[w]e do not insure for loss caused directly or indirectly by . . . [e]arth movement" The policy further defines earth movement as "[a]ny other earth movement including earth sinking, rising or shifting." It defines water damage as "[w]ater below the surface of the ground, including water which exerts pressure on, or seeps, leaks or flows through the building [or] . . . foundation"

As we noted, the engineer concluded the foundation collapsed due to earth movement and hydrostatic pressure. The public adjuster found water in the soil deteriorated the foundation's blocks, causing the earth to collapse—a form of movement. We, like the motion judge, see no meaningful difference between the engineer and the adjuster's view of the cause for the collapse. Both professionals identified water as a cause for the foundation's failure, causing earth to breach the foundation wall of plaintiff's property.

Therefore, viewing the facts favorably to plaintiff, it is clear the policy's exclusions applied and there was no coverage under the anti-concurrent clause. The facts readily show both water seepage and earth movement at play. Although the policy covered hidden decay and the condition of the foundation blocks was arguably in a state of decay, it still does not overcome the fact there were concurrent uncovered causes for the loss, namely, earth movement and water seepage.

Finally, plaintiff points us to proposed legislation, which would "[p]rohibit[] use of anti-concurrent causation clauses in homeowners insurance policies." A. 575 (2022). However, pending legislation is not dispositive. Johnson v. Roselle EZ Quick, LLC, 226 N.J. 370, 379 (2016). Plaintiff's

remaining arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION