SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2678-20

TMN, LLC, GIACCIO LLC, and NJ RITA'S LLC (all trading as RITA'S WATER ICE),

Plaintiffs-Appellants,

v.

OHIO SECURITY INSURANCE COMPANY,

Defendant-Respondent.

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Argued January 10, 2023 – Decided February 9, 2023

Before Judges Whipple, Smith, and Marczyk.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-0821-20.

Kevin J. Kotch argued the cause for appellants (Ferrara Law Group, PC, attorneys; Ralph P. Ferrara and Kevin J. Kotch, of counsel and on the briefs).

Rachel R. Hager argued the cause for respondent (Finazzo Cossolini O'Leary Meola & Hager, LLC, attorneys; Rachel R. Hager, on the brief).

PER CURIAM

Plaintiffs TMN LLC, Giaccio LLC, and NJ Rita's LLC (collectively, plaintiffs) appeal from an April 16, 2021 order granting defendant Ohio Security Insurance Company's motion to dismiss. We affirm.

Plaintiffs run three Rita's Water Ice (Rita's) businesses in New Jersey. They purchased an all-risk insurance policy from defendant for the policy period March 15, 2020, to March 15, 2021. The policy included coverage for business income, extra expense, and loss caused by civil authority. However, the policy only contemplates certain kinds of losses.

The policy defines Covered Cause of Loss as "[d]irect physical loss unless the loss is excluded . . . ." It covers actual loss of income incurred when operations are suspended during a "period of restoration," but only if the suspension is "caused by direct physical loss of or damage to property." The extra expense coverage also only applies during a "period of restoration" that is due to "direct physical loss or damage to the property."

The policy additionally included a clause excluding losses caused by viruses:

> We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or

> event that contributes concurrently or in any sequence to the loss.
>
> . . . .
>
> Any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.

In March 2020, in response to the COVID-19 pandemic, Governor Murphy declared a state of emergency and issued executive orders which suspended non-essential business operations, including restaurants. See Exec. Order No. 103 (Mar. 9, 2020), 52 N.J.R. 549(a) (Apr. 6, 2020); see also Exec. Order No. 104 (Mar. 16, 2020), 52 N.J.R. 550(a) (Apr. 6, 2020); Exec. Order No. 107 (Mar. 21, 2020), 52 N.J.R. 554(a) (Apr. 6, 2020). As a result, plaintiffs "were forced to close their businesses to the public," or had to confine their service to take-out and limit their hours of operation. Plaintiffs allege they suffered a substantial loss of business and income when the executive orders were in effect. They sought coverage through their insurance policy with defendant.

When defendant denied coverage for plaintiffs' losses, plaintiffs brought suit for a declaratory judgment and to compel defendant to provide business interruption and extra expense coverage as per the policy, including coverage

under the civil authority provision. Plaintiffs also sought a declaration that the policy's virus exclusion did not bar coverage for their losses.

Defendant moved to dismiss, arguing the policy, by its plain terms, did not cover the losses at issue. Following oral argument, the trial court granted this motion and dismissed plaintiffs' complaint with prejudice finding there was no direct physical loss of or damage to plaintiffs' property, and the virus exclusion applied because the Governor issued the executive orders in response to the COVID-19 virus.

On appeal, plaintiffs argue the limitations imposed by the executive orders constituted physical loss or damage to the property. They contend the virus exclusion does not bar coverage because it was the Governor's executive orders, and not the virus itself, that caused the closure. They also argue that, even if the virus exclusion did apply, the doctrine of regulatory estoppel bars defendant from asserting it.

We review de novo Rule 4:6-2(e) motions to dismiss for failure to state a claim upon which relief can be granted. Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157, 171 (2021) (citing Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, PC, 237 N.J. 91, 108 (2019)). In considering such a motion, we "must examine 'the legal sufficiency of the facts alleged on the

face of the complaint,' giving the plaintiff the benefit of 'every reasonable inference of fact.'" Ibid. (quoting Dimitrakopoulos, 237 N.J. at 107).

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) (citing Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 43 (1960) and Scarfi v. Aetna Cas. & Sur. Co., 233 N.J. Super. 509, 514 (App. Div. 1989)).

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)). This doctrine only applies if there is a genuine ambiguity in the contract, and "the phrasing of the policy is so confusing that the average policyholder cannot make out the boundaries of coverage." Templo Fuente De

Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 200 (2016) (quoting Progressive Cas. Ins. Co. v. Hurley, 166 N.J. 260, 274 (2001)).

We previously addressed the arguments raised in this appeal in Mac Property. 473 N.J. Super. at 12-16. In that case, several plaintiffs sought declaratory judgment enforcing business income and civil authority insurance provisions to cover losses incurred during the COVID-19 pandemic. Ibid. Writing for the court, Judge Sumners held the term "direct physical loss of or damage to" was not ambiguous because "average policyholders" could "understand that coverage extended only to instances where the insured property has suffered a detrimental physical alteration of some kind, or there was a physical loss of the insured property." Id. at 21-22.

We reasoned the plaintiffs in Mac Property did not suffer any damage to their equipment or property "that caused their premises to lose their physical capacity to operate, and there was no physical alteration that made their premises dangerous to enter." Id. at 23. Specifically, none of the plaintiffs alleged COVID-19 was present on their properties, rendering them uninhabitable. Ibid. If it had not been for the Executive Orders, the plaintiffs would have been able to continue functioning with their intended purposes. Ibid. We adopt the same reasoning here.

Plaintiffs did not suffer any damage rendering their premises inoperable. Additionally, they allege no patron or employee of their businesses has ever contracted COVID-19. Plaintiffs here did not suffer any "direct physical loss of or damage to" their property. Therefore, they cannot recover under the policy.

We additionally note even if the limitations on their businesses did constitute a covered loss under the policy, the virus exclusion is unambiguous. The policy states defendant "will not pay for loss or damage caused directly or indirectly by" "[a]ny virus," "regardless of any other cause or event that contributes concurrently or in any sequence to the loss."

"[A]nti-concurrent . . . or anti-sequential causation" language in a policy bars coverage when a loss is caused by both an excluded peril and a covered peril. N.J. Transit Corp. v. Certain Underwriters at Lloyd's London, 461 N.J. Super. 440, 461 (App. Div. 2019), aff'd, 245 N.J. 104 (2021) (quoting Simonetti v. Selective Ins. Co., 372 N.J. Super. 421, 431 (App. Div. 2004)).

Mac Property held the anti-concurrent and anti-sequential causation language in the plaintiffs' policies "undoubtedly barr[ed] coverage." 473 N.J. Super. at 40. We likewise hold here that "COVID-19 contributed to [the plaintiffs'] business losses, and therefore [defendant] satisfied [its] burden to

show that the exclusions applied regardless of whether the [executive orders] were considered a concurrent or sequential cause." Ibid.

Finally, regulatory estoppel applies when "an insurer makes misrepresentations to a regulatory body regarding the meaning and effect of language it has requested to include in its policies . . . ." Id. at 31 (Morton Int'l, Inc. v. Gen. Accident Ins. Co., 134 N.J. 1, 75-76 (1993)). If an insured makes misrepresentations regarding the scope of a particular clause, they "may be prevented from enforcing the otherwise clear and plain meaning of that language against an insured." Ibid. The record here is devoid of any evidence of a false statement or misrepresentation to a regulatory body regarding the scope of the virus exclusions. This argument lacks sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.