SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3114-20

ASBURY BLU CONDOMINIUM ASSOCIATION, INC.,

Plaintiff-Appellant,

v.

CHUBB CORPORATION and CHUBB GROUP OF INSURANCE COMPANIES,

Defendants,

and

GREAT NORTHERN INSURANCE COMPANY,

Defendant-Respondent.

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Argued October 13, 2022 – Decided October 31, 2023

Before Judges Gooden Brown, DeAlmeida and Mitterhoff.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-4138-18.

Gene Markin argued the cause for appellant (Stark & Stark, attorneys; Gene Markin, of counsel and on the briefs).

Edward M. Koch argued the cause for respondent (White and Williams LLP, attorneys; Edward M. Koch and Marc L. Penchansky, of counsel and on the brief).

The opinion of the court was delivered by

DeALMEIDA, J.A.D.

Plaintiff Asbury Blu Condominium Association, Inc. (Asbury Blu) appeals from two June 1, 2021 orders of the Law Division that collectively denied its motion for summary judgment, granted defendant Great Northern Insurance Company's (Great Northern) motion for summary judgment, and dismissed the complaint in this insurance coverage matter arising from water intrusion into residential units in a newly constructed building. We affirm.

I.

We derive the following facts from the parties' summary judgment motion papers. Pioneer AP II, LLC (Pioneer) developed and sponsored a 24-unit condominium building in Asbury Park. As required by law, Pioneer established Asbury Blu to, among other things, own, administer, manage, operate, maintain, repair, and replace the common elements of the building and appointed its initial members.

The building was completed in 2007. However, because of market conditions it took several years for Pioneer to sell all of the units and transition control of Asbury Blu to the unit owners. Asbury Blu alleges that during the time that it took to sell the units, water intrusion issues arose at the building.

Thomas Kollar, who later became president of Asbury Blu, purchased his unit in November 2007, when the building was "brand new." He noticed water intrusion into his living room and bedroom "somewhere in the beginning, but not – not immediately." At that time, water was also intruding into other units.

Asbury Blu alleges that Pioneer spent approximately $800,000 repairing exterior cladding, balconies, windows, and other common elements while its board was in control of the building. According to Asbury Blu, Pioneer's repair efforts were negligently performed and exacerbated the construction defects, causing additional and new sources of water intrusion and new interior damage.

Two consultants performed investigations of the water infiltration and damage at the building from 2008 through 2010. These investigations concluded that faulty installation of the doors, windows, and curtain walls had caused the water intrusion and resulting damage to the interior of the residential units, including floor damage. These conclusions were confirmed and expanded on in a July 2015 report by a forensic engineer retained by Asbury Blu, Kipcon, Inc.

(Kipcon). That report detailed construction and design deficiencies in the balconies, roof, windows, and artificial stucco at the building that caused water intrusion. Kipcon's report concluded that building repairs by Pioneer in 2008 and 2009 were improperly and/or inadequately performed, which resulted in additional sources of water intrusion and new water damage.

In 2013, Asbury Blu filed a complaint in the Law Division against Pioneer and the board members it appointed to Asbury Blu. Asbury Blu amended its complaint several times. The fourth amended complaint, its final version, alleged that while Pioneer had control of Asbury Blu, it failed to discover, disclose, or correct defects and deficiencies in the design and construction of the building's common areas that resulted in water intrusion.

Asbury Blu alleged that the construction defects caused consequential damages to other property, including sheathing, framing, interior finishes, and other building components. Asbury Blu alleged several claims against Pioneer, including negligence, breach of express warranties, breach of implied warranties, breach of fiduciary duty, and violations of the warranties contained in the Planned Real Estate Development Full Disclosure Act (PREDFDA), N.J.S.A. 45:22A-21 to -56. The fourth amended Complaint did not allege that Pioneer caused any loss or damage due to negligent repairs, renovations, or

maintenance of the building. The only allegations concerning repairs to the building were directed at another defendant, Big Bear Construction and Landscaping (Big Bear). Asbury Blu did not allege that Pioneer was vicariously liable for Big Bear's alleged negligence.

Pioneer sought defense and indemnification under an insurance policy Great Northern issued to Onyx Management Group, LLC (Onyx), with which Pioneer had common ownership. The insurance policy covered the Asbury Blu condominium building for continuous annual policy periods from October 5, 2006 through October 5, 2010 (the Policy). During negotiations for the Policy, Onyx was represented by a large and well-established insurance broker. Both Pioneer and Asbury Blu were named as additional insured on the Policy.

For each year, the Policy provided coverage as follows:

> We will pay for direct physical loss or damage to:
>
> - building; or
> - personal property,
>
> caused by or resulting from a peril not otherwise excluded, not to exceed the applicable Limit of Insurance for Building Or Personal Property shown in the Declarations.

The Policy excluded property coverage for loss or damage caused by faulty planning, design, materials, or maintenance as follows:

> Planning, Design, Materials Or Maintenance
>
> This insurance does not apply to loss or damage (including the costs of correcting or making good) caused by or resulting from faulty, inadequate or defective:
>
> • planning, zoning, development, surveying, siting;
>
> • design, specifications, plans, workmanship, repair, construction, renovation, remodeling, grading, compaction;
>
> • materials used in repair, construction, renovation or remodeling; or
>
> • maintenance
>
> of part or all of any property on or off the premises shown in the Declarations.
>
> This Planning, Design, Materials Or Maintenance exclusion does not apply to ensuing loss or damage caused by or resulting from a peril not otherwise excluded.

The Policy also included a business errors exclusion. That exclusion barred property coverage for, among other things, "damage caused by or resulting from errors in the . . . constructing; developing; . . . installing; . . . maintaining; . . . [or] repairing . . . of part or all of any property."

The property form for the Policy included a provision that limited the time that those covered by the Policy could sue Great Northern for property coverage to three years after the date on which the direct physical loss occurred:

> No legal action may be brought against us unless:
>
> • there has been full compliance with all the terms of this insurance; and
>
> • the action is brought within three years after the date on which the direct physical loss or damage occurred.

The Policy also provided liability coverage. Great Northern's liability coverage form provided that it "will pay damages that the insured becomes legally obligated to pay by reason of liability . . . for bodily injury or property damage caused by an occurrence to which this coverage applies." The Policy defined "occurrence" as an "accident, including continuous or repeated exposure to substantially the same harmful conditions."

The Policy's liability coverage form included two different, but similar, exclusions for damages arising out of construction or development. From October 5, 2006 to October 5, 2008, the Real Estate Development exclusion provision of the Policy provided:

> This insurance policy does not apply to . . . property damage . . . arising out of or directly or indirectly related to

- the development of real property; or
- the construction of real property,

by the insured for itself, or by the insured for others and for sale to others.

Before the 2008 renewal, Onyx approached Great Northern to consider providing coverage "on a go forward basis for future construction projects that Onyx might engage in." This led to negotiations between Onyx, its broker, and Great Northern. The final version of the Construction Or Development, Except Maintenance Or Renovation Or Scheduled Operations Or Work Exclusion provides, in relevant part:

> With respect to all coverage(s) under this contract, this insurance does not apply to any damages, loss, cost or expense arising out of any construction or development.
>
> This exclusion applies regardless of:
>
> A. whether such operations or work are or were performed or completed:
>
> 1. by you or on your behalf;
>
> 2. for you;
>
> 3. by or for others; or
>
> 4. for sale to others; and

B. when or where such operations or work are or were performed or completed.

This exclusion does not apply to:

- routine maintenance or renovation operations; or

- construction or development operations or work described in the Schedule.

. . . .

Construction or development means any:

- addition to any building or structure; or

- complete or partial construction or demolition or erection of any building or other structure; or

- planning, site preparation, surveying or other constructions or development of real property.

Maintenance or Renovation

A. means:

1. alteration or renovation operations; or

2. maintenance or repair operations; or

B. does not include any structural alteration that involves changing the size of, or any demolishing or moving of any building or other structure.

The Schedule which lists the exceptions to the exclusion provides that

ALL PROJECTS TO BE EVALUATED ON A CASE-BY-CASE BASIS TO DETERMINE WHETHER OR

> NOT COVERAGE WILL BE PROVIDED. REQUIRED CONTRACTUAL LANGUAGE AND MINIMUM INSURANCE LIMITS & TERMS/CONDITIONS REQUIREMENTS FOR CONTRACTORS AS PREVIOUSLY OUTLINED.
> AVERAGE PROJECT RATES (ESTIMATED): $0.035-$0.050 PER $100 CONSTRUCTION COSTS
> MINIMUM PROJECT PREMIUM: $2,500 (FULLY EARNED)

Great Northern denied coverage to Pioneer for all the non-negligence claims alleged against it because those causes of action and allegations did not represent a potentially covered occurrence, as required by the Policy. As to the negligence claims, Great Northern applied the exclusion contained in the Real Estate Development Form for the period October 5, 2006 to October 5, 2008. Great Northern concluded that Asbury Blu alleged property damages "arising out of or directly or indirectly related to" the development or construction of the building. For the remaining policy years, Great Northern rejected coverage under the Construction Or Development, Except Maintenance Or Renovation Or Scheduled Operations or Work Exclusion under the same theory and because the two exceptions to the exclusion did not apply.

Asbury Blu claimed it first became aware it was an insured under the Policy in November 2017, when Pioneer produced a copy of the Policy during discovery in the original suit. On November 10, 2017, Asbury Blu separately

submitted a property damage claim to Great Northern and sought coverage for property damage caused by water as a first-party insured under the Policy. In response, Great Northern hired an engineering firm to investigate water intrusion at the building. The firm agreed with Kipcon that the "sources of water entry are consistent with improper construction of the façade, balconies, and roof, which have allowed water to infiltrate the building envelope and cause damage." The firm also concluded that there was no evidence that the water intrusion and resulting damage were caused by a singular event such as a storm, flood, fire, vehicular impact, or pipe break.

In February 2018, Great Northern denied the first-party claim filed by Asbury Blu. In doing so, Great Northern applied several exclusions that barred coverage: (1) Acts or Decision; (2) Business Error; (3) Planning, Design, Materials or Maintenance; (4) Wear and Tear; and (5) Settling. Great Northern also concluded that the claim was filed beyond the three-year limitations period set forth in the Policy.

Asbury Blu settled its claims against Pioneer and the original board members. In exchange for the settlement, Asbury Blu received a monetary payment from a later insurer on the risk and entry of a consent judgment of

$450,000 against Pioneer as well as Pioneer's assignment to Asbury Blu to pursue any available insurance proceeds from Great Northern under the Policy.

The consent judgment states that "[a]fter construction," Asbury Blu "discovered the existence of various construction defects and deficiencies that were causing water intrusion and interior damages." In addition, the consent judgment states that Kipcon "found the presence of various construction defects, including but not limited to, missing and improperly installed flashings in the exterior cladding and window systems, improperly installed and sloped balconies, and interior water damage."

The consent judgment contains findings that Pioneer was responsible for: (1) ensuring that the condominium was built in compliance with architectural drawings, building codes, and industry standards: (2) supervising its project manager; and (3) ensuring that the building was free from construction defects at the time it sold the units. The consent judgment concludes that Pioneer breached these duties and responsibilities, and, as a result, the building "suffered from pervasive construction defects and intrusive water damage." The consent judgment does not refer at all to negligent repairs or maintenance by Pioneer.

Asbury Blu subsequently filed a complaint in the Law Division against Great Northern. The complaint sought: (1) a declaration that Great Northern

had a duty to indemnify Pioneer under the Policy for the water damage to the building and must indemnify Pioneer for a portion of the amount awarded in the consent judgment (Count I); (2) a declaration that Great Northern had a duty under the Policy to defend Pioneer against the water damage claims asserted by Asbury Blu in the first suit and to pay Pioneer's defense costs (Count II); and (3) a declaration that Asbury Blu was an insured under the Policy for water damage to the building and Great Northern must pay the cost to cure the property damage caused by water (Count III). The complaint also alleged that Great Northern acted in bad faith during the adjustment of Asbury Blu's first-party claim (Count IV).

Great Northern moved to dismiss the complaint. It argued that Asbury Blu's claims were not covered by the Policy because they were directly or indirectly related to the development or construction of real property and, therefore, within the Real Estate Development exclusion of the Policy for the period October 5, 2006 to October 5, 2008 and within the Construction Or Development, Except Maintenance Or Renovation Or Scheduled Operations Or Work Exclusion for the period October 5, 2008 to October 5, 2010, and that no exception to the exclusion applied because the Asbury Blu building was not listed on the exception Schedule and Asbury Blu had not alleged its damages

were caused by Pioneer's regular repairs or maintenance operations. In addition, Great Northern argued that Asbury Blu's claims did not fall within the ensuing loss exception to the exclusion for the coverage period.

In an oral opinion, the trial court found that the Real Estate Development exclusion in the policies for the period October 5, 2006 to October 5, 2008, was not "ambiguous, misleading or in any way not subject to the interpretation and understanding of its plain language." The court found "[v]ery simply it states that the insurance does not apply to property damage arising out of or directly or indirectly related to the development of real property or the construction of real property, whether by the insured itself, by the insured for others or for sale to others." The court concluded that no "amount of discovery . . . is going to change the plain meaning of that term." The court, therefore, concluded Great Northern was entitled to summary judgment with respect to indemnity and defense of Pioneer's liability for Asbury Blu's claims for the period October 5, 2006 to October 5, 2008.

With respect to the period October 5, 2008 to October 5, 2010, the trial court found that Asbury Blu stated a claim as to whether the building was covered by the Construction Or Development, Except Maintenance Or

Renovation Or Scheduled Operations Or Work Exclusion or the exceptions to the exclusion.

With respect to Asbury Blu's first-party coverage claim, the trial court found that Asbury Blu was entitled to discovery on its claim that the Planning, Design, Materials Or Maintenance exclusion did not apply because it was seeking coverage under the ensuring loss exception to the exclusion. In addition, the court found that Asbury Blu was entitled to discovery with respect to whether under the efficient proximate cause doctrine, water, which is not an excluded peril, should be considered the last cause of the damage, entitling Asbury Blu to coverage. The court also severed Asbury Blu's bad faith claims.

A May 16, 2019 order memorializes the trial court's decision.

After discovery, both Asbury Blu and Great Northern moved for summary judgment. On June 1, 2021, Judge Andrea I. Marshall entered two orders that collectively granted Great Northern's motion, denied Asbury Blu's cross-motion, and dismissed the complaint. Judge Marshall issued a comprehensive fifty-seven-page written opinion explaining her decisions.

With respect to Asbury Blu's claim that Great Northern was obliged to defend and indemnify Pioneer in the original suit for claims arising from October 2008 to October 2010, the judge began with an analysis of the

Construction Or Development, Except Maintenance Or Renovation Or Scheduled Operations Or Work Exclusion. The judge found that it was undisputed that the Policy in effect from October 2008 to October 2010 excluded coverage for losses resulting from construction and development. In addition, the judge found it is not disputed that the exclusion contains an exception for routine maintenance and renovation operations. The judge found the Policy's definition of "routine maintenance or renovation operations" to be ambiguous and open to more than one interpretation.

Judge Marshall, therefore, turned to legal doctrines that guide the interpretation of ambiguous provisions of an insurance contract. The judge noted that ambiguous language in an insurance policy generally is construed in favor of the insured. See Doto v. Russo, 140 N.J. 544, 556 (1995). However, the judge found that this doctrine does not apply to sophisticated commercial insured. See Oxford Realty Grp. Cedar v. Travelers Excess and Surplus Lines Co., 229 N.J. 196 (2017). The judge found that Onyx was a sophisticated business entity that was represented by an insurance broker at the time it negotiated the Policy. The judge, therefore, did not read the ambiguous language in favor of the insured.

The judge then analyzed the allegations in the fourth amended complaint in the original action to determine if they were sufficient to trigger Great Northern's duty to defend and indemnify Pioneer under the ambiguous language of the Policy. The judge found that the fourth amended complaint did not contain any allegations that Pioneer's negligent repairs or renovations to the building damaged Asbury Blu's property. To the contrary, the judge found, Asbury Blu alleged only that Pioneer's negligent construction and development of the building caused water infiltration that damaged Asbury Blu's property. Judge Marshall noted that Asbury Blu specifically included an allegation concerning repairs against Big Bear, which established that Asbury Blu intentionally omitted allegations regarding repairs against Pioneer. Thus, the judge concluded, Great Northern's duty to defend or indemnify Pioneer was not triggered by the fourth amended complaint, because Asbury Blu had not alleged claims within an exception to the exclusion for construction defects.

Judge Marshall also concluded that the Schedule exception to the construction defects exclusion did not apply. The judge found that the language of the Schedule exception was unambiguous and that in order for a project to be included on the Schedule it must first be submitted by the insured to Great Northern for evaluation to determine additional coverage. Because there is no

dispute that the Asbury Blu building was not on the Schedule and had not been submitted to Great Northern for evaluation, the judge concluded Asbury Blu's claims against Pioneer did not fall within the Schedule exception to the construction defect exclusion.

The judge also concluded that Great Northern had no duty to defend or indemnify Asbury Blu's claims of breach of implied warranty, breach of express warranty, breach of fiduciary duty, or under PREDFDA, in counts two through five of the fourth amended complaint. The judge found that an occurrence under the Policy was limited to an "accident, including continuous or repeated exposure to substantially the same general harmful conditions." Asbury Blu's claims in counts two through five, the judge concluded, did not fall under this definition, and therefore did not trigger Great Northern's duty to defend Pioneer. See Atl. Mut. Ins. Co. v. Hillside Bottling Co., 387 N.J. Super. 224, 233-34 (App. Div. 2006).

The judge then turned to Asbury Blu's claim for first-party coverage. The judge found that under the discovery rule, see Sodora v. Sodora, 338 N.J. Super. 308 (Ch. Div. 2000), Asbury Blu's cause of action against Great Northern accrued when it first became aware of the Policy in October 2017. Although the discovery rule does not generally apply to contract claims, the judge concluded

that its application here was appropriate because Asbury Blu had not negotiated the Policy and was unaware that it was an insured under the Policy until it was produced by Pioneer during discovery in the first suit. Thus, the judge concluded, Asbury Blu's complaint against Great Northern was timely filed.

However, Judge Marshall concluded that the Policy excludes coverage for Asbury Blu's claims, which arise directly or indirectly from construction defects. The judge concluded that it did "not see how water damage is an unforeseeable loss such that an average policyholder would not understand that, if caused by or resulting from faulty workmanship or construction defects, the damage would be excluded under the" unambiguous terms of the Policy. The judge also found that the construction defects and Pioneer's faulty workmanship were the first and the last steps in the chain of causation and the actual and proximate cause of the water damage.

Because Asbury Blu's damages were excluded by the construction defects exclusion and not saved by the ensuing loss exception, and in light of her holdings with respect to Great Northern's obligation to defend and indemnify Pioneer, the judge granted summary judgment in favor of Great Northern, denied Asbury Blu's cross-motion for summary judgment, and dismissed the complaint.

This appeal follows. Asbury Blu argues the trial court erred when it granted summary judgment to Great Northern because: (1) damage to the building caused by water is an ensuing loss, an exception from the construction defect exclusion, despite construction defects being the but-for cause of the water intrusion; (2) it did not conclude that, despite the absence of allegations in the fourth amended complaint of negligent repair and maintenance, Great Northern should have investigated the cause of the water intrusion at the building; and (3) damage caused by the Pioneer's negligent repairs is a covered loss under the liability provisions of the Policy.[1]

II.

We review a grant of summary judgment de novo, applying the same standard as the trial court. Samolyk v. Berthe, 251 N.J. 73, 78 (2022). 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.'" Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021) (quoting R. 4:46-2(c)).

[1] Asbury Blu does not contest the judge's conclusion that the Schedule exception to the construction and development exclusion does not apply.

"Summary judgment should be granted . . . 'against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" Friedman v. Martinez, 242 N.J. 449, 472 (2020) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)). We do not defer to the trial court's legal analysis or statutory interpretation. RSI Bank v. Providence Mut. Fire Ins. Co., 234 N.J. 459, 472 (2018); Perez v. Zagami, LLC, 218 N.J. 202, 209 (2014).

An insurance policy is a type of contract and as such, the interpretation of its language is a question of law. Selective Ins. Co. of Am. v. Hudson E. Pain Mgmt. Osteopathic Med., 210 N.J. 597, 605 (2012). Following the general principles of contract interpretation, Cadre v. Proassurance Cas. Co., 468 N.J. Super. 246, 258 (App. Div. 2021), an insurance policy should generally be "interpreted according to its plain and ordinary meaning." Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165, 175 (1992). "When the terms of a policy are clear and unambiguous the court must enforce the contract as it finds it; the court cannot make a better contract for the parties than they themselves made." Stone v. Royal Ins. Co., 211 N.J. Super. 246, 248 (App. Div. 1986).

If the court finds a phrase or provision within the policy to be subject to more than one reasonable interpretation, it is deemed ambiguous and, as such, it

may consider extrinsic evidence when interpreting the ambiguity. Templo Fuente De Vida Corp., Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 200 (2016). Ultimately, an insurance policy should be interpreted to align with an insured's reasonable expectations of coverage. Progressive Cas. Ins. Co. v. Hurley, 166 N.J. 260, 274 (2001).

If claims fall within the bounds of an insurance policy, the insurer owes its insured a duty to defend and a duty to indemnify. Flomerfelt v. Cardiello, 202 N.J. 432, 444 (2010). "Those duties are neither identical nor coextensive, and therefore, must be analyzed separately." Ibid. "The duty to defend is broader than the duty to indemnify." Jolley v. Marquess, 393 N.J. Super. 255, 274 (App. Div. 2007). In fact, an insurer may owe its insured a duty to defend even if ultimately it becomes clear after discovery or trial that the claims are not covered under the policy. Flomerfelt, 202 N.J. at 445. In such circumstances, the court must undertake an initial duty to defend analysis to determine whether the insurer must defend its insured. Id. at 444. However, if the terms of the policy clearly bar any claims of indemnity (i.e., there is a conclusive determination as to coverage), the insurer will not have a duty to defend. Id. at 442.

Whether an insurer's duty to defend is triggered by "an action brought against its insured depends upon a comparison between the allegations set forth in the complaint's pleading and the language of the insurance policy." Id. at 444. This analysis requires the reviewing court to inquire into "the nature of the claim asserted, rather than the specific details of the incident of the litigation's possible outcome . . . ." Ibid. The insurer must defend the insured against even meritless or frivolous allegations so long as "the claims of damage are within the policy's covenant to pay, i.e., the coverage of the policy." Muralo Co., Inc. v. Emps. Ins. of Wausau, 334 N.J. Super. 282, 289 (App. Div. 2000). "In short, in circumstances in which the underlying coverage question cannot be decided from the face of the complaint, the insurer is obligated to provide a defense until all potentially covered claims are resolved . . . ." Flomerfelt, 202 N.J. at 447.

While typically the duty to defend is triggered by the allegations set forth in the complaint, the duty may be "triggered by facts indicating potential coverage that arise during the resolution of the underlying dispute." SI Indus. v. Am. Motorists Ins. Co., 128 N.J. 188, 198 (1992). In order for the insurer's defense obligations to arise, the newly discovered facts must be known to the insurer. Id. at 199. "Although the insurer cannot ignore known information simply because it is not included in the complaint, the insurer has no duty to

investigate possible ramifications of the underlying suit that could trigger coverage." Ibid. The onus is placed on the insured being sued to promptly convey the new information that potentially triggers coverage to the insurer. Id. at 199-200. If the insured fails to do so, it cannot later "demand reimbursement from the insurer for defense costs the insurer had no opportunity to control." Id. at 200.

Contracts, such as insurance policies, often provide a period of limitations for which a claimant must assert a claim against the insurer. See Trinity Church v. Lawson-Bell, 394 N.J. Super. 159, 170 (App. Div. 2007). These provisions are upheld and enforced by New Jersey courts so long as they are reasonable. Eagle Fire Prot. Corp. v. First Indem. of Am. Ins. Co., 145 N.J. 345, 354 (1996).

New Jersey courts apply the manifest-trigger rule to first-party property damage coverage questions. Winding Hills Condo. Ass'n, Inc. v. N. Am. Specialty Ins. Co., 332 N.J. Super. 85, 92-93 (App. Div. 2000). Under the manifest-trigger rule,

> [I]n first[-]party progressive property loss cases, when . . . the loss occurs over several policy periods and is not discovered until several years after it commences, the manifestation rule applies. . . . [P]rior to the manifestation of damage, the loss is still a contingency under the policy and the insured has not suffered a compensable loss. Once the loss is manifested, however, the risk is no longer contingent; rather an

> event has occurred that triggers indemnity unless such event is specifically excluded under the policy terms.
>
> [Id. at 93 (quoting Prudential-LMI Com. Ins. v. Superior Court, 51 Cal. 3d 674 (1990)).]

"The discovery rule is an equitable doctrine created by the courts to protect unsuspecting persons from statutory limitations periods during which a claim must be brought or forever lost." Dunn v. Borough of Mountainside, 301 N.J. Super. 262, 273 (App. Div. 1997). Through application of the discovery rule, "the limitations clock does not commence until a plaintiff is able to discover, through the exercise of reasonable diligence, the facts that form the basis for an actionable claim against an identifiable defendant." The Palisades At Ft. Lee Condo. Ass'n, Inc. v. 100 Old Palisade, LLC, 230 N.J. 427, 435 (2017). "The question in a discovery rule case is whether the facts presented would alert a reasonable person, exercising ordinary diligence, that he or she was injured due to the fault of another." Caravaggio v. D'Agostini, 166 N.J. 237, 246 (2001). This standard is objective and asks "whether plaintiff 'knew or should have known' of sufficient facts to start the statute of limitations running." Ibid. (quoting Baird v. Am. Med Optics, 155 N.J. 54, 72 (1998)).

Courts must balance the equities of both plaintiff and defendant because while it may be inequitable to deny "an injured person, unaware that he has a

cause of action, . . . his day in court solely because of his ignorance," it also may be "unjust . . . to compel a person to defend a law suit [sic] after the alleged injury has occurred, when memories have faded, witnesses have died and evidence has been lost." County of Morris v. Fauver, 153 N.J. 80, 109 (1998).

New Jersey courts have applied the tort-based discovery rule to toll the statute of limitations in cases other than those alleging personal injury. Ibid. However, courts have not generally applied the discovery rule to contract-based actions because "[t]he rationale for employing the discovery rule in tort – or fraud-type actions . . . does not carry over to most contract actions . . . ." Id. at 110. This is because "most contract actions presume that the parties to a contract know the terms of their agreement and a breach is generally obvious and detectable with any reasonable diligence." Ibid. In Sodora, the Chancery Division held that the discovery rule applied to a third-party beneficiary of a contract about which the beneficiary was unaware. 338 N.J. Super. at 316.

We have carefully reviewed Asbury Blu's arguments in light of the record and applicable legal principles and affirm the June 1, 2021 orders for the reasons stated by Judge Marshall in her thorough and well-reasoned written opinion. The judge carefully considered the terms of the various exclusion and exception to exclusion provisions of the Policy. We find no fault with her determination

that Great Northern did not have a duty to defend or indemnify Pioneer for the claims alleged against in by Asbury Blu in the original suit.

We also agree with Judge Marshall's decision to apply the discovery rule to Asbury Blu's first-party claims in light of the unusual circumstances of this case. In addition, we find no cause to disturb the judge's conclusion that even if not time barred Asbury Blu is not entitled to coverage under the Policy.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION