

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3010-10T1

ASBURY CONVENTION HALL, LLC,
ASBURY PARTNERS, LLC AND
MAXUM SPECIALTY INSURANCE
GROUP,

Plaintiffs-Appellants,

v.

UNITED STATES LIABILITY
INSURANCE GROUP,

Defendant-Respondent.

Argued November 30, 2011 - Decided March 23, 2012

Before Judges Lihotz and Waugh.

On appeal from the Superior Court of New
Jersey, Law Division, Middlesex County,
Docket No. L-673-10.

Thomas M. Madden argued the cause for
appellants (Hack, Piro, O'Day, Merklinger,
Wallace & McKenna, P.A., attorneys; Mr.
Madden, of counsel and on the brief;
Jonathan Testa, on the brief).

Robert W. Muilenburg argued the cause for
respondent (Coughlin Duffy, LLP, attorneys;
Mr. Muilenburg, of counsel and on the brief;
Conor T. Mulcahy, on the brief).

PER CURIAM

Plaintiffs Asbury Convention Hall, LLC, and Asbury
Partners, LLC (collectively referred to as plaintiff), and

plaintiff's insurer, Maxum Specialty Insurance Group (Maxum), appeal from the summary judgment dismissal of a declaratory judgment action seeking a determination of coverage under a commercial general liability insurance policy (CGL policy) issued by defendant United States Liability Insurance Company¹ to its insured, ECC, LLC (ECC). Plaintiff and ECC were named as defendants in a personal injury action for damages resulting from a slip and fall on plaintiff's property during an event sponsored by ECC. Ultimately, judgment was rendered against plaintiff, which was satisfied by Maxum.

Maintaining that the terms of the License Agreement, permitting ECC to use plaintiff's premises and also requiring ECC to obtain the CGL policy for plaintiff's benefit, plaintiff sought coverage for defense costs and any resultant liability arising in the underlying tort action. Defendant declined plaintiff's request for coverage, triggering plaintiff's initiation of this declaratory judgment action, seeking indemnification and defense costs. On cross-motions for summary judgment, the trial court concluded there were no contractual rights to indemnification or coverage under the CGL policy and granted summary judgment in favor of defendant.

¹ In our opinion, we have elected to use defendant's correct name rather than that stated in the caption.

On appeal, plaintiff argues the motion judge erred in reviewing the policy provisions in light of the License Agreement and maintains claims arising from the underlying tort action were covered under the CGL policy. Plaintiff argues the judgment must be vacated and its motion for summary judgment granted. We have reviewed plaintiff's arguments in light of the record and applicable law. We affirm.

The facts are derived from evidence submitted by the parties in support of, and in opposition to, the summary judgment motions and are viewed in a light most favorable to plaintiff. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). While attending an ECC sponsored cheerleading event at Asbury Park Convention Hall, the premises owned by plaintiff, Christine Levecchi sustained injuries when she fell on the stairs. Levecchi filed suit, generally alleging plaintiff allowed the stairs to exist in an unsafe condition and ECC provided inadequate security at the event (Levecchi action). The Levecchi action was tried before a jury, which found plaintiff 90% negligent, Levecchi 10% comparatively negligent, and ECC not negligent. Plaintiff's portion of the final judgment was satisfied by Maxum.

When the Levecchi action was filed, plaintiff requested ECC and defendant to indemnify, insure, and undertake defense of the

matter as required by the License Agreement. ECC and defendant declined. Plaintiff initiated a declaratory judgment action against defendant asserting it was entitled to defense costs and indemnification of any judgment under the CGL policy.

Plaintiff and defendant filed cross-motions for summary judgment in the declaratory judgment action. Following extensive argument and detailed submissions, the motion judge found the indemnification clause of the License Agreement did not expressly include an agreement for ECC to defend or indemnify for plaintiff's negligent acts. Additionally, the judge concluded plaintiff was not an insured under ECC's CGL policy. Consequently, the motion judge concluded defendant had no duty to indemnify Maxum or plaintiff for any judgment or related defense costs incurred in defending the Levecchi action. The court granted defendant's motion for summary judgment and dismissed plaintiff's complaint with prejudice on January 14, 2011. Plaintiff filed this appeal.

ECC was using plaintiff's premises on April 29, 2007, for the sole purpose of hosting a cheerleading competition, pursuant to the terms of the License Agreement. A review of plaintiff's arguments requires an examination of the License Agreement's language.

Paragraph twenty of the License Agreement contained ECC's indemnification agreement, which provided, in pertinent part:

Indemnification. Licensee [ECC] agrees to indemnify, defend and hold Licensors [plaintiff] and . . . their respective . . . agents, employees and affiliates harmless from and against any and all liability, personal injury, death, damage, cost and expense (including reasonable attorneys' fees and disbursements) arising in connection with: (i) any act or omission of Licensee or its members, officers, directors, agents, employees, Licensees affiliates or invitees (including persons in attendance at an Event), including any act or omission before, during or after an Event in or about the Premises; . . . (v) claims made by invitees or entertainers; or . . . the presentation of an Event.

In addition, paragraph thirteen imposed specific insurance requirements during ECC's use, including:

General Public Liability Insurance, including blanket contractual liability coverage, covering the Premises and Licensee's use thereof against claims for personal injury or death and property damage occurring upon, in or about the Premises. . . . Such policy shall name Licensors and any mortgagee or ground lessor of the Premises of which Licensee has notice as additional insureds.

. . . .

Each policy of liability insurance obtained and maintained by Licensee in accordance with the provisions of [section thirteen] must be primary, valid and collectible insurance of Licensee and Licensors.

It is undisputed ECC was obliged to name plaintiff as an additional insured under a CGL policy procured for the cheerleading event. ECC notified its insurance agent of the insurance requirements for the event and procured the CGL insurance policy from defendant. Thereafter, ECC advised plaintiff its insurance coverage was \$1 million per person and \$2 million per occurrence and "[t]he insurance [wa]s being underwritten . . . and a declaration page w[ould] be sent immediately."

The terms of the CGL policy allowed payment for sums "the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." A policy endorsement listed specific events for which coverage could apply, including the April 29, 2007 competition held at plaintiff's premises.

The CGL policy also enumerated exclusions to the provided coverage. Within the exclusion section, conditions obviating the exclusion were found in clause 2b of Section I, which stated:

This insurance does not apply to:

. . . .

b. Contractual Liability

"Bodily injury" or "property damage" for which the insured is obligated to pay

damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- (1) That the insured would have in the absence of the contract or agreement; or
- (2) Assumed in a contract or agreement that is an "insured contract,"^[2] provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract," reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:
 - (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and
 - (b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

The parties agree, notwithstanding the provisions of the License Agreement, ECC did not properly list plaintiff as a

² In the CGL policy's definition's section, an "insured contract" is defined as "any easement or license agreement" or any "contract for lease of premises."

named or additional insured; the only named insured on the CGL policy was ECC.

Our review of the motion judge's decision is governed by well established principles. In our de novo review of a trial court's grant or denial of summary judgment, we "'view the facts in the light most favorable to plaintiff.'" Livsey v. Mercury Ins. Grp., 197 N.J. 522, 525 n.1 (2009) (quoting Sciarrotta v. Global Spectrum, 194 N.J. 345, 348 (2008)). Also, because the interpretation of an insurance contract is a question of law, Polarome Int'l, Inc. v. Greenwich Ins. Co., 404 N.J. Super. 241, 260 (App. Div. 2008), certif. denied, 199 N.J. 133 (2009), we undertake an independent review of whether the motion judge's application of the law was correct, noting the "interpretation of the law and legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). Accord Alloway v. Bradlees, 157 N.J. 221, 231 (1999).

An "insurance policy is an agreement that 'set[s] forth in fundamental terms, the general outlines of coverage.'" Hardy v. Abdul-Matin, 198 N.J. 95, 102 (2009) (quoting Weedo v. Stone-E-Brick, Inc., 81 N.J. 233, 247 (1979)). Consequently, the premium paid for insurance coverage "does not buy coverage for all . . . damage but only for that type of damage provided for

in the policy." Ibid. (internal quotation marks and citation omitted).

When interpreting an insurance contract, we "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)). Construing insurance policies requires a broad search "for the probable common intent of the parties in an effort to find a reasonable meaning in keeping with the express general purposes of the policies." Royal Ins. Co. v. Rutgers Cas. Ins. Co., 271 N.J. Super. 409, 416 (App. Div. 1994). Our analysis also requires that any interpretation reached be "consistent with the objectively reasonable expectations of the insured[,]" Aubrey v. Harleysville Ins. Co., 140 N.J. 397, 404 (1995), "fulfill the expectations of the parties," Passaic Valley Sewerage Comm'rs v. St. Paul Fire & Marine Ins. Co., 206 N.J. 596, 608 (2011), interpret "the policy as written[,]" and avoid "writing a better insurance policy than the one purchased." President v. Jenkins, 180 N.J. 550, 562 (2004).

"[T]he question [of] whether a party is insured at all may be a separate matter susceptible of resolution by reference to any relevant matter such as an underlying contract, here the

[License] agreement, which clarifies the intendments of the parties in apportioning responsibility and providing for insurance coverage." Pennsville Shopping Ctr. Corp. v. Am. Motorists Ins. Co., 315 N.J. Super. 519, 523 (App. Div. 1998), certif. denied, 157 N.J. 647 (1999).

Other generally accepted policy interpretation rules include: (1) the insured has the burden "to bring the claim within the basic terms of the policy[,]" Reliance Ins. Co. v. Armstrong World Indus., Inc., 292 N.J. Super. 365, 377 (App. Div. 1996); (2) where an insurer claims the matter in dispute falls within exclusionary provisions of the policy, it bears the burden of establishing that claim, Hartford Acc. & Indem. Co. v. Aetna Life & Cas. Ins. Co., 98 N.J. 18, 26 (1984); (3) coverage clauses are interpreted liberally, whereas exclusions are construed strictly, Butler v. Bonner & Barnewall, Inc., 56 N.J. 567, 576 (1970); Erdo v. Torcon Constr. Co., 275 N.J. Super. 117, 121 (App. Div. 1994); and (4) "[w]here the language of a policy will support two meanings, one favorable to the insured and the other favorable to the insurer, the interpretation sustaining coverage must be applied." Franklin Mut. Ins. Co. v. Sec. Indem. Ins. Co., 275 N.J. Super. 335, 340 (App. Div.), certif. denied, 139 N.J. 185 (1994). See also Harrah's Atl. City, Inc. v. Harleysville Ins. Co., 288 N.J.

Super. 152, 160 (App. Div. 1996) (holding ambiguity must be construed in favor of the insured).

Although exclusions in an insurance policy should be narrowly construed, if the exclusion is "specific, plain, clear, prominent, and not contrary to public policy[,]" the exclusion should be given effect. Doto v. Russo, 140 N.J. 544, 559 (1995). However, in the event of an ambiguity in the insurance contract provisions, we "interpret the contract to comport with the reasonable expectations of the insured, even if a close reading of the written text reveals a contrary meaning." Zacarias, supra, 168 N.J. at 595.

"Ambiguous policies are those that are 'overly complicated, unclear, or written as a trap for the unguarded consumer.'" Passaic Valley, supra, 206 N.J. at 608 (quoting Zacarias, supra, 168 N.J. at 604). "'A genuine ambiguity arises only where the phrasing of the policy is so confusing that the average policyholder cannot make out the boundaries of coverage.'" Ibid. (quoting Progressive Cas. Ins. Co. v. Hurley, 166 N.J. 260, 274 (2001)). "[A]n ambiguity does not arise simply because the parties have offered two conflicting interpretations." Polarome Int'l, supra, 404 N.J. Super. at 259.

Plaintiff argues the motion judge erred in concluding ECC's failure to include it as a named insured was fatal to providing

coverage under the CGL policy for its liability and defense costs related to the Levecchi action. Plaintiff suggests a joint reading of the provisions of these two documents supports its argument for coverage. In this regard, plaintiff maintains ECC obtained the CGL policy to cover plaintiff's premises, which it clearly listed on a policy endorsement. Under the License Agreement's indemnification clause, ECC assumed liability for claims made by ECC's invitees on plaintiff's premises. Further, plaintiff contends the License Agreement is an "insured contract," as defined in the CGL policy, and the contractual liability exclusion of Section I paragraph 2b is thereby inapplicable. Therefore, ECC, as an insured under the CGL policy, which assumed responsibility for injuries to its invitees, is entitled to coverage for sums related to Levecchi's injuries.

The Licensing Agreement cannot confer an obligation on defendant to provide coverage to plaintiff. That relationship, if any, is governed by the terms of the CGL policy. We conclude plaintiff is not covered by the policy. First, we determine whether plaintiff can directly make claims against the CGL policy. By its terms, payment under the CGL policy is limited to "sums that the insured becomes legally obligated to pay." Plaintiff is neither an insured nor an additional insured, see

Universal Underwriters Grp. v. Heibel, 386 N.J. Super. 307, 315 (App. Div. 2006) (holding insurance company was not obliged to cover defendant because he was not listed as an insured under the policy). Consequently, plaintiff has no direct entitlement to payment and may only recover through ECC's coverage, as ECC is the only insured under the policy.

Second, the License Agreement's requirement that ECC obtain a CGL policy alone can not bind defendant to provide coverage of the disputed claims. We examine whether the provisions of the License Agreement, specifically the indemnification clause, trigger ECC's coverage of plaintiff's claims under the CGL policy. See Conduit & Found. Corp. v. Hartford Ca. Ins. Co., 329 N.J. Super. 91, 95 n.3 (App. Div.) (noting that one of the policies at issue provided coverage for contractual indemnity claims against the insured pursuant to the "insured contract" exception to the contractual liability exclusion), certif. denied, 165 N.J. 135 (2000).

In construing an indemnity provision, "[t]he 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." Kieffer v. Best Buy, 205 N.J. 213, 223 (2011) (citing Zacarias, supra, 168 N.J. at 595). "[I]ndemnity provisions differ from provisions in a typical contract in one

important aspect." Ibid. If the meaning of an indemnity provision is ambiguous, the provision is "'strictly construed against the indemnitee.'" Mantilla v. NC Mall Assocs., 167 N.J. 262, 272 (2001) (quoting Ramos v. Browning Ferris Indus. of S. Jersey, Inc., 103 N.J. 177, 191 (1986)).

The significant flaw in plaintiff's policy interpretation syllogism is ECC's obligations under the indemnification clause of the License Agreement did not include responsibility for plaintiff's negligent acts. The indemnification clause does not obligate ECC to indemnify plaintiff for plaintiff's own negligent acts. Further, the damage award against plaintiff in the Levecchi action did not qualify under the CGL policy as sums for "'[b]odily injury' for which [ECC wa]s obligated to pay damages by reason of the assumption of liability in a contract or agreement."

In the Levecchi action, plaintiff defended against claims for its own negligence, not vicarious liability for ECC's negligence. In fact, the jury found plaintiff's own negligent acts were the primary cause of Levecchi's injuries and found ECC not negligent.

"[A] contract will not be construed to indemnify the indemnitee against losses resulting from its own negligence unless such intention is expressed in unequivocal terms."

Ramos, supra, 103 N.J. at 191. See also Kieffer, supra, 205 N.J. at 224 (stating shifting liability to an indemnitor can be accomplished only "through express and unequivocal language"). This stems from common law principles that a party bears responsibility for its own negligence. Ramos, supra, 103 N.J. at 183.

Accordingly, we reject plaintiff's claims of error and discern no flaw in the trial judge's conclusion that the CGL policy did not extend coverage to plaintiff as ECC did not clearly assume liability to indemnify plaintiff for its own negligent acts. Defendant has no obligation to satisfy the judgment in the Levecchi action because ECC was found not to have been negligent.

Finally, we reject as without merit, R. 2:11-3(e)(1)(E), plaintiff's contention the motion judge's opinion rendering summary judgment insufficiently complied with Rule 4:46-2(c) to "find the facts and state its conclusions in accordance with R[ule] 1:7-4."²

Affirmed.

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


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² Rule 1:7-4(a) obligates a motion judge "'to set forth factual findings and correlate them to legal conclusions.'" Allstate Ins. Co. v. Fisher, 408 N.J. Super. 289, 300 (App. Div. 2009) (quoting Great Atl. & Pac. Tea Co. v. Checchio, 335 N.J. Super. 495, 498 (App. Div. 2000)).