812.8067

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FILED
JUL 15 2014
E. DAVID MILLARD, P.J.Cv.

NAUTILUS INSURANCE COMPANY, Plaintiff, vs. NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, JOHN DOES 1-10 and ABC CORPS. 1-10, Defendants.	SUPERIOR COURT OF NEW JERSEY OCEAN COUNTY: LAW DIVISION DOCKET NO. OCN –L-2760-13 CIVIL ACTION **ORDER**

This matter having been opened before this Court by COLLIAU CARLUCCIO KEENER MORROW PETERSON & PARSONS, attorneys for the defendant NATIONAL FIRE INSURANCE COMPANY OF HARTFORD ("National Fire"), for an Order of Summary Judgment pursuant to R. 4:46-2, and plaintiff NAUTILUS INSURANCE COMPANY ("Nautilus") having filed an opposition to National Fire's motion for summary judgment and its own cross-motion for summary judgment, the Court having considered all motion papers, certifications and exhibits submitted, and having heard oral arguments on July 11, 2014, and for good cause shown and for the reasons set forth in the Court's July 11, 2014 opinion;

IT IS on this 11 day of July , 2014

A. **ORDERED** that the motion for summary judgment pursuant to R. 4:46-2, filed by defendant National Fire is denied in part and granted in part for the reasons set forth in the Court's opinion of July 11, 2014; and

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B. **ORDERED** that the cross motion for summary judgment, pursuant to R. 4:46-2, filed by plaintiff Nautilus is denied in part and granted in part for the reasons set forth in the Court's opinion of July 11, 2014.;

C. ORDERED, for the reasons set forth in the Court's opinion of July 11, 2014, Nautilus is the primary insurance carrier for JDB Equipment Company, Inc. in the case of *Andrei Savon and Donna Savon v. Trinity Construction, Inc., JDB Equipment Company, Inc., Skyjack Equipment, Inc., Linamar USA, Inc. and Sexton's Equipment Rental, Inc.* venued in the Superior Court of New Jersey, Ocean County, docket number OCN-L-3857-10; and

D. ORDERED, for the reasons set forth in the Court's opinion of July 11, 2014, JDB Equipment Company, Inc. is an additional insured under the National Fire policy issued to Trinity Construction, Inc., to be applied on an excess basis only;

E. ORDERED, that the Court awards to Nautilus the amount of $700,000.00 (Seven Hundred Thousand Dollars), representing the excess sum paid by Nautilus over its policy limits in settlement to Andrei Savon and Donna Savon.

IT IS FURTHER ORDERED that a copy of this Order shall be served on all parties within 7 (seven) days hereof.

E. David Millard, J.S.C., Presiding, Civil

FOR THE REASONS EXPRESSED
ON THE RECORD 7/11/14

AND IN THE ATTACHED
WRITE UP

CIVIL MOTION # 8

DOCKET: L-2670 **ORAL [] IF OPPOSED [X] WAIVED [ ]**

PLAINTIFF: Nautilus Insurance Company **COUNSEL:** Robert Cosgrove

DEFENDANT: National Fire Insurance Company **COUNSEL:** Nancy Lem

Motion Filed: **P () D (X)**

OPPOSED: **Y (X) N ()**

Defendant National Fire Insurance Company's Motion for Summary Judgment

Plaintiff Nautilus Insurance Company's Cross-Motion for Summary Judgment

Complaint Filed: 10/3/13
DED: 6/25/14
Motion Filed: 5/27/14

Facts:

On October 3, 2013, Nautilus Insurance Company ("Nautilus") commenced a declaratory judgment action against National Fire Insurance Company of Hartford ("National"). At all times relevant to the instant action, Nautilus insured JDB Equipment, Inc.("JDB") and National insured Trinity Construction, Inc. ("Trinity") On or about October 27, 2009, JDB and Trinity entered into a contract whereby JDB agreed to lease a Skyjack boom lift to Trinity. Trinity originally requested a 50-foot boom lift from JDB, but later requested an upgrade to a 60-foot boom lift. The 50-foot boom lift was owned and delivered to Trinity by Sexton Equipment Rental ("Sexton"). JBD allegedly rented the boom from Sexton to fulfill its order with Trinity. The 60-foot boom lift was allegedly owned by JDB and provided to Trinity for the same price. A new lease was not issued for the substitution, but the product name for the 50-foot boom lift was crossed out and replaced with the product name for the 60-foot boom lift.

The Skyjack Lease between JDB and Trinity lists "Sexton's Equipment Rental, Inc." as the lessor. However, according to the deposition of David Sexton, 1/3 owner of JDB, this was a mistake, and it should have said "JDB Equipment Company," but the wrong form was fed through the printer. JDB and Sexton allegedly had an agreement where Sexton would deliver construction equipment for JDB and JDB would pay Sexton an annual fee for this service. Paragraph 14 of the Skyjack Lease reads as follows:

> INDEMNIFICATION FOR INJURIES OR DAMAGES. LESEE AGREES TO DEFEND AT ITS OWN EXPENSE, INDEMNIFY AND HOLD LESSOR HARMLESS FOR ANY AND ALL DAMAGES, LOSSES, CLAIMS, COSTS, AND EXPENSES (INCLUDING REASONABLE ATTORNEY'S FEES) INCURRED BY LESSOR AS A RESULT OF ANY INJURY TO PERSON, LIFE, OR PROPERTY CAUSED BY THE LEASED PROPERTY OR ITS OPERATION WHILE IN THE POSSESSION OF THE LESSEE OR ANY OTHER PERSON[sic] OR ENTITY POSSESSING THE LEASED PROPERTY DURING THE TERMS OF THIS LEASE.

Moreover, Paragraph 33 of the Skyjack Lease reads, in pertinent part:

> Liability and Indemnity for Personal Injuries and Property Damage. Liability for injury disability and death of workman and other persons and liability for damage to property, real or personal, caused by operation, handling or transportation of the equipment during the rental period shall be assumed by lessee and lessee shall indemnify lessor and hold lessor harmless against all such liability.

On November 18, 2009, Andrei Savon ("Savon") and Alexander Bermudez-Martinez ("Bermudez") were injured in a construction accident when the substitute 60-foot boom lift toppled over. On February 2, 2011, Savon commenced the Savon Lawsuit and on November 3, 2011, Bermudez commenced the Bermudez Lawsuit. The lawsuits sounded in negligence and facts arising out of Trinity's maintenance, operation or use of the lifts.

The National Policy had a policy period of June 17, 2009 to June 17, 2010. The National Policy contains a blanket additional insured endorsement that provides:

> WHO IS AN INSURED (Section II) is amended to include as an insured any person or organization, including any person or organization shown in the schedule above, (called additional insured) whom you are required to add as an additional insured on this policy under written contract or written agreement; but the written contract or written agreement must be:
>
> 1. Currently in effect or becoming effective during the term of this policy; and
>
> 2. Executed prior to the "bodily injury," "property damage," or "personal and advertising injury"...

> Only the following persons or organizations are additional insureds under this endorsement and coverage provided to such additional insureds is limited as provided herein...
>
> g. Lessor of Equipment
> Any person or organization from whom you leased equipment. Such person or organization are insureds only with respect to their liability arising out of the maintenance, operation or use by you of equipment leased to you by such person or organization.

The National Policy contains an excess provision, which states:

> This insurance is in excess over any other insurance naming the additional insured as an insured whether primary, excess, contingent or on any other basis unless a written contract or written agreement specifically requires that the insurance be either primary or primary and noncontributing.

The Nautilus Policy contains an excess provision, the relevant portion of which provides that the Policy is excess over:

> Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured by attachment of an endorsement.

On November 17, 2010, Nautilus tendered JDB's defense and indemnity of the Savon on both a contractual and additional insured basis to both Trinity and NIA Associates ("NIA") as agents of National, pursuant to the Skyjack Lease. On April 4, 2011 Mark Senal of National sent a letter to Nautilus rejecting the tender because: 1) the SkyJack Lease did not require the National Policy to be primary and non-contributory, only excess; 2) the "additional insured enforsement applies only to the maintenance, operation, or use of the equipment, not products liability"; and 3) "[t]he contractual indemnity clause does not protect your insured for design, manufacture, failure to warn or failure to maintain the equipment." National's letter did not address the contractual indemnity aspect of the Nautilus tender.

On September 18, 1013, Nautilus again tendered JDB's defense and indemnity to National in respect of the Savon Lawsuit as well as tending JDB's defense to National in respect of the Bermudez Lawsuit. The Bermudez Lawsuit eventually settled and, while Nautilus did not offer indemnity monies, considerable fees and expenses were incurred in its defense. The Savon lawsuit proceeded to trial. The jury awarded Savon $3,200,000, which exceeds the $1,000,000 per occurrence limit of the Nautilus policy. Nautilus paid

Savon $1,700,000 in settlement of the judgment. JDB incurred $81,086,12 in legal fees from the Savon and Bermudez Lawsuit.

On May 27, 2014, National filed for summary judgment against Nautilus asserting that, since the prior lease agreement between JDB and Trinity was no longer valid at the time of the accident, there can be no basis for additional insured coverage. Moreover, National asserts that, assuming Nautilus can prove that JDB was an additional insured under the National Policy, the Policy would be excess over any other insurance. National also asserts that, assuming Nautilus can prove that the National Policy was excess, any claim over and above Nautilus' Policy limits should be bared as Nautilus failed to settle within the policy limits.

LEGAL ANALYSIS:

Rule 4:46-2(c) governs the standard by which a court determines a Motion for Summary Judgment. The question to be decided by the court is whether there is a genuine issue as to any material fact in the proceeding. The rule provides that an issue of fact is only genuine 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." Id. The evidence to be considered includes "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, [which] 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." Id.

In Brill, the New Jersey Supreme Court stated the purpose of their decision was "to encourage trial courts not to refrain from granting summary judgment when the proper circumstances present themselves." Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 541 (1995). "Where the party opposing summary judgment points only to disputed issues of fact that are 'of an insubstantial nature,' the proper disposition is summary judgment." Id. at 529. "If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of Rule 4:46-2." Id. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)). The analysis is whether, upon review of the pleadings, deposition testimony and other competent evidence presented, viewed in a light most favorable to the non-moving party, a rational fact finder can resolve the disputed issue in favor of the non-moving party. Brill, 142 N.J. at 523. "Summary judgment is designed to provide a prompt, businesslike and inexpensive method of disposing of any cause which...clearly shows not to present any genuine issue of material fact requiring disposition at trial." Ledley v. William Penn Life Ins. Co., 138 N.J. 627, 641-642 (1995) (quoting Judson v. Peoples Bank & Trust of Westfield, 17 N.J. 67, 71 (1954)).

Rule 4:46-5(a) compels a non-moving party on a summary judgment motion to counter the moving party's prima facie showing of entitlement to Summary Judgment by presenting specific facts showing that there is a genuine issue for trial. The Rule further

mandates that a defendant cannot rely upon "mere allegations or denials of his pleading," but must furnish affidavits "setting forth specific facts showing that there is a genuine issue for trial." Moreover, a non-moving party cannot defeat a motion for summary judgment "merely by pointing to any fact in dispute." Brill, 142 N.J. at 529.

In the present action, plaintiff has filed a motion for summary judgment based upon the Declaratory Judgment Act, N.J.S.A. 2A:16-52, which provides that:

> All courts of record in this state shall, within their respective jurisdictions, have power to declare rights, status and other legal relations, whether or not further relief is or could be claimed; and no action or proceeding shall be open to objection on the ground that a declaratory judgment is demanded.

Whether declaratory relief is appropriate and should be granted rests in sound discretion of court. 966 Video, Inc. v. Mayor and Tp. Committee of Hazlet Tp., 299 N.J. Super. 501 (1995). While a declaratory judgment remedy ought not to be denied where a justiciable controversy exists within statute, use of declaratory judgment device remains within the vested discretionary power of trial judge. Hammond v. Doan, 127 N.J. Super. 67 (1974). Where a concrete, contested issue is presented, and there is a definite assertion of legal rights on the one side and a positive denial thereof on the other, there exists a "justiciable controversy", justifying maintenance of an action for declaratory judgment. Sperry & Hutchinson Co. v. Margetts, 25 N.J. Super. 568 (Ch.1953), cert. granted, 13 N.J. 495, aff'd, 15 N.J. 203 (1954).

Detrimental Reliance

Reasonable, detrimental reliance estops an insurer from changing its position concerning the basis for its denial of coverage. See Pasha v. Rosemount Memorial Park, Inc. 344 N.J. Super 350 (2001). "Estoppel presupposes misleading conduct by reason of which the party invoking it is prejudiced." Capece v. Allstate Ins. Co., 86 N.J. Super 462, 477 (1965). In Capece, Allstate sought to estop State Farm from asserting any defense other than those laid out in its two letters denying tender. Id. The Court found that State Farm could not be estopped from asserting a different basis to deny coverage than those previously enumerated, as there was no prejudice to Allstate for State Farm's failure to mention additional defenses because Allstate did not change its position in reliance on the denial of tender. Id.

In this instance, there was not detrimental reliance by Nautilus on National's denial of tender and there was no prejudice to Nautilus flowing therefrom. Nautilus did not change its position based on National's denial of tender. Nautilus covered the claim and brought a declaratory judgment action. There has been no detrimental reliance by Nautilus on the denial letters or the defenses they assert. Nautilus has proceeded with a declaratory judgment action as a result of a denial of tender letter by National, as any other insurance carrier would. There has been no prejudice as a result of the letter.

Skyjack Lease

It is a well settled principle in New Jersey "that parties bargaining at arms-length may generally contract as they wish." Saxon Constr. & Management Corp. v. Masterclean, Inc., 273 N.J. Super. 231, 235 (App. Div. 1994) (citing Marchak v. Claridge Commons, Inc., 134 N.J. 275 (1993)). "In the ordinary case, 'courts should enforce contracts as made by the parties.'" Id. at 236 (quoting Vasquez v. Glassoro Serv. Ass'n, 83 N.J. 86, 101 (1980)). Courts will refuse to enforce contracts that are unconscionable or violate public policy. Id.

JDB is an additional insured under the National Policy. The testimony of David Sexton and David Kiessling establishes that JDB and Trinity entered into the Skyjack Lease on October 27, 2009. Moreover, the Skyjack Lease is printed on JDB letterhead and was billed to Trinity Construction. David Kiessling, the president of Trinity, testified that the Skyjack Lease was entered into between JDB and Trinity. David Sexton's testimony that the lease was printed on the wrong form establishes that being named the lessor was a simple mistake. The Certificate of Liability Insurance lists Trinity Construction, National Insurance and the Certificate Holder as JDB Equipment Company, Inc. Therefore, the Court finds that the Skyjack lease was between JDB and Trinity Construction.

JDB and Trinity construction properly modified the Skyjack Lease to reflect the upgrade from the 50-foot boom lift to the 60-foot boom lift. Modification of a contract occurs with "a change in one or more respects which introduces new elements into the details of a contract and cancels others, but leaves the general purpose and effect undisturbed." Wells Reit II-80 Park Plaza v. Dir., Div. of Taxation, 414 N.J. Super 453 (App. Div. 2010)(internal citations omitted). The ability to abandon or modify one's contract has been consistently recognized in New Jersey. County of Morris v. Fauver, 153 N.J. 80, 95 (1998). Further, "'[i]n the absence of some vested derivative interest in another, a contract may be modified, abrogated or rescinded by . . . the contracting parties.'" Ibid. (quoting Gillette v. Cashion, 21 N.J. Super. 511, 516 (App.Div.1952)). Parties to an existing contract may, by mutual assent, modify that contract. Id. at 99 (citing Bohlinger v. Ward & Co., 34 N.J. Super. 583, 587 (App.Div.1955), aff'd, 20 N.J. 331 (1956)). Such modification can be proved by an explicit agreement to modify or by the actions and conduct of the parties as long as the intention to modify is mutual and clear. Ibid.

In this instance, it is clear that the contracting parties had a clear intention to modify the contract. The testimony establishes that Trinity Construction required a 60-foot boom lift and that an employee of Trinity requested said lift. JDB Construction provided the requested lift at no extra charge and modified the contract accordingly. The actions and conduct of the parties establishes that the contracting parties intended to modify the contract, and said modification was mutual and clear. Therefore, the Skyjack Lease between JDB and Trinity was effective at the time of the construction accident.

Additional Insured Endorsement

"In interpreting insurance policies, the court must start with the plain language of the policy and "give the words 'their plain, ordinary meaning.'" Hardy ex rel. Dowdell v. Abdul-Matin, 198 N.J. 95, 101-102 (N.J. 2009)(Internal Citations Omitted). "If the policy terms are clear, courts should interpret the policy as written and avoid writing a better insurance policy than the one purchased." Ibid. Even exclusionary provisions "are presumptively valid and will be given effect if 'specific, plain, clear, prominent, and not contrary to public policy.'" Princeton Ins. Co. v. Chunmuang, 151 N.J. 80, 95 (1997) (quoting Doto v. Russo, 140 N.J. 544, 559 (1995)). If the policy terms are not clear or are ambiguous, courts should "interpret the contract to comport with the reasonable expectations of the insured." Zacarias v. Allstate Ins. Co., 168 N.J. 590, 595 (2001).

Under the terms of the National Policy's blanket additional insured endorsement, "any person or organization…whom [Trinity] [was] required to add as an additional insured on this policy under written contract or written agreement" is an additional insured, so long as the written agreement is "[c]urrently in effect" and "executed prior to the "bodily injury."" The Skyjack Lease requires Trinity to defend and indemnify JDB for any personal injury incurred while Trinity was in possession of the equipment. Moreover, the Skyjack Lease Section 33 requires Trinity to maintain coverage of $1,000,000, with the lessor, JDB, named as an additional insured. Therefore, JDB is an additional insured under the National Policy.

Excess Coverage

In this instance, the National Policy is excess and the Nautilus Policy is primary, as the relevant provision of the Nautilus Policy states that it is excess over "any other primary insurance." It does not state it is excess over any other insurance, whether excess, contingent or primary, as the National Policy does. The National Policy's excess provision applies, making the National Policy an excess policy over any other insurance policy. The fact that the National Policy is an excess policy removes it from the Nautilus Policy's excess provision, as it clearly states it is "excess over any other primary insurance." The National Policy is not a primary insurance policy. The excess provision of the Nautilus Policy would be applicable to National if the excess provision of the National Policy did not itself state that it is excess over any other insurance, including excess, contingent or primary. Therefore, the Nautilus Policy is primary and the National Policy is excess. Therefore, Nautilus is responsible for payment of the first $1,000,000 as the primary insurance carrier, and National is responsible reimbursement of the excess.

Bad Faith

In New Jersey, an insurance carrier owes a duty to exercise good faith in handling claims to both the insured and the excess carrier. See Baen v. Farmers Mut. Fire Ins. Co. of Salem County, 318 N.J. Super 260 (App. Div. 1999)(citing Western World Ins. Co. v. Allstate Ins. Co., 150 N.J. Super 481 (App. Div. 1977). Once an excess carrier denies coverage, the duty owed to that carrier to exercise good faith in handling a claim

"evaporates." Baen v. Farmers Mut. Fire Ins. Co. of Salem County, 318 N.J. Super 260, 267 (App. Div. 1999).

In this instance, National very well could have assumed the defense and indemnification of JDB under the terms of the lease between Trinity and JDB, seeking reimbursement through a declaratory judgment action. The Skyjack Lease specifically requires Trinity to defend and indemnify JDB for all injuries arising from use or operation of the boom lift. Instead, National denied coverage for the accident, requiring Nautilus to institute this declaratory judgment action. National cannot now claim that Nautilus' choice to try the case instead of settling was made in bad faith.

CONCLUSION:

Defendant National Fire Insurance Company's Motion for Summary Judgment is DENIED as to the assertion that JDB is not an additional insured under the terms of its Policy and GRANTED as to the assertion that, if JDB is an additional Insured, the National Policy is excess over any other insurance Policy, including the Nautilus Policy.

No evidence of bad faith is shown on the part of Nautilus in trying the case.