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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5835-11T2

NORTH JERSEY PUBLIC
ADJUSTERS, INC.,

Plaintiff-Appellant,

v.

PHILADELPHIA INSURANCE
COMPANY,

Defendant-Respondent,

v.

SALVATORE CAPODICE and
ANITA CAPODICE,

Third-Party Defendants-
Respondents.

Argued December 4, 2013 – Decided July 9, 2015

Before Judges Fuentes, Simonelli, and Haas.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-5411-10.

Jeffrey A. Bronster argued the cause for appellant (Jeffrey A. Bronster, P.C., attorneys; Mr. Bronster, on the brief).

Francis X. Garrity argued the cause for respondent Philadelphia Insurance Company (Garrity, Graham, Murphy, Garofalo & Flinn, P.C., attorneys; Mr. Garrity, of counsel; Jane Garrity Glass, on the brief).

The opinion of the court was delivered by

FUENTES, P.J.A.D.

In this declaratory judgment action, plaintiff North Jersey Public Adjusters seeks a judicial declaration that defendant, the Philadelphia Insurance Company, is obligated to defend and indemnify plaintiff under an errors and omissions policy, in connection with a complaint filed against plaintiff by Salvatore and Anita Capodice. Plaintiff was retained by the Capodices to negotiate and settle their claims against their homeowners' insurance carrier arising from a fire that severely damaged their home. Plaintiff settled the Capodices' claims and thereafter assumed the role of "project manager" in the reconstruction of their fire-damaged home.

In their suit, the Capodices alleged plaintiff negligently discharged its responsibilities as project manager by hiring an incompetent contractor and thereafter failing to supervise the contractor's performance while the construction was in progress. Based on the Capodices' factual claims against plaintiff and their theory of liability, plaintiff and Philadelphia Insurance filed cross-motions for summary judgment before the Law Division claiming the declaratory relief at issue was ripe for disposition as a matter of law.

The motion judge initially granted summary judgment in plaintiff's favor on the question of defendant's duty to defend and in defendant's favor on the indemnification issue. Plaintiff thereafter filed a motion seeking to recover counsel fees it had incurred up to that point defending the Capodices' action. The judge heard oral argument on plaintiff's motion in a hearing conducted telephonically. In the course of considering the arguments of counsel on plaintiff's motion for counsel fees, the judge sua sponte reconsidered her earlier ruling with respect to defendant's duty to defend, and granted defendant's summary judgment motion on that question as well, effectively dismissing plaintiff's complaint in its entirety.

After reviewing the factual allegations made by the Capodices' against plaintiff in their complaint, the judge concluded plaintiff was not performing the services of a public adjuster when it assumed the role of project manager and assumed responsibility to oversee the reconstruction of the Capodices' home. The motion judge found support for this conclusion in the definition of "claims adjuster" or "claims consultant" in the coverage section of defendant's policy.

Plaintiff now appeals arguing the errors and omissions policy obligates defendant to defend and indemnify it against the claims asserted by the Capodices. Plaintiff argues the

motion judge misconstrued the services performed and the responsibilities associated with being a public adjuster. Plaintiff argues the judge erred in focusing on the term "project manager" as a critical factor in determining whether plaintiff was entitled to a defense and indemnification in the Capodices' cause of action under the professional liability policy issued by defendant.

We disagree with plaintiff's arguments and affirm. Because the trial court decided this issue as a matter of law, we will recite the salient facts in the light most favorable to plaintiff. R. 4:46-2(c); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

I

In July 2007, the Capodices' home was severely damaged by an accidental fire. They retained plaintiff to negotiate or "adjust" their losses with the insurance company that issued their homeowners' policy. The Capodices agreed to pay plaintiff ten percent of the amount of the settlement reached with the insurance company. The Capodices' policy provided "Replacement Cost" coverage. This entitled them to receive a settlement based on the cost of restoring or rebuilding their home. This would be paid in two parts. The first part was in the form of a lump sum payment based on the "actual cash value" of the home

before the fire, excluding the land. The second part represented the cost of rebuilding the home. This is known as a "holdback" payment because it is paid by the insurer only if the insured decides to rebuild.

The Capodices' insurance company settled the "actual cash value" portion of the claim for $289,131.15. Based on the proof of loss submitted by the Capodices, their insurance company held back $68,382.19, representing the "replacement cost" coverage under the policy. These additional funds were intended to cover the cost of restoring the property to its pre-fire condition.

In their suit against plaintiff, the Capodices claim plaintiff became the project manager to coordinate the repairs to their home after the final settlement negotiations were completed. As described in the Capodices' complaint:

> [T]he insurance policy proceeds were paid directly from [the homeowner's insurance company] to North Jersey Public Adjusters.
>
> North Jersey Public Adjusters selected G. Vlantis Construction Co., Inc., as the general contractor for the repairs . . . in which Vlantis agreed to complete the repairs at a contract price of $303,750.00.

Plaintiff admits that it became the "project manager" of the construction of the Capodices' home. In this role, plaintiff hired the general contractor and subcontractors, oversaw the construction work, and paid these companies directly

when the work was completed. In support of its summary judgment motion in the declaratory judgment action, defendant submitted a letter written by Bruno D'Avella, a licensed public adjuster employed by plaintiff. The letter was directed to an insurer of the plumbing subcontractor hired by plaintiff to work on the Capodices' construction project. We quote here the following relevant parts of D'Avella's letter:

> My office was hired to adjust and project manager [sic] the re-build of Mr. and Mrs. Capodice.
>
> . . . .
>
> We hired your insured to do the plumbing contract at the above address, and we paid him 90% of his contract.
>
> . . . .
>
> I was pressed to hire an emergency company to pump out the water and demo the constructed walls[.]

Despite these deficiencies, the Capodices claim plaintiff paid the general contractor in full in violation of regulations promulgated by the State Division of Consumer Affairs.[1]

[1] In support of this claim the Capodices cited N.J.A.C. 13:45A-16.2(a)(10)(ii), which makes it an "unlawful practice" for a contractor to demand or receive final payment on a home improvement project before furnishing the homeowner with copies of final certificates of inspections, where such certificates are required under state law or local ordinance.

The Capodices sued plaintiff after the general contractor abandoned the project before completion. They claim that "much of the work promised by Vlantis was defective, not done in [a] professional and workmanlike manner and . . . remains incomplete." As of January 18, 2010, the Capodices had not received a Final Certificate of Occupancy from the City of Bayonne. They seek compensatory damages measured by the cost of having to hire another contractor to correct improper work and complete the construction of the house, and consequential damages associated with the delay in returning to their home and emotional distress damages caused by the disruption to their lives.

II

The professional liability policy defendant issued to plaintiff had a one-year coverage period from July 28, 2009 to July 28, 2010. The relevant coverage provisions under section I.A, denoted "Professional Liability Coverage," provide as follows:

> We shall pay on your behalf all sums, not exceeding the Limits of Liability and in excess of the applicable Deductible set forth in the Declarations, for which you shall become legally obligated to pay as damages resulting from any claim first made against you during the policy period or any subsequent extended reporting period arising out of a wrongful act committed after the retroactive date stated in Item 6. of the

> Declarations and prior to the end of the policy period.

The emphasized words are specifically defined in the policy under Section II, denoted "Definitions." "Claim" and "wrongful act" are defined as follows:

> Claim means a demand received by you for money or services, including the service of suit or institution of arbitration proceedings involving you arising from any alleged wrongful act. Claim shall also include any request to toll the statute of limitations relating to a potential claim involving an alleged wrongful act.
>
> . . . .
>
> Wrongful Act means a negligent act, error, or omission committed or alleged to have been committed by you or any person for whom you are legally responsible in the rendering of professional services. Wrongful Act shall include personal injury arising out of the rendering of professional services.

To trigger coverage under the policy, the wrongful act must arise from the rendering of "professional services," which is defined as "services rendered to others for a fee solely in the conduct of your profession as stated in Item 9. of the Declarations." Item 9. of the Declarations Page is modified by a "Claim Adjuster/Consultant Pro Pak Elite" Endorsement, which defines a "claim adjuster" or "claim consultant" as "a professional engaged for the purpose of appraising, processing,

settling, investigating losses, prospective losses or loss damages which are pertinent to any insurance arrangement."

By letter dated March 26, 2010, plaintiff's counsel sent defendant a copy of the Capodices' complaint requesting the assignment of counsel. Plaintiff's counsel sent defendant a second letter dated July 3, 2010, expressing his disappointment that his letter and emails requesting acknowledgement of coverage had been "ignored." By letter dated September 2, 2010, defendant formally informed plaintiff's counsel that it was disclaiming liability in this case. The letter provided, in pertinent part:

> Our Philadelphia policy insures Public Adjusters against claims that arise out of wrongful acts done in the course of rendering professional services as a "claim adjuster." Inasmuch as [the Capodices'] claims as asserted against Public Adjusters do not arise out of a wrongful act done in the course of a rendering professional services as a "claim adjuster," but rather out of conduct as a construction project manager, no insurance is afforded Public Adjusters for the [Capodices'] claim under the Philadelphia policy.

Defendant's letter thereafter explained in detail the legal basis for the declination of coverage, citing the specific facts

alleged by the Capodices and contrasting them with the policy's terms of coverage.[2]

III

We review a summary judgment motion applying the same standard used by the trial judge. Bhagat v. Bhagat, 217 N.J. 22, 38 (2014). We must determine, based on the competent evidential materials submitted by the parties, whether there are genuine issues of material fact and, if not, whether the moving party is entitled to summary judgment as a matter of law. R. 4:46-2(c); Brill, supra, 142 N.J. at 540. Based on our review of the record, we are satisfied there are no material issues of fact in dispute, and the case is ripe for disposition as a matter of law.

Public adjusters are licensed and regulated by the State Commissioner of Insurance under the Public Adjusters' Licensing Act (Act), N.J.S.A. 17:22B-1 to -20. Defendant's professional liability policy defines an adjuster or consultant as a "professional engaged for the purpose of appraising, processing, settling, investigating losses, prospective losses or loss

[2] In the interest of completeness, we note the Capodices also alleged in their complaint "mold growth" in their basement as one of the negative conditions that resulted from plaintiff's negligent supervision of the construction project. Defendant's September 2, 2010 letter refers to this allegation as an independent basis for declining coverage under the policy's "mold exclusion."

damages which are pertinent to any insurance arrangement." The definition of "public adjuster" under the policy tracks the statutory definition under the Act:

> "Public adjuster" or "adjuster" means any individual, firm, association or corporation who, or which, for money, commission or any other thing of value, acts or aids in any manner on behalf of an insured in negotiating for, or effecting, the settlement of claims for loss of damage caused by, or resulting from, any accident, incident, or occurrence covered under a property insurance policy, including, but not limited to, a flood, transit, inland marine or ocean marine policy; or who, or which, advertises for, or solicits employment as an adjuster of those claims. The term "public adjuster" shall also include any individual who, for money, commission or any other thing of value, solicits or adjusts those claims on behalf of any public adjuster.
>
> [N.J.S.A. 17:22B-2.]

The complaint filed by the Capodices against plaintiff alleges conduct outside the scope of the definition of public adjuster in both the insurance policy issued by defendant and the Act adopted by the Legislature to license and regulate the profession. In determining whether professional services coverage in an insurance policy is applicable, a reviewing court must ask "whether a substantial nexus exists between the context in which the acts complained of occurred and the professional services sought." Princeton Ins. Co. v. Chunmuang, 151 N.J. 80,

97 (1997). The duty to defend arises when the allegations in a complaint correspond with the language of the policy, irrespective of the actual merit of the claims asserted against the insured. Hampton Med. Grp., P.A. v. Princeton Ins. Co., 366 N.J. Super. 165, 173 (App. Div. 2004).

Applying these principles of coverage to the allegations made against plaintiff by the Capodices, as revealed within the four corners of their pleadings, defendant does not have a duty to defend plaintiff. There is no substantial nexus between the allegations in the Capodices' pleadings and the professional services performed by plaintiff as public adjusters.

Affirmed.