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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5772-11T3

WOODCLIFF LAKE BOARD
OF EDUCATION,

Plaintiff-Appellant,

v.

ZURICH AMERICAN INSURANCE
COMPANY,

Defendant-Respondent.

Argued May 6, 2013 – Decided August 14, 2013

Before Judges Ashrafi, Espinosa and Guadagno.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-3124-11.

Stephen R. Fogarty argued the cause for appellant (Fogarty & Hara, attorneys; Mr. Fogarty, of counsel and on the brief; Cameron R. Morgan, on the briefs).

Karen H. Moriarty argued the cause for respondent (Coughlin Duffy, LLP, attorneys; Robert W. Muilenburg, of counsel and on the brief; Ms. Moriarty, on the brief).

PER CURIAM

More than four years after defendant Zurich American Insurance Company (Zurich) denied coverage for an asbestos-

related claim, plaintiff Woodcliff Lake Board of Education (the Board) asked Zurich to re-evaluate the claim, stating its loss was caused by vandalism. The Board appeals from the trial court's grant of summary judgment in favor of Zurich. We affirm.

In the summer of 2005, the Board had construction projects in progress at Dorchester Elementary School and Woodcliff Middle School (the Middle School). Because it was known that asbestos-containing materials remained in certain areas of the sites, the Board hired asbestos abatement contractors D&S Abatement, Inc. (D&S) and B&G Restoration (B&G) to remove the asbestos and abate those areas containing asbestos. The Board also contracted with PMK Group (PMK) to monitor the asbestos abatement activities and take air samples during the procedure. The Board hired five contractors to perform the additions and renovations: (1) SBN Enterprises, Inc. (SBN), the general construction services contractor and the demolition contractor; (2) Pflugh, Inc. (Pflugh), the heating, ventilation, and air conditioning (HVAC) contractor; (3) Herman H. Braun, Inc. (Braun), the plumbing contractor; (4) Sal Electric Co., Inc. (Sal Electric), the electrical contractor; and (5) J.G. Schmitt, the structural steel contractor. The Board also contracted with Epic Management, Inc. (Epic) to provide construction management

services. All bidding contractors were given notice that asbestos was present on-site and that they were not to disturb or remove the asbestos while performing their work.

It was reported that asbestos abatement work had been completed in the Middle School gym and bathroom area on July 6, 2005. However, SBN found asbestos in the gym ceiling and in the locker rooms when it commenced demolition of the gym on July 8, 2005. PMK was instructed to examine and test the newly discovered asbestos. Additional asbestos was found on July 11, 2005 in the insulation covering two heating pipes in the locker room.

The Board met with representatives from PMK and Epic on July 14, 2005 to develop a plan for the removal and abatement of the newly discovered asbestos. The construction contractors were advised of the newly discovered asbestos at a project meeting on July 19, 2005, and were notified that the Board was in the process of determining the additional abatement work for the Middle School gym area. The Board contracted with D&S and B&G for the removal and abatement of the newly discovered asbestos. On August 5, 2005, a foreman's meeting was held and the contractors were advised that, as a result of the abatement schedule, none of the construction contractors were permitted to be in these areas from August 9 through August 11. The foremen

from SBN, Sal Electric, Braun, and Pflugh were all in attendance.

However, when PMK and D&S arrived on August 9, 2005 to begin abatement services, they discovered two Braun plumbers working in a prohibited area of the girls' locker room near the asbestos-covered pipes. The asbestos had been "improperly disturbed" and "appeared to be strewn about the area." D&S and PMK notified the New Jersey Department of Community Affairs and the United States Environmental Protection Agency (EPA), and inspectors were dispatched to the Middle School immediately.

The EPA inspector observed the asbestos scattered throughout the gym, showers, and locker room, and noted that only sixty feet of the 490-foot pipe insulation in the girls' locker room that was scheduled for abatement was undisturbed. The inspector further discovered duct vibration cloth and pipe insulation containing asbestos scattered on the gym floor, and additional asbestos in piles of construction debris and in dumpsters behind the school, where it was mixed with general construction debris.

A "Stop Construction Notice" was issued on August 10, 2005. An emergency work order was issued on August 12, 2005, directing D&S to commence emergency abatement work on August 14, 2005. On September 10, 2005, PMK issued a final asbestos clean-up

certificate of completion. The Board incurred over $150,000 to pay for the emergency abatement services.

On October 19, 2005, the Board's architect informed Braun that because it was believed that a Braun plumber disturbed the asbestos, no further payments to Braun would be certified and Braun's contract balance would be withheld "to offset the damage caused by [its] employees." Braun denied responsibility for the improper removal.

The Board asked PMK to conduct an investigation to determine who was responsible for the improper removal of the asbestos. PMK issued a summary of its findings on March 10, 2006, stating it was unable to determine exactly who was responsible but nonetheless apportioning liability among SBN, Pflugh, and Braun. Both Braun and Sal Electric filed suits against the Board for contract balances that remained unpaid because the Board withheld payment. Each lawsuit was settled without any admission of liability.

EPA filed a complaint against the Board on January 4, 2006, seeking to hold the Board, as owner of the premises, strictly liable for the improper disturbance of the asbestos and to impose a fine of $45,500. This matter was settled through a Consent Agreement, whereby the Board paid a fine of $18,200.

The EPA fine and settlement agreement are not part of this appeal.

Zurich issued a Commercial Insurance Policy (the Policy), to the Board for the policy period July 1, 2005 through July 1, 2006. The Policy provided for Building and Personal Property Coverage.

With regard to property coverage, the policy states,

> We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

The Policy contains a "pollution exclusion," which states Zurich "will not pay for loss or damage caused by or resulting from the

> [d]ischarge, dispersal, seepage, migration, release or escape of "pollutants" unless the discharge, dispersal, seepage, migration, release or escape is itself caused by any of the "specified causes of loss." But if the discharge, dispersal, seepage, migration, release or escape of "pollutants" results in a "specified cause of loss," we will pay for the loss or damage caused by that "specified cause of loss."
>
> [(Emphasis added).]

The parties do not dispute that asbestos is a pollutant under the Policy. Vandalism is included among the "Specified Causes of Loss" but is not defined by the Policy.

The exclusion pertaining to "faulty, inadequate, or defective workmanship" provides that Zurich

> will not pay for loss or damage caused by or resulting from . . . [f]aulty, inadequate or defective . . . workmanship, repair, construction, renovation, [or] remodeling . . . of part or all of any property on or off the described premises.

The Board filed a claim and notice of loss with Zurich on January 11, 2006, shortly after the EPA complaint was filed. The Notice of Claim form identified EPA as the "injured owner" and the "occurrence" as EPA's determination that materials scattered about the insured's property contained asbestos, resulting in a fine to the insured of $45,500. Zurich denied coverage by letter dated January 23, 2006, which referenced the EPA complaint and fine.

More than four years later, the Board requested that Zurich reevaluate its coverage decision. In a letter dated August 6, 2010, the Board's attorney stated that the coverage denial letter had only addressed the EPA matter and failed to address the costs exceeding $150,000 incurred by the Board in extracting asbestos from the building. Counsel stated that coverage was provided under the commercial property coverage provided in the "Building and Personal Property Coverage Form," and that none of the exclusions to coverage applied. In reply, Zurich stated that because its file had been closed in February 2006 and moved

off-site, it would be necessary to retrieve and re-open the file. Zurich again denied coverage by letter dated November 10, 2010. Zurich based its denial upon the applicability of the pollution exclusion in the Policy, and the inapplicability of the provision for additional coverage for "Pollutant Clean-up and Removal."

By letter dated November 24, 2010, the Board contended that the pollution exclusion was inapplicable because the disturbance of the asbestos had resulted from "vandalism," one of the "specified causes of loss" that are exceptions to the exclusion. This was the first time that the Board had ever taken the position that the loss was caused by vandalism. Zurich requested additional documentation to support the Board's claim that the asbestos disturbance was the result of vandalism. The Board failed to supply any documentation in response.

On April 6, 2011, the Board filed a complaint for declaratory judgment, seeking a declaration of coverage under the Policy. At the close of discovery, both parties filed for summary judgment.

The trial court granted summary judgment to Zurich and denied the Board's cross-motion. The court observed that the discovery failed to show that anyone other than one of the contractors might have been responsible for the unauthorized

disturbance of asbestos and that the Board had failed to produce any documentation to support its claim of vandalism, most notably producing no evidence it had reported an act of vandalism to the police. The court rejected the Board's argument that vandalism could have been the cause even if one of the contractors had disturbed the asbestos, noting

> The Board cannot show that [any of the contractors] intended to damage or destroy the school's property. Although [the contractors' actions] may have been inappropriate and unauthorized, such action does not rise to the level of vandalism. Negligence would be more appropriate; or poor workmanship or breach of contract.

The court found that the pollution and faulty workmanship exclusions applied to bar coverage for the Board's claims.[1]

The Board presents the following arguments for our consideration in its appeal:

> POINT I
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> THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF ZURICH AND AGAINST THE BOARD, SINCE THE UNDISPUTED FACTS DEMONSTRATE THAT THE GENERAL PROPERTY COVERAGE PROVISIONS OF THE POLICY COVER THE BOARD FOR THE INCREASED CLEAN-UP COSTS IT

[1] In addition, the trial court reviewed the Policy's coverage for "Pollutant Clean-up and Removal," which provides coverage for the "expense to extract 'pollutants' from land or water at the described premises," and found the provision did not apply because the asbestos was not extracted from land or water. The Board does not appeal from this decision.

INCURRED DUE TO THE IMPROPER DISTURBANCE OF THE ASBESTOS, AND ZURICH HAS FAILED TO MEET ITS BURDEN TO SHOW AN APPLICABLE EXCLUSION.

A. THE "POLLUTION EXCLUSION" DOES NOT APPLY BECAUSE THE LOSS RESULTED FROM VANDALISM, SINCE THE DISTURBER OF THE ASBESTOS, WHETHER AN OUTSIDER OR AN EMPLOYEE OF ONE OF THE PRIME CONTRACTORS, CAUSED PROPERTY DAMAGE TO THE BOARD BY WILLFULLY AND MALICIOUSLY TEARING OUT ASBESTOS THAT HE WAS FULLY AWARE HE WAS NOT AUTHORIZED TO DISTURB.

B. THE "FAULTY, INADEQUATE, OR DEFECTIVE WORKMANSHIP EXCLUSION" DOES NOT APPLY BECAUSE, EVEN ASSUMING THE DISTURBANCE WAS CAUSED BY ONE OF THE PRIME CONTRACTORS, DISTURBING OR ATTEMPTING TO REMOVE THE ASBESTOS WAS OUTSIDE THE PRIME CONTRACTORS' SCOPE OF WORK AND THEY WERE EXPRESSLY INFORMED THAT THEY WERE NOT PERMITTED TO EVEN BE IN THE SAME VICINITY AS THE ASBESTOS AT THE TIME WHEN IT WAS DISTURBED.

The interpretation of an insurance contract presents a question of law. Sealed Air Corp. v. Royal Indem. Co., 404 N.J. Super. 363, 375 (App. Div.), certif. denied, 196 N.J. 601 (2008). Therefore, we conduct a de novo review of the insurance contract, Selective Ins. Co. of Am. v. Hudson E. Pain Mgmt., 210 N.J. 597, 605 (2012), to determine whether summary judgment is warranted pursuant to R. 4:46-2(c); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

Under well-settled principles of insurance contract interpretation, we give the words of a policy "their plain, ordinary meaning," Passaic Valley Sewerage Comm'rs v. St. Paul Fire & Marine Ins. Co., 206 N.J. 596, 607-08 (2011), and, if the policy terms are clear, we will enforce the terms of the policy "as written and avoid writing a better insurance policy than the one purchased." Id. at 608; see also Villa v. Short, 195 N.J. 15, 23 (2008); President v. Jenkins, 180 N.J. 550, 562 (2004).

The insurer bears the burden "to bring the case within the exclusion." Proformance Ins. Co. v. Jones, 185 N.J. 406, 415 (2005). However, exclusionary clauses are presumptively valid and are enforced if they are "specific, plain, clear, prominent, and not contrary to public policy." Flomerfelt v. Cardiello, 202 N.J. 432, 441 (2010) (quoting Princeton Ins. Co. v. Chunmuang, 151 N.J. 80, 95 (1997)). If the policy language regarding the exclusion is ambiguous, the exclusion will be construed against the insurer and in favor of the insured to give effect to the insured's reasonable expectations. Flomerfelt, supra, 202 N.J. at 441. However, as the Court instructed,

> [C]ourts must be careful not to disregard the clear import and intent of a policy's exclusion, and we do not suggest that any far-fetched interpretation of a policy exclusion will be sufficient to create an ambiguity requiring coverage[.]

> [Id. at 442 (internal citation and quotation marks omitted).]

This case requires us to interpret the pollution exclusion and its application to the facts of this case. The exclusion states Zurich "will not pay for loss or damage caused by or resulting from [the] [d]ischarge, dispersal, seepage, migration, release or escape of 'pollutants' . . . ." This language is clear and unambiguous and it is undisputed that the loss here was caused by the disturbance of an acknowledged pollutant.

The dispute concerns how the pollution exclusion is interpreted and applied in light of the "exception" to the exclusion. The Policy states coverage is not provided for pollutant-caused loss "unless the . . . dispersal . . . is itself caused by any of the 'specified causes of loss.'" The Board argues that vandalism is one of the specified causes of loss and that Zurich bears the burden of proving that vandalism was not the cause in order for the exclusion to be enforced. Zurich contends that, the application of the pollution exclusion being clear, the Board bears the burden of showing that the loss was caused by vandalism, which it describes as "the majority rule" throughout the country.

The fact that there is an exception to the exclusion does not, in itself, render the exclusion language ambiguous. See Boddy v. Cigna Prop. & Cas. Cos., 334 N.J. Super. 649, 654 (App.

Div. 2000). In construing the insurance contract, "a court must not focus on an isolated phrase but should read the contract as a whole as well as considering the surrounding circumstances." Ibid. (quoting Wheatly v. Sook Suh, 217 N.J. Super. 233, 239 (App. Div. 1987)).

Vandalism is not defined in the Policy. Since "[t]he use of reference books is an accepted method of ascertaining the 'ordinary' meaning of terms," id. at 656, we turn to the dictionary definitions. Webster's New Collegiate Dictionary 1293 (1974 ed.) defines "vandalism" as the "willful or malicious destruction or defacement of public property." Black's Law Dictionary 1392 (5th ed. 1979) defines "vandalism" as "the willful and malicious destruction of property generally, and the destruction must have been intentional or in such reckless and wanton disregard of the rights of others as to be the equivalent of intent, and malice may be inferred from the act of destruction." Although the Board urges us to accept a definition of vandalism that is satisfied by mere damage, it is evident that the damage must be caused intentionally, with malice or, at least, with reckless or wanton disregard for the rights of others.

There is no evidence of any trespasser coming onto the Middle School property to wreak havoc with the asbestos. The

Board concedes that the disturbance was likely caused by one of the contractors. Still, the Board argues that, even if a contractor were responsible, it was irresponsible for the contractor to disturb the asbestos after being specifically instructed not to do so.

We agree with the trial judge that the available evidence fails to show that the disturbance was the result of any malicious act, whether by a contractor or anyone else. The lack of such evidentiary support for a conclusion that vandalism caused the disturbance is so glaring that it would require us to adopt a "far-fetched interpretation of [the] policy exclusion" to conclude that this loss was caused by vandalism and therefore covered by the Policy. See Flomerfelt, supra, 202 N.J. at 442. Viewing the language, which we find unambiguous, and the surrounding circumstances, we conclude that the pollution exclusion applied and barred coverage here.

The Board also argues that Zurich waived reliance upon the faulty workmanship exclusion because it did not identify this exclusion in any of its denial letters. Although we need not reach this issue in light of our decision that the pollution exclusion applies, we note that Zurich reserved the right to identify other grounds for denying coverage in its letters and

specifically referenced the faulty workmanship exclusion in its answer to the declaratory judgment complaint.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION