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MAR 20 2009
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SUSSEX COUNTY PLUMBING, INC., Plaintiff, - v - NEW JERSEY MANUFACTURERS INSURANCE COMPANY, et al. Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: SUSSEX COUNTY DOCKET NO. SSX-L-248-07 CIVIL ACTION

ORDER FOR SUMMARY JUDGMENT

This matter having been brought before the Court by Defendant Hartford Accident and Indemnity Company ("Hartford"), improperly plead as "Hartford Insurance Company," on its Motion for Summary Judgment, and the Court having considered the moving papers and certification in support thereof, and any opposition thereto, and for good cause shown;

It is on this the 20th day of March, ~~2008;~~ 2009

ORDERED that Defendant Hartford's Motion for Summary Judgment is GRANTED, and

ORDERED that this action is hereby dismissed with prejudice as against defendant Hartford, and

~~**ORDERED** that Plaintiff reimburse Hartford for its costs and attorneys' fees in connection with the present motion~~, and

ORDERED that a copy of this Order shall be served upon all parties

within 7 days hereof.

J.S.C. DAVID H. BONSON, J.S.C.

See Statement of Reasons attached hereto.

Sussex County Plumbing v. New Jersey Manufacturers', et al.
SSX-L-248-07

Statement of Reasons

This matter comes before the Court by way of Notice of Motion for Summary Judgment filed on behalf of Defendant, Hartford Accident and Indemnity Company ("Hartford"). In addition, Hartford seeks attorneys' fees and costs.

In deciding the motion for summary judgment, the Court must apply the standard set forth in New Jersey Court Rule 4:46-2(c) and further explained in Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995). Pursuant to Rule 4:46-2(c), summary judgment should be granted where there is no genuine issue as to any material fact alleged such that the movant is entitled to judgment as a matter of law.

By way of background, this matter involves a declaratory judgment action filed on behalf of Plaintiff, Sussex County Plumbing, Inc., against various insurance companies seeking coverage for two asbestos liability cases. Specifically, Plaintiff seeks coverage in connection with two actions alleging injury due to exposure to asbestos from products sold and/or distributed by Sussex County Plumbing dating back to 1950. The asbestos cases were filed in the Superior Court of New Jersey, Middlesex County under captions Wood v. A.O.Smith Corp., MID-L-3259-05 and Notaro v. Sussex County Heating & Plumbing, MID-L-9342-03.

The record indicates that, pursuant to policies of insurance covering Sussex County Plumbing for the years 1988 through 2004, Defendant, Penn National Insurance Company ("Penn National") provided for the defense and funded the settlement of both asbestos suits on behalf of Sussex County Plumbing. The Wood matter settled for $35,000.00 and the Notaro matter settled for $200,000.00. Penn National purportedly expended a total of $302,721.40 in defense and indemnity of the underlying actions. By way of cross-claim and counter-claim, Penn National has sought contribution from Sussex County Plumbing and their insurers for settlement and defense costs expended in the underlying asbestos actions.

In Botti v. CNA Ins. Co., 361 N.J. Super. 217 (App. Div. 2003), the Appellate Division provided a review of the settled legal authority on insurance contract interpretation. The court stated:

> Insurance policies are contracts. Therefore, policies are subject to general principles of contract law. However, as noted by the leading treatise on insurance law in this state, principles of construction applicable to general contracts have

been modified over the years to reflect the overriding public policy, reflected in both statutory and case law, of protecting the individual policy holder. Thus, insurance polices are subject to special rules of interpretation. [...]

First, any ambiguity in an insurance contract must be resolved against the insurer and in favor of coverage. However, if there is no ambiguity present, an insurance contract will be enforced as written. A "genuine ambiguity" exists only "where the phrasing of the policy is so confusing that the average policyholder cannot make out the boundaries of coverage."

Second, policies must be construed liberally in favor of the insured's reasonable expectations of coverage.

Third, when a policy of insurance does not make clear its intention to exclude a class of claimants or claims otherwise allowed thereunder, coverage will be found to exist.

Fourth, an insured is chargeable with knowledge of the contents of a policy, in the absence of fraud or unconscionable conduct on the part of the insurer. For that reason, "reformation will be denied if [an insured] has been negligent in failing to apprise himself of its contents."

Fifth, the "courts should not write for the insured a better policy of insurance than the one purchased."

In summary, when the terms of a policy are clear, the courts will enforce it as written and will not make a better contract for either of the parties. We have observed that the rule of [l]iberality in the construction of an agreement against the drafter when ambiguity appears, or when strict constructions would contravene public policy, is a salutary principle. But, it should not be used as an excuse to read into a private agreement that which is not there, and that which people dealing fairly with one another could not have intended. Thus, the court's goal is to ensure that the "reasonable expectations of the assured in the purchase of his [or her] insurance policy" are justly fulfilled. Id. at 224-26(internal citations omitted).

In this case, Hartford provided insurance under policy number 18 OTS 360851 ("Hartford Policy" or "Policy") from August 17, 1960 to August 17, 1963. The policy was an "Owners', Landlords' and Tenants' Schedule of Liability Policy" that provided coverage in connection with the insureds' interests in premises located at 34-38 Townsend Street, Newton; 32-34-36 East Clinton Street, Newton; and various private residences. Pursuant to the Policy Declarations, the "Named Insured" on the Hartford Policy is "Belle A. Fierstein & Adeline M. Francke". The Policy further indicates that

the named insured is a "Partnership." At Item Four, the policy indicates that the named insured is the owner of the insured premises but that the named insured occupies no part of the same.

Paragraph 18 of the Policy Conditions states:

> By acceptance of this policy, the named insured agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance.

The Policy further provides, in relevant part, under the "Insuring Agreements" section that Hartford

> agrees with the insured, named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy: ... To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages....

In addition, the Policy defines the insured as follows:

> the unqualified word "insured" includes the named insured and also includes any executive officer, director or stockholder thereof while acting within the scope of his duties as such, and any organization or proprietor with respect to real estate management for the named insured. If the named insured is a partnership, the unqualified word "insured" also includes any partner therein but only with respect to his liability as such.

Hartford maintains that Sussex County Plumbing is not an insured under the Hartford Policy and therefore they have no duty to indemnify the Plaintiff. Hartford contends that neither of the named insureds were defendants in the underlying asbestos actions. Further, Hartford highlights that Belle Fierstein and Adeline Francke had no ownership interest in Sussex Heating, the predecessor to Sussex County Plumbing, until in or about 1966 and 1967, respectively, after the expiration of the Hartford Policy. Hartford maintains that because the named insureds were not named in the underlying action and because Sussex does not qualify under the policy as an insured, Hartford has no duty to provide for their defense or indemnification. In addition, Hartford argues that, even if Sussex County Plumbing were an insured, there is no coverage for the conduct

alleged in the underlying actions because the policy did not cover Products-Completed Operations.

In opposition, Plaintiff argues that while Sussex County Plumbing is not a named insured, it is an insured under the Policy. Plaintiff contends that Sussex County Plumbing was owned and operated by the Fierstein and Francke families, and as such is covered under the policy issued to Belle Fierstein and Adeline Francke. Additionally, Plaintiff contends that Adeline Francke and Belle Fierstein, as the wives of Paul Francke and Isadore Fierstein, the original owners of Pompton, Warco, and Sussex Plumbing, had a legal interest in all three entities. Plaintiff further argues that the deposition testimony of Gary Mitchell, Plaintiff's representative, establishes that Sussex County Plumbing was a "twig" operation of Pompton Plumbing and is therefore insured. Moreover, Plaintiff maintains that 32-34-36 East Clinton Street, the property on which Sussex County Plumbing operated, is covered under the Policy and therefore the policy contemplated coverage for the business operated thereon.

Insurance policies are contracts and are therefore, subject to general principles of contract law. The coverage afforded under the Hartford Policy requires Hartford "To pay on behalf of the insured all sums which the insured shall become legally obligated to pay..." As noted, the Hartford Policy provides, in relevant part, that "the unqualified word 'insured' includes the named insured and also includes any executive officer, director or stockholder thereof [...]. If the named insured is a partnership, the unqualified word 'insured' also includes any partner therein but only with respect to his liability as such." The Policy specifically provides that "By acceptance of this policy, the named insured agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance." The "named insured" on the Declarations page of the Hartford Policy is "Belle A. Fierstein & Adeline Francke" and is designated as a "Partnership".

There is no ambiguity in the Hartford Policy provisions regarding the definition of the named insured and persons insured thereunder. Therefore, the Court must apply the plain meaning of the contract. The Declarations on the Hartford Policy do not name

Sussex County Plumbing as an insured. Moreover, Plaintiff has not presented any proofs which would establish coverage for Sussex County Plumbing under the applicable Policy language. The deposition testimony of Gary Mitchell, Plaintiff's representative, indicates that neither Belle Fierstein nor Adeline Francke held an ownership interest in Sussex County Plumbing until in or about 1966, after expiration of the Hartford Policy. Mr. Mitchell's testimony further indicates that Warco, Pompton, and Sussex County Plumbing were separate business entities. The facts do not demonstrate that Plaintiff was an executive officer, director or stockholder of the Partnership named on the Policy. In addition, while the named insured is designated as a "Partnership" the record does not support a finding that the Plaintiff was a partner therein.

Plaintiff's argument that coverage is afforded to Sussex County Plumbing even though they do not fit under the policy definition of an "insured" is unsupported. The Policy specifically indicates that coverage is only afforded to the insured as defined by the Policy provisions. Furthermore, the policy specifically states that 32-34-36 East Clinton Street is "NOT OCCUPIED BY THE INSURED -- N.O.C. -- (Lessor's Risk Only.)". Hartford had a right to rely on that representation.

In this case, there is no genuine issue of material fact as to whether Plaintiff is covered under the Hartford Policy. The plain language of the Policy does not permit a reading which would require Hartford to provide for the defense or indemnification of Sussex County Plumbing. Plaintiff has not presented any factual or legal justification for finding coverage and the Court may not make a better contract for the parties then the bargain they envisioned. Accordingly, Defendant, Hartford's motion for summary judgment is granted.

As noted, Hartford also seeks attorneys' fees and costs on the grounds that there was no good-faith basis for Plaintiff's claim against them. Hartford contends that Sussex County Plumbing was not an insured under the Hartford policy and that the policy did not cover product liability claims and therefore Plaintiff had no reason to pursue coverage against them. Hartford maintains that they raised these issues with Plaintiff's counsel at prior conferences and in numerous conversations. Specifically, Hartford highlights the Court's case management Order of December 20, 2007, which indicates in part, "Plaintiff has until February 29, 2008 to voluntarily dismiss any parties without coverage, after that

date dispositive motions can be filed." The record indicates that by letter dated May 1, 2008, Hartford's counsel sent a letter to plaintiff's counsel pursuant to Rule 1:4-8. Plaintiff's counsel responded by letter dated July 29, 2008, indicating that he did not intend to dismiss the case "based upon the fact insurance policies are strictly construed against the insurance company."

In this case, the award of counsel fees is governed by Rule 4:42-9 and Rule 1:4-8. It should be noted that "pursuant to the 'American Rule,' adhered to by our Supreme Court, the prevailing party is ordinarily not entitled to collect counsel fees from the losing party." Shore Orthopaedic Group, LLC v. Equitable Life Assur. Soc. of U.S., 397 N.J. Super. 614, 624 (App.Div. 2008). It is clear that "[t]he decision to award counsel fees rests within the sound discretion of the trial court." Id.

Pursuant to N.J.S.A. 2A:15-59.1(a), a court may award reasonable litigation costs and counsel fees to the prevailing party "if the judge finds at any time during the proceedings or upon judgment that a complaint, counterclaim, cross-claim or defense of the non-prevailing person was frivolous." In order to find that the complaint of the non-prevailing party was frivolous, the judge must find that it "was filed in bad faith solely for the purpose of harassment, delay or malicious injury, or filed without any reasonable basis in law." Shore Orthopaedic Group, 397 N.J. Super. at 627.

In the case of Port-O-San Corp. v. Teamsters Local Union No. 863, Welfare & Pension Funds, 363 N.J. Super. 431, (App.Div. 2003), the Appellate Division stated:

> Rule 1:4-8(a), applicable to attorneys, provides that an attorney's signature on a pleading constitutes that attorney's certification that the pleading is not being presented for an improper purpose; that the claims are warranted by existing law or by a non-frivolous argument for the law's extension, modification, reversal or for the establishment of new law; and that the factual allegations therein have evidentiary support. We have construed paragraph (d) of that rule to authorize sanctions in instances in which the rule has been violated in bad faith. Id. at 437-438.

In Wyche v. Unsatisfied Claim and Judgment Fund of State, 383 N.J. Super. 554 (App.Div. 2006), the court explained:

> The nature of conduct warranting sanction under R. 1:4-8 has been rather strictly construed. An award of attorneys' fees is not warranted where the plaintiff had a reasonable, good faith belief in the merits of the action. This is a test of objective

> reasonableness. We agree with Judge Pressler's comment that honest and creative advocacy should not be discouraged. Id. at 560-61.

Further, in First Atlantic Federal Credit Union v. Perez, 391 N.J. Super. 419 (App.Div. 2007), the court stated:

> An assertion is deemed frivolous when "no rational argument can be advanced in its support, or it is not supported by any credible evidence, or it is completely untenable. That some of the allegations made at the outset of litigation later proved to be unfounded does not render frivolous a complaint that also contains some non-frivolous claims. The nature of conduct warranting sanction under Rule 1:4-8 has been strictly construed and the term 'frivolous' should be given a restrictive interpretation to avoid limiting access to the court system. Id. at 432-433.

Although Hartford has prevailed on the instant motion for summary judgment, they are not entitled to reimbursement for attorneys' fees and costs. Plaintiff's claim against Hartford, while tenuous, was not frivolous. Plaintiff made a good-faith claim for recovery. Plaintiff's reading of the insurance contract, while insufficient to avoid summary judgment, constitute honest and creative advocacy. In this case, the facts do not demonstrate that the Complaint was filed in bad faith. Accordingly, Hartford's request for attorneys' fees and costs is denied.