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Superior Court of New Jersey,
Appellate Division.

Michael ABBOUD, Plaintiff–Appellant,
v.
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA,
Defendant–Respondent.

Argued December 20, 2016
|
Decided June 21, 2017

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L–680–14.

Attorneys and Law Firms

Lawrence R. Lonergan argued the cause for appellant.

Andrew L. Indeck argued the cause for respondent (*Weber Gallagher Simpson Stapleton Fires & Newby, LLP*, attorneys; *Mr. Indeck*, of counsel and on the brief; *Jane S. Kelsey*, on the brief).

Before Judges Ostrer, Leone and Vernoia.

Opinion

The opinion of the court was delivered by

OSTRER, J.A.D.

***1** In this insurance coverage dispute, we interpret an "insured vs. insured" exclusion in a directors and officers (D & O) liability policy. Generally speaking, such exclusions bar coverage for claims by one insured director or officer against another. Plaintiff Michael Abboud sought indemnity and a defense in connection with counterclaims made against him by fellow officers of Monarch Medical PET Services, LLC (Monarch). Defendant National Union Fire Insurance Company of Pittsburgh, Pa., eventually denied coverage based on the insured vs. insured exclusion. Abboud filed a declaratory judgment action against National Union, which ended in summary judgment dismissal and the present appeal.

We discern no ambiguity in the exclusion, and find no basis for Abboud's argument that a showing of collusion between the insureds is required to invoke it. We also find no merit in his argument that National Union should be barred from denying coverage because it would violate his reasonable expectations. We therefore affirm.

I.

Abboud started the underlying litigation by suing: Monarch; four of its members and managers—Patrick Collins, Andrew Kreamer Rooke, Sr., Gary Moyers and William McCue; and a non-member officer, Andrew Kreamer Rooke, Jr. (collectively, "the defendants"). Abboud was a forty-percent owner of Monarch, which operates and leases PET/CT[1] equipment. He alleged the four member-managers tried to remove him from Monarch's board of managers and his position as its chief executive officer. In his verified complaint, Abboud alleged the defendants engaged in oppressive acts and breached their fiduciary duty and the firm's operating agreement. He sought: reinstatement, salary and other employment benefits; an injunction restraining the defendants from interfering with his access to the premises, its computers and its employees; as well as attorneys' fees and expenses.

[1] PET/CT refers to positron emission tomography—computer tomography. *Stedman's Medical Dictionary* 468, 1468 (28th ed. 2006).

The verified complaint did not address the defendants' asserted reasons for their actions, but we gather they concerned Monarch's involvement with two other companies, Monarch Medical Imaging Equipment, Inc. (Monarch Imaging)—a corporation that Abboud and Collins owned—and Monarch Medical Technologies, LLC (Monarch Technologies)—a wholly owned subsidiary of Monarch Imaging. We infer this from Abboud's complaint, which sought to justify certain payments Monarch made to Monarch Imaging and the existence of other agreements between Monarch and Monarch Technologies.

In their responsive pleading, Monarch and the individual defendants other than Collins asserted various counterclaims against Abboud. They alleged Abboud engaged in self-dealing and exploited Monarch's opportunities for his personal gain or that of his other companies. Monarch independently alleged Abboud breached his loyalty and fiduciary duties, and engaged in

intentional interference with prospective economic advantage. The company and the individual counterclaimants also alleged breach of the operating agreement. Additionally, they sought a declaratory judgment that grounds existed for involuntarily withdrawing Abboud's membership interest in the company.

***2** All the defendants in Abboud's underlying lawsuit sought and obtained an acknowledgement of partial coverage from National Union, subject to a reservation of rights, under the Employment Practices Liability (EPL) section of Monarch's multi-coverage policy, which also included a D & O liability section. It appears the defendants made their request in a timely manner. National Union sent its coverage letter on March 13, 2013, a month after Abboud filed his complaint and a month before the filing of the answer and counterclaims.

By contrast, Abboud did not notify National Union of the counterclaims against him until November 20, 2013, when his attorney gave "notice of claims covered" under the D & O section of the policy. The attorney asserted the notice was late because Monarch and National Union had delayed responding to his requests for information about coverage. National Union did not respond to the notice.

In February 2014, Abboud filed his declaratory judgment action. Expressly invoking and quoting the policy's D & O section, Abboud sought indemnity and defense costs for the counterclaims in the underlying lawsuit. Referring to the November 20, 2013 notice of claim, he asserted National Union failed to respond to his purported "written claim for defense and indemnification." He argued that its failure barred National Union from denying coverage based on waiver and estoppel principles.

In its answer, National Union denied its policy provided indemnity or defense costs coverage for the counterclaims against Abboud. Limited paper discovery followed. National Union objected to many of Abboud's discovery demands, including requests for claim processing documents and for the identification of an employee familiar with the policy's D & O section. Shortly thereafter, National Union filed its summary judgment motion. Although Abboud's attorney asserted that National Union's discovery responses were deficient, he did not formally seek to compel further discovery.

In support of its summary judgment motion, National Union contended the insured vs. insured exclusion within the D & O section precluded coverage. In opposition, Abboud argued the exclusion applied only if there was collusion, and whether there was such collusion presented a genuine issue of material fact. He also contended enforcing the exclusion would frustrate his reasonable expectations. He based his estoppel argument on National Union's failure to respond to the November 2013 notice. He also argued National Union's motion was premature because discovery remained pending.

In granting the motion, Judge Katie A. Gummer found that the insured vs. insured exclusion plainly barred Abboud's claim for coverage. The court rejected Abboud's arguments about collusion and reasonable expectations. Also, estoppel did not apply because Abboud failed to demonstrate any reliance on National Union's inaction. The judge rejected Abboud's prematurity argument because he failed to identify the discovery that would create a dispute over material facts.

On appeal, Abboud renews the arguments he presented to the trial court. He adds that the court should have sua sponte found coverage under the policy's EPL section.

II.

We review de novo the trial court's grant of summary judgment, applying the same standard as the trial court. *Templo Fuente de Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 224 *N.J.* 189, 199, 129 *A.*3d 1069 (2016). The movant is entitled to summary judgment if the record shows "there is no genuine issue as to any material fact challenged and ... the moving party is entitled to a judgment or order as a matter of law." *Ibid.* (quoting *R.* 4:46–2(c)). Interpretation of an insurance policy also presents a legal question, which we review de novo. *Selective Ins. Co. of Am. v. Hudson E. Pain Mgmt. Osteopathic Med. & Physical Therapy*, 210 *N.J.* 597, 605, 46 *A.*3d 1272 (2012).

***3** The *Templo Fuente* Court reviewed the rules of construction that apply to insurance policies:

> If the plain language of the policy is unambiguous, we will not engage in a strained construction to support the imposition of liability or write a better policy for the insured than the one purchased.
>
> When the provision at issue is subject to more than one reasonable interpretation, it is ambiguous, and the court may look to extrinsic evidence as an aid to interpretation. Only where there is a genuine ambiguity, that is, where the phrasing of the policy is so confusing that the average policyholder cannot make out the boundaries of coverage, should the reviewing

> court read the policy in favor of the insured. When construing an ambiguous clause in an insurance policy, courts should consider whether clearer draftsmanship by the insurer would have put the matter beyond reasonable question.
>
> [*Templo Fuente*, *supra*, 224 *N.J.* at 200, 129 *A.*3d 1069 (internal quotation marks and citations omitted).]

Consistent with these rules, our courts will enforce exclusionary clauses if "specific, plain, clear, prominent, and not contrary to public policy," notwithstanding that exclusions generally "must be narrowly construed," and the insurer bears the burden to demonstrate they apply. *Flomerfelt v. Cardiello*, 202 *N.J.* 432, 441–42, 997 *A.*2d 991 (2010) (internal quotation marks and citations omitted).

We look first to the policy language, which we conclude plainly and unambiguously bars coverage because the counterclaims against Abboud fall within its insured vs. insured exclusion. We begin with the language of the relevant provision defining the D & O coverage before turning to the exclusion.

As D & O Coverage, National Union agreed to

> pay the Loss of an Individual Insured of the Company arising from a Claim made against such Individual Insured for any Wrongful Act of such Individual Insured, except when and to the extent that the Company has indemnified such Individual Insured. The Insurer shall, in accordance with and subject to Clause 7 of this D & O Coverage Section, advance Defense Costs of such Claim prior to its final disposition.

Except for "Company," which is defined to mean Monarch in the policy's "General Terms" section, the highlighted terms are separately defined within the D & O section. These definitions establish the coverage's scope.

An "Individual Insured" includes an "Executive" or "Employee of a Company." The two categories are mutually exclusive. An "Executive" refers to "any past, present or future duly elected or appointed director, officer, management committee member or member of the Board of Managers ...." "Employee" explicitly excludes Executives, as the definition states it means "any past, present, or future employee, other than an Executive of a Company ...." A "Wrongful Act" by an "Executive or Employee of a Company" means "any breach of duty, neglect, error, misstatement, misleading statement, omission or act ... in their respective capacities as such, or any matter claimed against ... [them] solely by reason of his or her status as an Executive or Employee of a Company ...."

The insured vs. insured exclusion is one of several exclusions in the D & O section for which the insurer "shall not be liable to make any payment for Loss in connection with any Claim made against the Insured." The exclusion disallows claims depending on which party raises them; specifically, it excludes any claim "which is brought by or on behalf of a Company or Individual Insured, other than an Employee of the Company ...."[2]

[2] The insured vs. insured exclusion has various exceptions that do not apply here.

***4** There is nothing ambiguous, convoluted, or opaque about this exclusion when interpreted in accord with the definitional provisions. The exclusion disallows coverage when the claim is raised by either an executive of the company (i.e., an "Individual Insured" who is not an "Employee") or the company itself. Its application here is equally clear. The claims raised against Abboud were brought by Monarch and five of its executives (whose status within the company Abboud does not contest). Therefore, the insured vs. insured exclusion bars these claims.

Abboud seeks to avoid the plain import of the exclusion on two grounds. First, he contends it violates his reasonable expectations. Second, he contends the exclusion applies only in cases of collusion between the individual insureds, about which there remains an issue of fact. We are unpersuaded.

Our courts "have recognized the importance of construing contracts of insurance to reflect the reasonable expectations of the insured in the face of ambiguous language and phrasing, and in exceptional circumstances, when the literal meaning of the policy is plain." *Doto v. Russo*, 140 *N.J.* 544, 556, 659 *A.*2d 1371 (1995) (citation omitted); *see also Pizzullo v. N.J. Mfrs. Ins. Co.*, 196 *N.J.* 251, 271, 952 *A.*2d 1077 (2008) ("Indeed, in some circumstances, we have recognized that it might be appropriate to permit an insured's reasonable expectation to overcome the plain meaning of a policy."); *Werner Indus. v. First State Ins. Co.*, 112 *N.J.* 30, 35–36, 548 *A.*2d 188 (1988) ("At times, even an unambiguous contract has been interpreted contrary to its plain meaning

so as to fulfill the reasonable expectations of the insured ....").

These exceptional circumstances are narrowly confined. The "reasonable expectations" doctrine applies to policy forms that have the characteristics of an adhesion contract. *See, e.g.*, *Doto, supra*, 140 *N.J.* at 556, 659 *A.*2d 1371. Courts are more inclined to apply the doctrine in cases of personal lines of insurance obtained by an unsophisticated consumer. *See, e.g.*, *Oxford Realty Grp. Cedar v. Travelers Excess & Surplus Lines Co.*, ––*N.J.* ––––, ––––, –– *A.*3d –––– (2017) (slip op. at 15–16), 2017 WL 2290135; *Werner Indus., supra*, 112 *N.J.* at 38, 548 *A.*2d 188; *see also Nunn v. Franklin Mut. Ins. Co.*, 274 *N.J.Super.* 543, 550, 644 *A.*2d 1111 (App. Div. 1994). Yet, the doctrine has been applied to commercial lines, as well. *See, e.g.*, *Nav–Its, Inc. v. Selective Ins. Co. of Am.*, 183 *N.J.* 110, 123–24, 869 *A.*2d 929 (2005) (applying the doctrine to a pollution exclusion clause of a building contractor's comprehensive general liability insurance policy); *Sparks v. St. Paul Ins. Co.*, 100 *N.J.* 325, 338–39, 495 *A.*2d 406 (1985) (applying doctrine to a legal malpractice policy).

Courts may vindicate the insured's reasonable expectations over the policy's literal meaning "if the text appears overly technical or contains hidden pitfalls, cannot be understood without employing subtle or legalistic distinctions, is obscured by fine print, or requires strenuous study to comprehend." *Zacarias v. Allstate Ins. Co.*, 168 *N.J.* 590, 601, 775 *A.*2d 1262 (2001) (citations omitted) (rejecting "reasonable expectations" argument because the policy language was "not so confusing that the average policyholder cannot make out the boundaries of the coverage," nor was an "entangled and professional interpretation of an insurance underwriter ... pitted against that of an average purchaser of insurance" (internal quotation marks and citation omitted)).

The expectations of coverage must be real. *See Werner Indus., supra*, 112 *N.J.* at 39, 548 *A.*2d 188 (remanding for a factual determination whether the insured, through its broker, conveyed an intent contrary to the policy's unambiguous language); *DiOrio v. N.J. Mfrs. Ins. Co.*, 79 *N.J.* 257, 270, 398 *A.*2d 1274 (1979) (declining to deviate from policy language where "as a factual matter the record is barren of any suggestion that the [insureds] 'expected' at they had primary or excess coverage"). The expectations must also be "objectively reasonable." *See, e.g.*, *Templo Fuente, supra*, 224 *N.J.* at 210, 129 *A.*3d 1069.

***5** In assessing whether the expectations are objectively reasonable, a court will consider communications regarding the coverage between the insured or its broker and the insurer or its agent that relate to the insured's expectations. *See, e.g.*, *Doto, supra*, 140 *N.J.* at 557–58, 659 *A.*2d 1371. A court must also consider whether the scope of coverage is so narrow that it "would largely nullify the insurance" and defeat the purpose for which it was obtained. *See Sparks, supra*, 100 *N.J.* at 337–39, 495 *A.*2d 406 (internal quotation marks and citation omitted). For example, the Court in *Sparks* concluded that a claims-made legal malpractice policy that excluded claims arising out of occurrences preceding the policy period "d[id] not accord with the objectively reasonable expectations of the purchasers of professional liability insurance." *Id.* at 340, 495 *A.*2d 406. Additionally, a court must consider whether policies with "unrealistically narrow coverage" cause "broad injury to the public at large[,]" which may preclude enforcement on public policy grounds. *Id.* at 340–41, 495 *A.*2d 406.

Applying these principles, we discern no basis to set aside the insured vs. insured exclusion based on Abboud's alleged expectations of coverage. The policy provides commercial insurance to a presumably sophisticated consumer. The public at large has no identified interest in finding coverage. The policy language is straightforward, as discussed above, and is "not so confusing that the average policyholder cannot make out the boundaries of the coverage." *Zacarias, supra*, 168 *N.J.* at 601, 775 *A.*2d 1262 (internal quotation marks and citation omitted). The record is also devoid of competent evidence of Abboud's expectations of coverage or proof that such expectations would be objectively reasonable, given that D & O insurance typically covers liability for third-party claims, *see Biltmore Assocs., LLC v. Twin City Fire Ins. Co.*, 572 *F.*3d 663, 668 (9th Cir. 2009) (stating, "[t]he reasonable expectations of the parties [to a D & O policy] were that they were protecting against claims by outsiders, not intra-company claims"), and enforcement of the exclusion nonetheless leaves broad D & O coverage. In sum, the policy's plain language need not be tailored to conform to Abboud's alleged expectations.

We also reject Abboud's contention that proof of collusion is a prerequisite to applying the insured vs. insured exclusion. As our courts have not expressly addressed the question, Abboud relies on several decisions from other jurisdictions adopting this view,[3] and there are others. *See* 3–22 New Appleman Law of Liability Insurance § 22.06(2)(c) n.30 (2017) (collecting cases). However, the contrary view is both more persuasive and more consistent with our rules of construction.

[3] The cases Abboud cites were not formally published; consequently, we will not address them.

The insured vs. insured exclusion was, reportedly, the insurance industry's "reaction to several lawsuits in the mid–1980s in which insured corporations sued their own directors to recoup operational losses caused by improvident or unauthorized actions." *Biltmore Assocs., supra*, 572 *F.*3d at 668; *see also Appleman, supra*, § 22.06(2)(c). These suits thus extended liability coverage to intra-company claims and transformed the nature of the insurance; specifically, they "turned liability insurance into casualty insurance, because the company would be able to collect from the insurance company for its own mistakes, since it acts through its directors and officers." *Biltmore Assocs., supra*, 572 *F.*3d at 669.

Although the specific formulation of this exclusion may vary from policy to policy, its purpose was not simply to bar collusive claims—as Abboud implies. Instead, it was intended:

> to exclude coverage both of collusive suits—such as suits in which a corporation sues its officers or directors in an effort to recoup the consequences of their business mistakes, thus turning liability insurance into business-loss insurance—and of suits arising out of those particularly bitter disputes that erupt when members of a corporate, as of a personal, family have a falling out and fall to quarreling.
>
> ***6** [*Level 3 Commc'ns, Inc. v. Fed. Ins. Co.*, 168 *F.*3d 956, 958 (7th Cir. 1999) (emphasis added) (citations omitted).]

See also Biltmore Assocs., supra, 572 *F.*3d at 669 ("The exclusion protects of course against collusion, and also against the risk of selling liability insurance for what amounts to a fidelity bond."); *Appleman, supra*, § 22.06(c).

The question is whether this history requires us to deviate from the exclusion's plain language by requiring an insurer to prove collusion as Abboud contends. We think not. As Judge Posner concluded in *Level 3 Communications*, the argument that collusion must be proved "confus[es] a rule with its rationale ...." *Supra*, 168 *F.*3d at 958. The drafters were free to develop a standard that assumed some risk of over-inclusiveness—that is, to include claims that did not involve collusion or corporate family spats—to achieve the benefit of simplicity and ease of enforcement. After all, "[a] standard, like 'no coverage for collusive suits or lovers' quarrels,' [would be] contoured exactly to [the exclusion's historical] purpose, but it cannot be applied without a potentially costly, time-consuming, and uncertain inquiry into the nature of the underlying dispute sought to be covered." *Ibid.*

In any event, it is clear from the face of Abboud's verified complaint, and the counterclaims, that what we have is one of those "particularly bitter disputes that erupt when members of a corporate ... family have a falling out ...." *Ibid.* Although there is no evidence of collusion, enforcing the insured vs. insured exclusion here nonetheless satisfies one of the primary historical goals of the exclusion.[4]

[4] At least one insurer has drafted an insured vs. insured exclusion that expressly provides that it applies regardless of whether the claim is collusive. *See Westchester Fire Ins. Co. v. Wallerich*, 563 *F.*3d 707, 710 (8th Cir. 2009). That development lends no support to Abboud's argument, but merely reflects an insurer's effort to avoid the headaches such an argument creates.

In sum, guided by our rules of construction that place dispositive weight on the plain language of a provision that is neither ambiguous, convoluted nor opaque, we reject Abboud's proposed gloss on the insured vs. insured exclusion's plain language. We are in good company. *See, e.g., Sphinx Int'l, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 412 *F.*3d 1224, 1229–30 (11th Cir. 2005) (applying Florida law); *Level 3 Commc'ns, supra*, 168 *F.*3d at 958; *Foster v. Ky. Hous. Corp.*, 850 *F.Supp.* 558, 561 (E.D. Ky. 1994); *Durant v. James*, 189 *So.*3d 993, 996 (Fla. Dist. Ct. App.), *review denied*, No. SC16–1004, 2016 WL 4680098, 2016 Fla. LEXIS 1989 (Sept. 7, 2016); *Robinson v. Rockhill Ins. Co.*, 139 *So.*3d 1031 (La. Ct. App. 2014).[5]

[5] We note, happily, that this case does not require us to address other knotty issues involving the scope of insured vs. insured exclusions. Questions have arisen when some claimants are insureds and others are not, *see, e.g.*, *Miller v. St. Paul Mercury Ins. Co.*, 683 *F.*3d 871 (7th Cir. 2012); and when claims are brought in the context of bankruptcy or other insolvency-related proceedings, *see, e.g.*, *W Holding Co. v. AIG Ins. Co.*, 748 *F.*3d 377, 385–86 (1st Cir. 2014) (discussing split in case law on whether insured vs. insured exclusion applies to Federal Deposit Insurance Corporation); *Appleman, supra*, § 22.06(2)(c) (noting the issue of the "Insured vs. Insured exclusion in the bankruptcy context ... is becoming less significant as more D & O policies contain exclusions for claims 'brought or maintained by or on behalf of a bankruptcy or

insolvency trustee, examiner, receiver or similar official'."); *see also* 9A Couch on Insurance 3d § 131:36 n.1 (2015) (collecting cases).

III.

***7** Abboud's remaining arguments lack sufficient merit to warrant extended discussion. *R.* 2:11–3(e)(1)(E). Abboud's estoppel argument falls short because he has failed to show any detrimental reliance on National Union's alleged unjustified delay in denying coverage. *See Knorr v. Smeal*, 178 *N.J.* 169, 178, 836 *A.*2d 794 (2003) (noting that estoppel requires a showing that the adversary "engaged in conduct, either intentionally or under circumstances that induced reliance, and that plaintiffs acted or changed their position to their detriment"); *Greenberg & Covitz v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 312 *N.J. Super.* 251, 265, 711 *A.*2d 909 (App. Div. 1998) ("[D]etrimental reliance by the insured is a prerequisite to finding that coverage has been expanded by estoppel."), modified on other grounds, 161 *N.J.* 143, 735 *A.*2d 569 (1999).

His argument that summary judgment was premature fails because he does not identify what discovery he needs. *See Trinity Church v. Lawson–Bell*, 394 *N.J.Super.* 159, 166, 925 *A.*2d 720 (App. Div. 2007) ("A party opposing summary judgment on the ground that more discovery is needed must specify what further discovery is required, rather than simply asserting a generic contention that discovery is incomplete.").

Finally, we decline to reach Abboud's claim that he was entitled to coverage under the policy's EPL section (although there appears to be little that is employment-related in the counterclaims against Abboud). Abboud invoked only the D & O section in his notice of claim, in his declaratory judgment complaint, in discovery, and in argument before the trial court. *See Nieder v. Royal Indem. Ins. Co.*, 62 *N.J.* 229, 234, 300 *A.*2d 142 (1973) (stating that "appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available unless the questions ... go to the jurisdiction of the trial court or concern matters of great public interest" (internal quotation marks and citation omitted)).

Affirmed.

All Citations

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