SUPERIOR COURT OF NEW JERSEY

TRAVIS L. FRANCIS
ASSIGNMENT JUDGE

MIDDLESEX COUNTY COURT HOUSE
P.O. BOX 964
NEW BRUNSWICK, NEW JERSEY 08903-0964

January 23, 2015

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Re: Wakefern Food Corp., et al. v. Lexington Ins. Co., et. al
Docket No.: L-6483-13

Enclosed herein please find the Court's decision of this date regarding the above-captioned matter and Order.

Preliminary Statement

On October 29, 2014 this Court granted Lexington Insurance Company's Cross Motion for Partial Summary Judgment against Wakefern Food Corp. At issue was the applicable deductible for the Plaintiff's losses and whether the Named Storm Deductible was properly applied. Additionally, this Court determined the proper interpretation of "Total Insurable Values" as described in the policy language. Plaintiff moves for reconsideration pursuant to Rule 4:49-2.

Rule 4:49-2

Rule 4:49-2 permits a party to make "a statement of the matters or controlling decisions which [the party] believes the court has overlooked or as to which it has erred" in entering an order or judgment. State v. Fitzsimmons, 286 N.J. Super. 141,

147 (App. Div. 1995). Reconsideration should be used for cases where 1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence. Fusco v. Board of Educ. of the City of Newark, 349 N.J. Super. 455. 462 (App. Div. 2002).

Parties' Arguments

Plaintiff contends 1) The Court's Application of the Named Storm Deductible to the Entirety of Plaintiff's Losses Fails to Appreciate the Lack of Probative, Competent Evidence; 2) The Court's Refusal to Apply "Appleman's Rule" was Palpably Incorrect; and 3) The Court's Conclusion that "Total Insurable Values" Means "Statement of Values" is Not Supported by the Policy Language and Relies Upon Disputed Facts Not Even in Evidence. Pl.'s Brief at pg. i.

Named Storm Deductible

Plaintiff asserts that the Court erred in determining that the Named Storm Deductible applies to the entire claim. Particularly, Plaintiff contests the Court's decision and language that "it is undisputed that prior to 7:00pm on October 29, 2012, Sandy was a hurricane." In the Opinion, the Court concluded that "damage while Sandy was still a hurricane created a substantial nexus between the storm and Wakefern's total losses." Slip. Op. at 21. Plaintiff contends "the Court justified its opinion by pointing to a 'Product Loss Summary' that identifies the time of power outages at various stores. . . . But there is nothing about that single spreadsheet that would allow any fact finder, let alone the Court on summary judgment as a matter of law, to determine the cause of Plaintiff's losses, and especially that the totality of Plaintiff's losses had a "substantial nexus" to pre-downgrade events." Pl.'s Brief at pg. 4. Moreover, "Plaintiff asserts that Lexington offered no proof of what caused the loss at any location." Pl.'s Brief at pg. 5. Based on what the Plaintiff considers "limited and/or disputed facts," the Plaintiff contends "Without any probative, competent evidence, the Court's decision was made on an irrational basis, which justifies reconsideration and reversal or modification of the decision to grant Lexington's motion for partial summary judgment before facts and expert discovery was completed." Pl.'s Brief at pg. 7.

Defendant responds by taking issue with Plaintiff's characterization of the storm and its nexus to the losses. Defendant asserts that,

> "Even if the most temporally direct cause of Plaintiffs' losses at any given location was Sandy's Flood (or Sandy's wind or Sandy's storm surge or Sandy's power interruption), still the losses at that location would have originated from, or grown out of, Hurricane Sandy. It was "Hurricane" Sandy that set in motion all storm-related events on October 29 and there are no losses at issue besides those 'sustained as a result of the storm events of and around October 29, 2012." Def.'s Brief at pg. 5 (citing Complaint ¶ 1.)

Defendant continues, "Even if . . . Plaintiffs had not begun to sustain losses until after the NWS declared Sandy to be a post tropical cyclone, all of Plaintiffs' losses nevertheless would have 'arisen out of' Hurricane Sandy as a matter of law..." Def.'s Brief at pg. 5.

This Court's decision was based on the clear language of the policy and its interpretation of the "arising out of" language. It was unnecessary for the Court to find that Plaintiff's losses were "caused by a Named Storm" based on the policies "arising out of" language which if applied as the Court aptly determined the question of causation would then not be required to be placed before a finder of fact. As stated in Flomerfelt v. Cardiello, where the 'loss is part of a chain of events' or part of 'interrelated or concurrent causes,' a 'substantial nexus' may be found. Flomerfelt, 202 N.J. 432 (2010). Plaintiff contends it is necessary for a fact-finder to explore, "what Wakefern's losses were, how they developed and when they developed." Reply Brief at pg. 7. This Court found that as a matter of law, the losses sustained as a result of the storm on October 29, 2012 have a substantial nexus with the Named Storm and are therefore subject to said named storm deductible. Furthermore, Plaintiff's reference to any case that does not include the 'arising out of' language is misplaced. The 'arising out of language' was dispositive in deciding the extent of the connection required. The Court's granting of summary judgment on the applicability of the Named Storm Deductible is supported by the "arising out of" policy language as well as the Plaintiff's own admission in their complaint that the losses at issue were the result of the 10/29/12 storm.

Appleman's Rule

Under Appleman's Rule, 'recovery may be allowed where the insured risk was the last step in the chain of causation set in motion by an uninsured peril, or [w]here the insured risk itself set into operation a chain of causation in which the last step may have been an excepted risk.' Stone v. Royal Ins. Co., 211 N.J. Super. 246, 251 (App. Div. 1986).

Plaintiff contends that according to the Appellate Division, Appleman's Rule only may be set aside if a policy "contain[s] an anti-concurrent or anti-sequential clause." Pl.'s Brief at pg. 8. Since, there is no anti-concurrent or anti-sequential clause applicable in the present case, Plaintiff contends that Spoilage is a more specific deductible and it should control. Plaintiff asserts that the Court's interpretation in this regard, not only ignores, but flatly contradicts Wakefern's reasonable expectations of coverage.

Lexington raises procedural concerns regarding Wakefern mentioning Appleman's Rule in their reply brief rather than raising the issue from the outset. Nonetheless, Lexington responds that Appleman's Rule does not apply. "The Parties contracted around Appleman's Rule." Def.'s Brief at pg. 8. Defendant contends that "The Policy objectively evinces the parties' intent for the Named Storm deductible to apply without regard to causation, stating that the deductible applies 'regardless of the number of Coverage's, Locations or Perils involved." Slip. Op. 22-23. Furthermore, Defendant asserts that, "[E]ven if Plaintiffs had properly raised Appleman's Rule at the outset, and even if the parties had not contracted around it, it would still not apply to the deductible provisions at issue here." Def.'s Brief at pg. 11. According to the Defendant, "Here, there is no exclusion at issue against which to apply Appleman's Rule. Further, it would be improper to apply the rule to deductible provisions given that deductibles do not present the risk of a complete forfeiture." Id. at pg. 12. The Defendant asserts the Court should reject the Plaintiff's motion for reconsideration on Appleman's Rule.

This Court held that Appleman's Rule was inapplicable to the deductibles because the Named Storm Deductible was not an exclusion. The parties contracted for the Named Storm Deductible to apply "regardless of the number of Coverage's, Locations, or Perils involved." Slip. Op. at 22-23. This Court sees no ambiguity in the Policy Language that would warrant reconsideration of its original decision. The Policy covers losses relating to a Named Storm albeit at a higher deductible. Plaintiff asserts that a deductible is a limitation on coverage and should be treated as an exclusion. Reply Brief at pg. 11. Applying Plaintiff's logic every deductible in every insurance contract would be subject to Appleman's Rule. This Court declined to apply Appleman's rule based on the absence of an exclusion as well as the absence of a deductible so high that the same could be considered exclusionary. After all

Defendant's had paid at least twenty million dollars toward the claim. The Court sees no reason to reconsider its opinion on that issue.

Total Insurable Values

Plaintiff asserts the Court erred in finding that Total Insurable Values meant Statement of Values. Plaintiff considers this finding unsupported by the policy language and based on disputed facts not even in evidence. Pl.'s Brief at pg. 10. Plaintiff stated that "The Court's finding regarding Wakefern's and Lexington's 'understandings' is unsupported and, in any case, wrong. To the extent that the parties' understanding were to be considered at some point that should have happened on a fully developed fact record submitted to a jury." Pl.'s Brief at pg. 11. To support this position, Plaintiff asserts Statement of Values appeared explicitly in the Policy seven times, yet the term was not used to articulate the applicable deductible. Id. at 10. Plaintiff also states that "Lexington attempts to explain away the court's unsupported and problematic interpretation of TIV by rephrasing the court's conclusion. See Lex. MFR Opp. At 14-15 ("this court held that Plaintiffs' TIV at each location is the amount listed within Plaintiffs' SOV under the column entitled "Total"...") Reply Brief at pg. 14. Based on such policy discrepancies Plaintiff considers summary judgment inappropriate and submits that the Court should reconsider its decision.

Defendant retorts that the Court properly construed Total Insurable Values as two percent of the total insurable values at each claimed location rather than two percent of a Sublimit of Liability. Def.'s Brief at pg. 11. Defendant contends the Court's actual holding relied on "the Policy's plain language, the persuasive case law on point, and the reasonableness of the competing constructions proffered by each party." Def.'s Brief at pg. 16. According to the Defendant, "the Court correctly rejected the one and only construction offered by Plaintiffs, which was that 'TIV' somehow referred to a $150 million Sublimit of Liability." Pl.'s Brief at 15-16. Based on such information Defendant submits that the Court's reasoning was proper and correct and Plaintiff's motion should be denied.

This Court found based on the Policy's plain language that Defendant's construction was the only reasonable and supportable interpretation of the policy. Plaintiff's view that the deductible was based on a sublimit of liability was not convincing. As Defendant notes, "Plaintiffs' view would have meant that the Named Storm Deductible is always calculated to be exactly $3 million (i.e., 2% of a 150 million sublimit). [A deductible based on the sublimit of liability] would have rendered the 'minimum deductible of $250,000 in any one occurrence' wholly inexplicable. . . . (Footnote) Simply put, there are no circumstances under which

two percent of $150 million is ever less than $250,000; it is always exactly $3 million." Def.'s Brief at pg. 16. This Court's decided "that because TIV is undefined in the policy [Wakefern asserts] an alternative interpretation is reasonable. This Court is not persuaded by the argument." Slip Op. at 25. The Court previously stated "The Named Storm deductible should be 2% of the aggregate Statement of Values at the stores for which Plaintiff submitted a claim." Slip Op. at 26. Plaintiff contends that the Court's reasoning is unsupported but the Court further explained "the deductible is calculated by taking 2% of the stated value of the entire location." Slip Op. at 27. Based on the parties' competing interpretations and the plain language of the Policy regarding when to apply the named storm deductible, the Court finds no basis for the reconsideration of the original decision.

Dated: January 23, 2015

Travis L. Francis, A.J.S.C.