

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5210-13T1

SHELDON AND SHIRLEY KAVESH,

Plaintiffs-Appellants,

v.

FRANKLIN MUTUAL INSURANCE,

Defendant-Respondent.

Submitted May 5, 2015 – Decided June 10, 2015

Before Judges Yannotti and Whipple.

On appeal from Superior Court of New Jersey,
Law Division, Sussex County, Docket No. DC-
000501-14.

Sheldon and Shirley Kavesh, appellants pro
se.

Sweet Pasquarelli, P.C., attorneys for
respondent (Anthony P. Pasquarelli and
Matthew G. Minor, on the brief).

PER CURIAM

Plaintiffs appeal an order dated May 22, 2014, that granted summary judgment to defendant and dismissed plaintiffs' complaint with prejudice. We affirm.

We discern the following facts from the record and view the facts and all reasonable inferences therefrom in the light most

favorable to the party against whom summary judgment was entered. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523-24 (1995). Plaintiffs owned a home in Whippany and had a homeowners' insurance policy (the "Policy") with defendant. The Policy contained a specific exclusion for damage or loss caused by mold, but permitted limited coverage for mold subject to terms and conditions, specifically, "[l]oss [caused by] fortuitous direct physical damage or destruction."

In October 2011, the roofing of plaintiffs' home was replaced with plywood sheathing and shingles. In June 2013, plaintiffs became aware of mold growth on the attic's interior plywood surfaces. Plaintiffs submitted a claim for remediation of the mold growth under the Policy, but defendant denied the claim, stating that it was not covered by the Policy. In denying plaintiffs' claim, defendant noted that it had inspected the home, found "no evidence of a roof leak or other water penetration to the attic[,] and determined that "[t]he fungus developed as a result of high humidity which ha[d] caused condensation in and on the plywood roof sheathing."

In July 2013, plaintiffs appealed the denial of their claim, and in September 2013, defendant affirmed the denial. Plaintiffs then sent a letter to the Insurance Claims Ombudsman at the New Jersey Department of Banking and Insurance, seeking

review of their claim.

Defendant retained Andrew K. Sharick, P.E., to inspect plaintiffs' home in October 2013. Sharick reported fungus "across the entire front roof slope of the upper attic[,] and found that "[t]his type of uniformly[-]spread fungus, without any localized water stains or water damage[,] often develops on organic surfaces such as wood in locations where ambient humidity is elevated." Sharick cited the absence of ventilation, the installation of an ice and water shield, and the placement of a fan as contributing factors to higher levels of condensation in the front slope of the attic.

Sharick wrote that the two-year-old nails in the front slope of the attic appeared to have more rust coating on them than those in the rear, further evidencing higher levels of humidity in the front. Sharick concluded that there was no exterior water entry through the roof, no missing shingles or roof damage, and no pipe, fixture, or appliance leaks causing the fungus. He wrote that "[t]he origin and spread of the fungi on the roof sheathing in the attic cannot be attributed to any individual weather event."

On November 25, 2013, the Insurance Claims Ombudsman sent plaintiffs a letter concluding that a "review of [defendant's] most recent denial letter . . . confirms the company's

compliance with applicable regulatory requirements[,]" and the office was not "in a position to hear the various arguments and issue a determination resolving the matter[.]" Defendant sent plaintiffs a letter dated December 12, 2013, and again affirmed the denial of plaintiffs' claim.

Plaintiffs brought suit against defendant on February 20, 2014, seeking \$3780 in damages. Defendant moved for summary judgment, and plaintiffs opposed the motion.

The trial judge held a hearing on defendant's motion, heard arguments, and granted defendant's motion, finding that there was no basis under the terms of the Policy to impose liability on defendant. The court granted defendant's motion for summary judgment and dismissed plaintiffs' complaint with prejudice because the mold endorsement in the Policy limits recovery to mold caused as a result of a "fortuitous, direct physical loss" and no such event was demonstrated that would have compelled coverage under the Policy.

On appeal, plaintiffs argue that mold growth was covered under the Policy and that the cause of the growth is a genuine issue of material fact that should have precluded the entry of summary judgment. We disagree.

We apply a de novo standard of review when evaluating whether summary judgment was proper. Wilson ex rel. Manzano v.

City of Jersey City, 209 N.J. 558, 564 (2012). We first decide if there is a genuine issue of material fact, and if none exist, whether the moving party is entitled to judgment as a matter of law. Brill, supra, 142 N.J. at 528-29.

Summary judgment must be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). "[A] non-moving party cannot defeat a motion for summary judgment merely by pointing to any fact in dispute[,]" and must bring forth evidence creating a genuine issue as to a material fact. Brill, supra, 142 N.J. at 529. To deny such a motion, the court must find more than "[t]he mere existence of a scintilla of evidence in support of [the non-moving party's] position[,]" and must determine whether a reasonable jury could find for the non-moving party. Id. at 532.

Here, plaintiffs dispute that the cause of the mold is condensation as indicated in Sharick's report but provide no other explanation. While they contend that this raises a genuine issue of material fact, plaintiffs have not provided any evidence that the mold condition is the direct result of any

loss that would bring the claim within the basic terms of the Policy.

As with other contracts, the terms of an insurance policy define the rights and responsibilities of parties to it. N.J. Citizens United Reciprocal Exch. v. Am. Int'l Ins. Co. of N.J., 389 N.J. Super. 474, 478 (App. Div. 2006). "The interpretation of an insurance contract is a question of law for the court to determine, and can be resolved on summary judgment." Adron, Inc. v. Home Ins. Co., 292 N.J. Super. 463, 473 (App. Div. 1996). The court's standard of review regarding conclusions of law is de novo. Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 385 (2010).

"Generally, an insurance policy should be interpreted according to its plain and ordinary meaning." Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165, 175 (1992). If the plain language of the policy is clear and unambiguous, then there is no need for further inquiry, and courts often consider identical or similar language in prior cases to determine the parties' intent. Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am., 195 N.J. 231, 238 (2008). While language is "construed liberally in favor of the insured and strictly against the insurer," courts must seek to settle on a reasonable meaning consistent with the express purposes and language of the policy.

Sinopoli v. N. River Ins. Co., 244 N.J. Super. 245, 250-51 (App. Div. 1990), certif. denied, 127 N.J. 325 (1991). "[A]n insurance policy is not ambiguous merely because two conflicting interpretations have been offered by the litigants[,]" and an ambiguity may be present when the terms of a policy are too difficult for the average policyholder to understand. Simonetti v. Selective Ins. Co., 372 N.J. Super. 421, 428 (App. Div. 2004).

Here, the Policy is not ambiguous. Section I D of the Policy, entitled "Losses Not Insured[,]" states that defendant does

not provide insurance . . . for any sort of damage or loss directly or indirectly, wholly or partially, aggravated by consisting of, or resulting from the following - even if loss otherwise covered contributes to such concurrently or in any sequence.

. . . .

[11.]E. Dry or wet rot; bacterium, fungus, mildew, mold, spores, or other natural growth.

The Policy contains a limited exception to the mold damage exclusion - an endorsement entitled "Fungi/Mold Limited Coverage - Section 1[,]" which provides that

Exclusion 11.E of Section I D - Losses Not Insured . . . is amended to cover direct physical damage to covered property . . . for loss cause by fungi [mold]that:

a. Is a direct result of a covered cause of loss as described in the applicable coverage form

. . . .

Section I E, entitled "Conditions[,]" states covered causes of loss are insured for "fortuitous direct physical" damage, destruction, or loss not otherwise excluded or limited by the Policy.

Thus, the plain language of the Policy states that mold is not covered, except for mold damage that is a direct result of a covered cause of loss (e.g., "fortuitous direct physical" damage, destruction, or loss not otherwise excluded or limited by the Policy). The Policy distinguishes between mold and mold that is a consequence of a covered loss. The motion judge's interpretation of "fortuitous direct physical" damage – damage to the home's structure resulting from an irregular event such as a falling object – is consistent with the plain and ordinary meaning of the words.

We reject plaintiffs' argument that mold growth by itself was a material intrusion into the home that meets the requirement of "physical" damage. The plain language and express purpose of the Policy is to generally deny coverage for mold damage, but provide limited coverage for mold damage when resulting from some other covered cause of loss. In the absence

of a material dispute of fact that would bring the claim within the Policy, we see no reason to disturb the court's determination.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION