2023 WL 2317188
Only the Westlaw citation is currently available.

Superior Court of New Jersey, Appellate Division.

HANDY & HARMAN, Handy & Harman Electronic Materials Corp., and Steel Partners Holdings, L.P., Plaintiffs-Appellants,
v.
BEAZLEY USA SERVICES, INC. (Syndicates 623 and 2623 at Lloyd's, London), Defendant-Respondent.

DOCKET NO. A-2068-20
|
Argued January 10, 2023
|
Decided March 2, 2023

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-4555-20.

Attorneys and Law Firms

Jeffrey M. Pollock argued the cause for appellants (**Fox Rothschild** LLP, attorneys; Jeffrey M. **Pollock**, of counsel and on the briefs; Michael W. Sabo, on the briefs).

M. Keith Moskowitz (Dentons US LLP) of the Illinois, New York and Connecticut bars, admitted pro hac vice, argued the cause for respondent (Dentons US LLP and M. Keith Moskowitz, attorneys; M. Keith Moskowitz, Shawn L. Kelly, Erika M. Lopes-McLeman, and Marilyn B. Rosen (Dentons US LLP) of the Illinois bar, admitted pro hac vice, on the brief).

Before Judges Whipple, Smith, and Marczyk.

Opinion

PER CURIAM

***1** This appeal involves a dispute between an insurance company, Beazley USA Services, Inc. (Beazley), and a policyholder, Handy & Harman Electronic Materials Corp. (Handy & Harman), over the denial of a claim for indemnification in a lawsuit brought by the New Jersey Department of Environmental Protection (NJDEP) related to the industrial activities on the insured property in the 1980s.

The insured property is in Montvale. Handy & Harman [1] operated a metal etching business from March 1984 to November 1985, when it decided to sell the property. Since the metal etching business used trichloroethylene (TCE) and other dangerous chemicals, the sale agreement required certain pre-closure approved cleanup and detoxification plans as approved by NJDEP pursuant to the Environmental Cleanup Responsibility Act (ECRA), N.J.S.A 13:1K-6 to -14. [2]

When these statutory requirements are triggered, property transactions cannot proceed unless NJDEP approves a negative declaration finding remediation has been completed or is no longer necessary, or the agency approves a Cleanup Plan. N.J.S.A. 13:1K-9(b) (1989). Handy & Harman entered into an Administrative Consent Order (ACO) with NJDEP in January 1987 to implement tasks set forth under ECRA to be able to sell the property. The ACO lists the requirements under ECRA and its implementing regulations with which Handy & Harman must comply.

The ACO requires the property owner to prepare and submit a Sampling Plan to NJDEP within ninety days of its signing. It is explicit that the Sampling Plan and its implementation are an ongoing obligation. If the Sampling Plan is approved and implemented by the property owner and certain environmental contamination is discovered, NJDEP requires the property owner to create a Cleanup Plan to remediate the property. Once the Cleanup Plan is approved, the ordered party must implement the remediation provisions. If no contamination is found, then the property owner must prepare a negative declaration to be able to sell the property.

Additional conditions of consent outlined in the ACO here include:

> A. The Ordered Party[ ] shall allow NJDEP access to the subject Industrial Establishment for the purpose of undertaking all necessary monitoring and environmental cleanup activities ....
>
> B. Compliance with the terms of this ACO shall not excuse the Ordered Party[ ] from obtaining and complying with any applicable federal, state or local permits, statutes, regulations, and/or orders while carrying out the obligations imposed by ECRA through this ACO. The execution of this ACO shall not excuse the Ordered Party[ ] from compliance with all other applicable environmental

> permits, statutes, regulations, and/or orders and shall not preclude NJDEP from requiring that the Ordered Party[ ] obtain and comply with any permits, and/or orders issued by NJDEP under the authority of the Water Pollution Control Act, ... the Solid Waste Management Act, ... and the Spill Compensation and Contract Act ... for the matters covered herein....
>
> ***2** ....
>
> D. NJDEP agrees that it will not bring any action, nor will it recommend that the Attorney General's Office bring any action, including monetary penalties, for the Ordered Party['s] failure to comply with ... the time requirements ....
>
> E. No obligations imposed by this ACO ... are intended to constitute a debt, claim, penalty[,] or other civil action which could be limited or discharged in a bankruptcy proceeding. All obligations imposed by this [ACO] shall constitute continuing regulatory obligations imposed pursuant to the police power of the State of New Jersey, intended to protect the public health, safety and welfare.
>
> ....
>
> G. In the event that the Ordered Party[ ] fails to comply with any of the provisions of this ACO, the Ordered Party[ ] shall pay to NJDEP stipulated penalties in the amount of up to $5,000. at the discretion of NJDEP for each day on which the Ordered Party[ ] fails to comply with any obligation under this ACO ....

The ACO is fully enforceable in the New Jersey Superior Court and also

> may be enforced in the same manner as an Administrative Order[ ] issued by NJDEP pursuant to other statutory authority and shall not preclude NJDEP from taking whatever action it deems appropriate to enforce the environmental protection laws of the State of New Jersey. It is expressly recognized by NJDEP and the Ordered Party[ ] that nothing in this ACO shall be construed as a waiver by NJDEP of its rights with respect to enforcement of ECRA on bases other than those set forth in the ECRA Program Requirements section of this ACO or by the Ordered Party[ ] of its right to seek review of any enforcement action as provided by the Administrative Procedure Act ....

Handy & Harman submitted a Revised Sampling Plan and Cleanup Plan to NJDEP in 1990. No industrial activities have occurred at Handy & Harman's property since 1986, and in accordance with its obligations under the ACO, Handy & Harman removed contaminated soils, performed geological surveys, and installed monitoring wells to delineate contaminated groundwater on the property.

In 2017, Handy & Harman purchased an Enviro Covered Location Insurance Policy from Beazley. The Policy covered Handy & Harman from December 13, 2017, through December 13, 2020, and is the subject of this appeal.

In December 2019, NJDEP filed a complaint in the Law Division, alleging violations of the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 to -11z (Spill Act); the New Jersey Water Pollution Control Act, N.J.S.A 58:10A-1 to -35 (WPCA); and the common law, seeking reimbursement of the costs and damages the State incurred and would continue to incur as a result of the discharge of hazardous substances and pollutants at the Handy & Harman site. These damages included the losses the State incurred or would incur due to damage to any natural resource injured because of the discharge of hazardous substances and pollutants at the property. NJDEP also sought an order requiring Handy & Harman to undertake—or, alternatively, fund—any further assessment of any natural resource that may have been damaged by Handy & Harman's actions.

***3** Handy & Harman's metal etching business allegedly caused this pollution because the manufacturing process included degreasing with TCE. Spent TCE was placed into large storage drums on the property and allegedly leaked into the ground and nearby waters. The complaint alleges TCE migrated into the ground water beneath the property, resulting in contamination of the Brunswick Aquifer and the closure of municipal drinking wells, as well as the installation of filtration systems to municipal wells supplying clean drinking water for public consumption.

NJDEP asserted prayers for relief for violations of the Spill Act, public nuisance, trespass, negligence, and strict liability

doctrines, seeking reimbursement for all cleanup and removal costs and damages it has incurred, including lost value and reasonable assessment costs for any natural resource damages (NRDs). Additionally, NJDEP sought an order for what is, in essence, the disgorgement of economic benefits.

Handy & Harman notified Beazley of NJDEP's suit and sought defense and indemnification. Beazley issued a reservation of rights letter to Handy & Harman, citing the Policy's Prior or Pending Litigation Exclusion and Specified Coverage and Contamination Exclusion as potential impediments to coverage. Handy & Harman responded to Beazley's letter demanding coverage for the suit. Beazley sent another reservation of rights letter to Handy & Harman, reiterating its same position.

Handy & Harman initiated action against Beazley, asserting breach of contract and seeking declaratory relief due to the denial of coverage. Beazley moved to dismiss the complaint. On October 21, 2020, the trial court sua sponte converted the motion to dismiss into a motion for summary judgment, pursuant to Rule 4:6-2. Additionally, over Handy & Harman's initial objection, the court enforced the choice of law provision in the insurance contract, therefore applying substantive New York law to resolve the dispute. Handy & Harman opposed the motion and requested discovery. [3]

The trial court issued an order and its corresponding written opinion on February 17, 2021, granting Beazley's motion for summary judgment. Applying New York law, the trial court relied on the plain language and structure of the policy and relevant case law and found the policy exclusions invoked by Beazley to deny coverage for NRDs [4] were valid. This appeal followed.

I.

We review the trial court's denial of the motion for summary judgment de novo, applying the same legal standards that govern such summary judgment motions. Shipyard Assocs., LP v. City of Hoboken, 242 N.J. 23, 37 (2020). We consider the factual record, and reasonable inferences that can be drawn from those facts, in the light most favorable to the non-moving party to decide whether that party was entitled to judgment as a matter of law. Friedman v. Martinez, 242 N.J. 449, 471-72 (2020). We accord no special deference to a trial judge's assessment of the documentary record because it amounts to a ruling on a question of law. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

Under New York law applicable here, when an insurance company relies on an exclusion in the policy for a denial of coverage, it carries the burden of "establish[ing] that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation[ ] and applies in the particular case." Tonoga, Inc. v. N.H. Ins. Co., 201 A.D.3d 1091, 1094 (N.Y. App. Div. 2022) (quoting Broome Cnty. v. Travelers Indem. Co., 125 A.D.3d 1241, 1241-42 (N.Y. App. Div. 2015)).

***4** A court will discern the proper meaning of the policy by interpreting the policy "according to common speech and consistent with the reasonable expectations of the average insured." Cragg v. Allstate Indem. Corp., 950 N.E.2d 500, 502 (N.Y. 2011) (internal citation omitted). Provisions "must be given their plain and ordinary meaning...." Universal Am. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 37 N.E.3d 78, 80 (N.Y. 2015) (internal citations omitted).

A contract "is to be construed in accordance with the parties' intent, which is generally discerned from the four corners of the document itself." Corter-Longwell v. Juliano, 200 A.D.3d 1578, 1581 (N.Y. App. Div. 2021) (quoting MHR Cap. Partners LP v. Presstok, Inc., 912 N.E.2d 43, 47 (N.Y. 2009)). However, "[a]mbiguity in a contract arises when the contract, read as a whole, fails to disclose its purpose and the parties' intent." Universal Am. Corp., 37 N.E.3d at 80 (quoting Ellington v. EMI Music, Inc., 21 N.E.3d 1000, 1003 (N.Y. 2014)). Policies are not ambiguous simply because the parties have different interpretations of them. Ibid.

If the court finds the provision to be unambiguous, then the court uses its ordinary interpretation to adjudicate the dispute, staying within the "four corners" of the contract. See, e.g., ibid. If the court finds the provision to be ambiguous, the court "may ... consider extrinsic evidence." 25 Bay Terrace Assocs., L.P. v. Pub. Serv. Mut. Ins. Co., 194 A.D.3d 668, 670 (N.Y. App. Div. 2021) (emphasis added).

II.

To determine if the Prior or Pending Litigation Exclusion applies, the court must consider whether the damages alleged by the NJDEP suit against Handy & Harman "aris[e] out of or result[ ] from any arbitration, cause of action, [c]laim, decree,

demand, judgment, legal proceeding or litigation against" the policyholder or involving the covered property.

We conclude, based on our review, the Prior or Pending Litigation Exclusion clearly applies. First, the injuries alleged in the NJDEP suit arise from the ACO because they are based on substantially the same underlying matter. Second, the ACO is a type of "claim."

The Prior or Pending Litigation Exclusion reads:

> In consideration of the premium charged for the Policy, it is hereby understood and agreed that the coverage under this [i]nsurance does not apply to [c]leanup [c]osts, [d]amages, and [c]laims [e]xpenses arising out of or resulting from any arbitration, cause of action, [c]laim, decree, demand, judgment, legal proceeding or litigation against the [u]nderwriters or any [i]nsured or involving any [c]overed [l]ocation;
>
> 1. which took place prior to or is pending as of the [e]ffective [d]ate that the [c]overed [l]ocation was endorsed onto the [p]olicy and of which ... any [i]nsured had received notice or otherwise had knowledge of as of such date; or
>
> 2. based on substantially the same matters as alleged in the pleadings of such prior or pending [litigation] against ... any [i]nsured or involving any [c]overed [l]ocation; or
>
> 3. based upon or arising out of any act of any [i]nsured that gave rise to such prior or pending [litigation] against ... any [i]nsured or involving any [c]overed [l]ocation.

The policy defines "claim" as:

> 1. a written demand received by an [i]nsured for money or services or alleging liability or responsibility, including, but not limited to service of suit or institution of arbitration proceedings; or
>
> ***5** 2. a court or government agency order or government or regulatory action filed against the [i]nsured.

Here, the trial court found the ACO meets the second definition because "[t]here can be no dispute the ACO is a government agency order" and just because Handy & Harman might have voluntarily submitted to the ACO process, does not mean the ACO is diminished in force. Because the ACO has the force of law behind it, the ACO is "filed" within the agency. Nothing in the definition states the ACO must be filed in a court proceeding to be a claim.

Additionally, the ACO meets the first definition of "claim" because it is a written demand. A person is required to remediate a site when:

> the person has executed or is otherwise subject to a judicial or administrative order, a judicial consent judgment, an administrative consent order, a memorandum of understanding, a remediation agreement, or any other oversight document for the remediation of a contaminated site.
>
> [N.J.A.C. 7:26C-2.2 (emphasis added); see also N.J.A.C. 7:26C-1.4 (requiring that "[e]ach person who has executed or is otherwise subject to a judicial or administrative order, a judicial consent judgment, [or] an administrative consent order" comply with Chapter 26C of ISRA's implementing regulations) (emphasis added).]

Using the current statute, ISRA, as a lens into Handy & Harman's obligations under ECRA, we note that ISRA states: "All obligations imposed by this act shall constitute continuing regulatory obligations imposed by the State." N.J.S.A. 13:1K-12 (emphasis added). The ACO demands Handy & Harman undergo its "continuing regulatory obligations"—remedial activities—to correct the pollution created from its industrial activities. The fact that the sale of Handy & Harman's property cannot proceed without the completion of the remediation of the property or a negative declaration from NJDEP shows how involuntary—and in turn mandatory—the whole process was. See N.J.S.A. 13:1K-9(b).

We conclude this is a demand—not simply a request—because Handy & Harman face significant penalties if it does not comply with its provisions. For instance, the ACO stated:

> In the event that the [o]rdered [p]arty[ ] fails to comply with any of the provisions of this ACO, the [o]rdered [p]arty[ ] shall pay to NJDEP stipulated penalties in the amount of up to $5,000. at the discretion of NJDEP for each day on which the [o]rdered [p]arty[ ] fails to comply with any obligation under this ACO....

Relatedly, N.J.S.A. 13:1K-13 says:

> Failure of the transferor to perform a remediation and obtain department approval thereof as required pursuant to the provisions of this act is grounds for voiding the sale or transfer of an industrial establishment ... and renders the owner or operator of the industrial establishment strictly liable, without regard to fault, for all remediation costs and for all direct and indirect damages resulting from the failure to implement the remedial action workplan.
>
> [(Emphasis added).]

Likewise, chapter 26C, subchapter 9 of ISRA's implementing regulations, titled "Enforcement," says:

> Each violation of an administrative order, an administrative consent order, a remediation agreement, a rule, or a remedial action permit constitutes an additional, separate, and distinct offense, and each penalty payment constitutes a payment of civil or civil administrative penalties pursuant to the [Spill Act].
>
> ***6** [N.J.A.C. 7:26C-9.2(a) (emphasis added).]

Additionally, "both owner and operator [of the property] are strictly liable without regard to fault, for compliance with ISRA and this chapter." N.J.A.C. 7:26B-1.10.

The obligations already existed and the ACO served as affirmative acknowledgement by Handy & Harman it knew of and would complete its statutorily mandated obligations and potential penalties—analogous to being served with a lawsuit. Thus, under both of the policy's definitions, the 1986 ACO is a claim.

The second element of the Prior or Pending Litigation Exclusion is whether the NJDEP suit against Handy & Harman (1) "aris[es] out of or result[s] from" the ACO; (2) is "based on substantially the same matters as alleged in the pleadings" of the ACO; or (3) is "based upon or aris[es] out of any act of [Handy & Harman] that gave rise to" the ACO.

The trial court found the NJDEP suit is "based on substantially the same matters as alleged in the pleadings" of the ACO and found the "matters" to be "the very same pollution alleged to have caused NRD." It also found the difference in damages sought by the NJDEP suit and the ACO does not affect the interpretation of this exclusion. We agree.

Because the NJDEP suit is based upon Handy & Harman's business and environmental contamination, which is what the ACO—a legally enforceable, remedy-demanding claim—was also based on, the Prior or Pending Litigation Exclusion applies, and Beazley does not have to indemnify Handy & Harman for any NRDs they might have to pay as a result of the NJDEP suit.

III.

The Specified Coverage and Contamination Exclusion provides:

> In consideration of the premium charged for the policy, it is hereby understood and agreed that the coverage under the Insuring Clause(s) I.B. of this insurance does not apply to [c]leanup [c]osts arising out of or resulting from the Pollution Conditions listed below, including any breakdown, daughter, co-products, or derivative products of such Pollution Conditions where such Pollution Conditions are on, at, under, or migrating from the Covered Location[.]

The Policy goes on to specify the "Pollution Conditions" are "[a]ll Pollution Conditions associated with the ECRA/ISRA investigation/remediation."

Handy & Harman argues the NRDs sought by NJDEP in its suit are covered by Beazley and are not barred by the Specified Coverage and Contamination Exclusion because NRDs and cleanup costs are distinct—as evidenced by their different definitions and subcategories in the Policy.

This issue was raised in the initial motion, and the trial judge discussed the parties' arguments in her written decision. However, she did not make any findings about whether NRDs are excluded by the Specified Coverage and Contamination Exclusion because she concluded the current claim for NRD is barred by the Prior or Pending Litigation Exclusion. We agree with her determination.

Affirmed.

All Citations

Not Reported in Atl. Rptr., 2023 WL 2317188

Footnotes

1 For simplicity, we refer to the three related plaintiffs together as Handy & Harman.

2 In 1993, the Legislature replaced ECRA with the Industrial Site Recovery Act (ISRA), N.J.S.A. 13:1K-6 to -14.

3 Neither party appeals the application of New York substantive law in the case, and their briefs freely cite to New York law on the substantive issues.

4 Handy & Harman had already conceded that cleanup costs are subject to the Specified Coverage and Contamination Exclusion.