97 Mass.App.Ct. 1118
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).
Appeals Court of Massachusetts.

PHOENIX BAYSTATE CONSTRUCTION, CO., INC.
v.
FIRST FINANCIAL INSURANCE COMPANY & Another. [1]

[1] Lanco Scaffolding, Inc., as a necessary party. As is our practice, we take the parties' names from the complaint.

19-P-743
|
Entered: May 18, 2020.

By the Court (Milkey, Lemire & McDonough, JJ. [2])

[2] The panelists are listed in order of seniority.

MEMORANDUM AND ORDER
PURSUANT TO RULE 1:28

***1** This appeal concerns a commercial general liability insurance policy (policy) that First Financial Insurance Company (FFIC) issued to Lanco Scaffolding (Lanco), which was doing subcontract work for Phoenix Baystate Construction, Co., Inc. (Phoenix). The sole issue on appeal is whether the terms of the policy required FFIC to defend Phoenix, as an additional insured, in a negligence action brought by a Lanco employee against Phoenix for workplace injuries. [3] We conclude that FFIC had no duty to defend Phoenix under the terms of the policy.

[3] A judge of the Superior Court resolved this issue in Phoenix's favor on cross motions for summary judgment. While other claims remained pending in the Superior Court, the judge reported his interlocutory summary judgment order pursuant to Mass. R. Civ. P. 64 (a), as amended, 423 Mass. 1403 (1996). Given that the decision to report is "highly discretionary," McMenimen v. Passatempo, 452 Mas. 178, 189 (2008), we will not second guess the judge's decision to report in the circumstances of this case.

Background. Lanco was a subcontractor for Phoenix on a construction project in Chestnut Hill. Lanco's subcontract agreement with Phoenix required it to purchase and maintain commercial general liability coverage and to "cause [that coverage] to include ... [Phoenix] ... as [an] additional insured on a primary and non-contributory basis for claims caused in whole or in part by [Lanco's] negligent acts or omissions." The policy accomplished just that, by providing that Phoenix was an additional insured with respect to liability for bodily injury caused by "[Lanco's] acts or omissions" or by "[t]he acts or omissions of those acting on [Lanco's] behalf."

In September 2017, Francisco Perlera, an employee of Lanco, brought a negligence action against Phoenix. As alleged in his complaint, Perlera was assisting with the dismantling of scaffolding on the construction project in Chestnut Hill. The scaffolding did not have any guardrails, and Perlera was not provided with any fall protection. While handing down a metal beam, Perlera lost his balance and fell from the scaffolding. [4]

[4] While FFIC argues that these allegations are not reasonably susceptible of an interpretation that Lanco or someone acting on Lanco's behalf caused Perlera's injuries, we need not address this argument.

FFIC declined to defend Phoenix in Perlera's underlying action based in part on the policy's cross liability exclusion. The cross liability exclusion bars coverage for bodily injury to, among others, an "employee of any insured" (emphasis added). FFIC argues, and Phoenix does not dispute, that if we were to read the cross liability exclusion in isolation, FFIC

would have no duty to defend Phoenix in the Perlera action since Perlera was an employee of another insured, Lanco.

The primary argument on appeal, however, and the only one we need address, concerns the interplay between the cross liability exclusion and a separation of insureds clause. The separation of insureds clause provides as follows:

> ***2** "Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:
>
> "a. As if each Named Insured were the only Named Insured; and
>
> "b. Separately to each insured against whom claim is made or 'suit' is brought."

Phoenix argues that the separation of insureds clause is inconsistent with the cross liability exclusion, as the separation of insureds clause requires that each insured be treated as having its own insurance policy. If we treat Phoenix in this manner, Phoenix argues, the reference to "any insured" in the cross liability exclusion is at least ambiguous and should be construed in Phoenix's favor to mean Phoenix only. Because Perlera was not an employee of Phoenix, Phoenix concludes that there is no basis in the cross liability exclusion for FFIC to decline to defend Phoenix in the Perlera action.

Discussion. "The issue at bar is one well-suited for summary judgment, since the interpretation of an insurance contract is a question of law for the court" (quotation omitted). Cable Mills, LLC v. Coakley Pierpan Dolan & Collins Ins. Agency, Inc., 82 Mass. App. Ct. 415, 418 (2012). We construe an insurance contract "according to the fair and reasonable meaning of the words in which the agreement of the parties is expressed" (quotation omitted). Id. We enforce an insurance contract "whose provisions are plainly and definitely expressed in appropriate language ... in accordance with its terms" (quotation omitted), but we construe any ambiguities in favor of the insured. Cody v. Connecticut Gen. Life Ins. Co., 387 Mass. 142, 146 (1982).

The language at issue has been interpreted across the country. The majority view is that there is a crucial distinction between the phrases "any insured" and "the insured" in determining the import of a severability of interests clause such as the separation of insureds clause. See J&J Holdings, Inc. v. Great Am. E&S Ins. Co. 420 F. Supp. 3d 998, 1011-1012 (C.D. Cal. 2019); Travelers Home & Marine Ins. Co. v. Stahley, 239 F. Supp. 3d 866, 875 n.60 (E.D. Pa. 2017); Archer Daniels Midland Co. v. Burlington Ins. Co. Group, 785 F. Supp. 2d 722, 733 (N.D. Ill. 2011); Nautilus Ins. Co. v. K. Smith Bldrs, Ltd., 725 F. Supp. 2d 1219, 1229 (D. Haw. 2010); Standard Fire Ins. Co. v. Proctor, 286 F. Supp. 2d 567, 574 (D. Md. 2003). For exclusions that pertain to "any insured," severability of interests clauses have no effect, and the plain meaning of "any" applies. See, e.g., J&J Holdings, Inc., 420 F. Supp. 3d at 1011-1012. For exclusions that pertain to "the insured," severability of interests clauses make clear that "the insured" refers only to the insured who is actually seeking coverage. See, e.g., id. [5]

[5] While not addressing the distinction between "any insured" and "the insured," Ratner v. Canadian Universal Ins. Co., 359 Mass. 375, 380-381 (1971), and Lumberman's Mut. Cas. Co. v. Hanover Ins. Co., 38 Mass. App. Ct. 53, 57 (1995), both hold that severability of interests clauses would be rendered meaningless if exclusions that pertained to "the insured" also pertained to insureds who were not actually seeking coverage.

***3** The Supreme Judicial Court recently drew a similar distinction in Aquino v. United Prop. & Cas. Co., 483 Mass. 820 (2020). In that case, two tenants in common were coinsureds on a homeowners' insurance policy. Id. at 821. One insured intentionally set fire to the home without the involvement of the other insured. Id. The Supreme Judicial Court concluded that the coinsureds' homeowners insurance policy, which excluded coverage for intentional acts by "an insured," conflicted with the mandatory minimum coverages set forth in G. L. c. 175, § 99, which permit an exclusion for intentional acts by "the insured." Id. at 827-829. As the Supreme Judicial Court noted, "The distinction in the use of the words 'an insured' and 'the insured,' although subtle on its face, is not without difference, and has been extensively analyzed by numerous courts and scholars, who have concluded that an intentional loss exclusion referencing 'the insured' offers more protection than an exclusion referencing 'an insured' or 'any insured.' " Id. at 827.

The distinction between the two phrases "any insured" and "the insured" is especially important in the context of this case, where the policy sometimes uses one phrase and sometimes uses the other. [6] Pursuant to the general principle of contract interpretation, we must presume that every word has "been employed with a purpose" and give every

word "meaning and effect whenever practicable" (quotations omitted). Boston Gas Co. v. Century Indem. Co., 454 Mass. 337, 355 (2009). Applying this principle, if some exclusions refer to "any insured," while others refer to "the insured," there must be a difference between those two phrases. Based on the foregoing, and giving effect to the policy as a whole, we conclude that the policy's reference to "any insured" in the cross liability exclusion unambiguously includes Lanco in addition to Phoenix.

6 We note, for example, that a different exclusion for employer's liability creates an exclusion for bodily injury to "[a]n 'employee' of the insured arising out and in the course of ... [e]mployment by the insured."

Phoenix places much reliance on Worcester Mut. Ins. Co. v. Marnell, 398 Mass. 240 (1986), but it is not to the contrary. Marnell involved parents who were sued for negligent supervision after their son, another insured, became intoxicated at their house, left in a motor vehicle that he owned, and fatally struck a third party. Id. at 241. The parents sought coverage under their homeowners' insurance policy, which included a severability of interests clause and an exclusion for bodily injury arising out of the use of "a motor vehicle owned or operated by ... any insured." Id. at 242. In concluding that the phrase "any insured" as used in the motor vehicle exclusion referred only to anyone actually seeking coverage, the Supreme Judicial Court noted that the negligent supervision claim against the parents was more closely related to the risks associated with their house, which a homeowners' insurance policy is designed to protect against, than to the risks associated with a motor vehicle, which a homeowners insurance policy is not designed to protect against. Id. at 245. See Hingham Mut. Fire Ins. Co. v. Smith, 69 Mass. App. Ct. 1, 8 (2007) ("result in Marnell turned on the allocation of risks between homeowner's coverage and automobile liability insurance"). In other words, the fact that the motor vehicle exclusion did not appear designed to bar coverage for the type of claim at issue was thus essential to the Supreme Judicial Court's conclusion in Marnell. [7]

7 After Marnell, however, some companies responded by including additional language in their motor vehicle exclusions. See First Specialty Ins. Corp. v. Pilgrim Ins. Co., 83 Mass. App. Ct. 812, 818 (2013). The additional language still referenced a motor vehicle "owned or operated ... by any insured." Id. at 814 n.3. Yet, First Specialty Ins. Corp. holds that the additional language made clear, despite a severability of interests clause, that the motor vehicle exclusion applied to bodily injury arising out of the use of a motor vehicle owned or operated any insured, regardless of who was actually seeking coverage.

***4** Unlike in Marnell, the purpose of the cross liability exclusion is to bar coverage for the precise type of claim at issue here. "A cross liability exclusion ... bars coverage for claims brought by one insured against another insured." Archer Daniels Midland Co., 785 F. Supp. 2d at 735. There would thus be "no logical reason why [a severability of interests clause] would operate to limit application of an exclusion whose very purpose is to prevent one insured (or its employee) from suing another insured (or its employee)." Id.

The report is discharged; the amended summary judgment order entered January 23, 2019, is reversed; the amended order on cross motions for summary judgment entered February 7, 2019, is reversed; and the case is remanded to the Superior Court for entry of a new order declaring that FFIC has no duty to defend or indemnify Phoenix for claims asserted in or arising from the action entitled Francisco Perlera vs. Phoenix Bay State Construction, Co., Inc., Suffolk Superior Court C.A. No. 17-3008-G.

So ordered.

Reversed and remanded

All Citations

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