NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1649-14T1

GLENN FOERSTER and
DONNA FOERSTER, husband
and wife,

Plaintiffs,

v.

MECKEL ENTERPRISES, LLC,

Defendant-Appellant,

and

ARBOR ASSOCIATES INC.,

Defendant,

and

MECKEL ENTERPRISES, LLC

Defendant/Third-Party
Plaintiff-Appellant,

v.

PENN NATIONAL INSURANCE,

Third-Party Defendant-
Respondent,

and

ROBERT S. FOERSTER OPTICIAN,
INC. and BARRETTA PLUMBING
HEATING AND COOLING,

Third Party Defendants.

Argued February 23, 2016 – Decided October 12, 2016

Before Judges Fisher, Espinosa and Rothstadt.

On appeal from Superior Court of New Jersey, Law Division, Atlantic County, Docket No. L-4606-12.

Jon Robinson argued the cause for appellant (Law Offices of Terkowitz & Hermesmann, attorneys; Mr. Robinson, on the briefs).

Robert M. Kaplan argued the cause for respondent (Margolis Edelstein, attorneys; Mr. Kaplan, on the brief).

The opinion of the court was delivered by

ESPINOSA, J.A.D.

The issue in this appeal is which of two competing "other-insurance" clauses in policies issued by two primary insurers provides coverage for plaintiff's damages. For the reasons set forth herein, we affirm the order granting summary judgment.

I.

Plaintiff Glenn Foerster[1] was injured when he slipped and fell on water on the bathroom floor of the commercial space Robert S. Foerster Optician, Inc. (RFO) rented from defendants/third-party plaintiffs-appellants Meckel Enterprises, LLC and Ann Arbor Associates Inc. (collectively Meckel). Foerster filed a complaint

[1] Foerster's wife, Donna Foerster, is also a plaintiff in this matter.

against Meckel, alleging he informed Meckel that water was leaking from the ceiling in the bathroom, and Meckel's failure to properly repair the leak created an unreasonably dangerous condition.

The lease agreement between RFO and Meckel provided: "Tenant shall, at all time during this Lease and at the Tenant's sole expense, provide General Liability Insurance in amounts not less than $1,000,000 Combined Single Limit, or $1,000,000 for Bodily Injury and $1,000,000 Property Damage, per occurrence and aggregate." The lease also required RFO to name "Meckel Enterprises, LLC," as an additional insured.

RFO complied with these requirements, maintaining a Businessowners Policy with third-party defendant Penn National Insurance (Penn National), and listing Meckel as an additional insured. RFO's Penn National policy included both first-party property coverage, and third-party liability coverage. Penn National's other-insurance provisions included the following:

> [H.]1. If there is other insurance covering the same loss or damage, we will pay only for the amount of covered loss or damage in excess of the amount due from that other insurance, whether you can collect on it or not. But we will not pay more than the applicable Limit of Insurance.
>
> [H.]2. Business Liability Coverage is excess over any other insurance that insures for direct physical loss or damage.
>
> [(Emphasis added).]

Meckel maintained its own Businessowners Policy with Citizens Insurance Company of America (Citizens).[2] The Citizens policy also contained both first-party property coverage, and third-party liability coverage. In the liability sub-section of the "Other Insurance" clause in its Common Policy Conditions, Citizens provided:

> This insurance is excess over:
>
> 2) Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured by attachment of an endorsement.
>
> . . . .
>
> c. When this insurance is excess over other insurance, we will pay only our share of the amount of the loss if any, that exceeds the sum of:
>
> 1) The total amount that all such other insurance would pay for the loss in the absence of this insurance;
>
> . . . .
>
> e. Method of Sharing
>
> . . . .
>
> If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total

[2] Citizens was never a party to this action.

> applicable limits of insurance of all insurers.
>
> [(Emphasis added).]

Meckel moved for summary judgment on the ground Penn National's other-insurance clause was inapplicable and Citizens' applied, rendering Citizens the excess policy. Penn National cross-moved for summary judgment, arguing its excess other-insurance clause invalidated Citizens pro-rata other-insurance clause. Meckel appeals from the trial court's grant of Penn National's cross-motion for summary judgment, and the denial of its motion for summary judgment.

II.

Meckel argues the trial court erred in finding Penn National was the excess carrier. It contends that Paragraph H.1 of Penn National's other-insurance clause does not apply to Meckel's third-party business liability coverage claim because plaintiff's claims were for bodily injury and not "direct physical loss or damage." Meckel argues that, as a result, Paragraph H.2 of Penn National's policy is not triggered to render that policy excess. Penn National counters that all coverage under its policy is subject to the other-insurance provision in Paragraph H.1. As a

result, it contends the Penn National Policy is excess and no duty to defend was triggered here.[3]

III.

The interpretation of insurance contracts entails a question of law. Sealed Air Corp. v. Royal Indem. Co., 404 N.J. Super. 363, 375 (App. Div.), certif. denied, 196 N.J. 601 (2008). Therefore, in reviewing the order granting summary judgment here, we conduct a de novo review. Kieffer v. Best Buy, 205 N.J. 213, 222 (2011); Zabilowicz v. Kelsey, 200 N.J. 507, 512-13 (2009).

The parties agree that Meckel's claim for liability coverage is covered under both the Citizens and Penn National policies. When two policies that provide coverage each have a clause declaring the policy is excess over any other policy, the provisions are "mutually repugnant" and are disregarded. W9/PHC Real Estate LP v. Farm Family Cas. Ins. Co., 407 N.J. Super. 177, 199 (App. Div. 2009) (citation omitted). The result is that "the carriers stand on equal footing, with each sharing payment of liability equally until the limit of the smaller policy is exhausted." Ibid. (citing Universal Underwriters Ins. Co. v. CNA Ins. Co., 308 N.J. Super. 415, 418-19 (App. Div. 1998)).

[3] The policies have comparable provisions regarding the duty to defend in their other insurance clauses.

Our inquiry goes further, however. We then examine "the 'Other-Insurance' clause of each policy to determine whether there exists language which may govern the contribution each party should make. . . ." Universal Underwriters, supra, 308 N.J. Super. at 417.

We first address Meckel's contention that Paragraph H.1 of Penn National's other-insurance clause does not apply to Meckel's third-party business liability coverage claim because plaintiff's claims were for bodily injury and not "direct physical loss or damage." Meckel argues that, as a result, Paragraph H.2 of Penn National's policy is not triggered to render that policy excess. In effect, Meckel argues that Paragraph H.2 of the Penn National policy limits the other-insurance clause, making the policy excess only as to claims for "direct physical loss or damage." We are not persuaded by this argument. Paragraph H.1 plainly states that excess coverage is triggered when there is "other insurance covering the same loss or damage."

"Other insurance clauses generally fall into three categories: pro rata, excess and escape." W9/PHC, supra, 407 N.J. Super. at 197. The other-insurance clause in the Citizens policy calls for a pro rata allocation of insurance obligations when there is "[a]ny other primary insurance available . . . covering liability for damages arising out of the premises or

operations. . . ." The policy also defines the method of sharing. When, as here, the other-insurance does not permit contribution by equal shares, the Citizens policy states it will "contribute by limits" with "each insurer's share . . . based on the ratio of its applicable limit or insurance to the total applicable limits of insurance of all insurers."

In contrast, an excess other-insurance clause does not establish a sharing of obligations; it "seeks to make an otherwise primary policy excess insurance should another primary policy cover the loss in issue." W9/PHC, supra, 407 N.J. Super. at 197. The Penn National policy falls within this category.

In W9/PHC, we reviewed the split in authority regarding how insurance obligations should be allocated when policies providing primary coverage for a loss also contain competing other-insurance clauses. We described the reasoning underlying the majority rule:

> [T]he policy containing the pro rata clause is valid and collectible primary insurance that triggers application of the excess clause in the second policy. The excess clause in the second policy therefore is given full effect and that carrier is only liable for the loss after the primary insurer has paid up to its policy limits. The policy containing the excess clause, however, is not considered to be other valid and collectible primary insurance for the purpose of triggering the operation of the pro rata clause, because when a stated contingency occurs, that is, when there is other valid and collectible primary insurance available to the insured, the policy

> containing the excess clause becomes secondary coverage only.
>
> [Id. at 201 (quoting Jones v. Medox, Inc., 430 A.2d 488, 491 (D.C. 1981)).]

We adopted the majority rule, noting that it "recognizes and considers the language in both policies" and that with this approach, "[n]either insurance company is getting 'stuck' for anything more that it contracted to provide for its insured." Id. at 202 (citations omitted). Stated simply, "where one policy has an excess other-insurance clause and another policy on the same risk does not, the former policy will not come into effect until the limits of the latter policy are exhausted." Id. at 197 (citation omitted).

Applying that rule here, because the Penn National policy contains an excess other-insurance clause and the other-insurance provision in the Citizens policy provides for pro-rata sharing of the insurance obligation, the Penn National policy does not come into effect until the Citizens policy limits are exhausted. Therefore, we agree that summary judgment was properly granted.

Affirmed.