FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D20-916

CAROLINA CASUALTY INSURANCE COMPANY,

Appellant,

v.

JOHN D. SPICER, as Chapter 7 Trustee for the Bankruptcy Estate of Primcogent Solutions, LLC,

Appellee.

On appeal from the Circuit Court for Duval County.
Adrian G. Soud, Judge.

June 29, 2021

RAY, C.J.

Carolina Casualty Insurance Company ("Carolina Casualty") appeals a final order granting partial summary judgment to John D. Spicer (the "Trustee"), as Chapter 7 Trustee for the Bankruptcy Estate of Primcogent Solutions, LLC ("Primcogent"). The Trustee sued Carolina Casualty to recover an arbitration award it obtained against Santa Barbara Medical Innovations, LLC ("SBMI"). Carolina Casualty had issued a management liability insurance policy to SBMI, but it refused to satisfy the arbitration award. The Trustee asserted a claim for breach of contract that is the subject

of this appeal, as well as claims of bad faith and fraudulent transfers that remain pending in the trial court. The court found that the arbitration award is a covered claim under the policy and is not subject to any of the policy exclusions raised by Carolina Casualty. We affirm the trial court's order and write only to address Carolina Casualty's argument that the breach of contract exclusion applies to bar coverage for the underlying arbitration award against SBMI.

I.

This case began in Texas as a business dispute between Primcogent and SBMI. Primcogent is the exclusive North American distributor of medical equipment manufactured by Erchonia Corporation ("Erchonia"), another Texas-based corporation. SBMI was Erchonia's prior exclusive distributor until it breached its agreement with Erchonia and was unable to satisfy its purchase commitments due to increasing customer problems with the equipment. Primcogent then bought those distribution rights from SBMI under an Asset Purchase Agreement ("APA"). During negotiations leading to that acquisition, SBMI and Erchonia misled Primcogent about the medical equipment's revenue-generating potential.

About two years later, Primcogent was forced to file for bankruptcy to reorganize its business. Primcogent then sued SBMI in bankruptcy court alleging it was fraudulently induced into purchasing SBMI's distribution rights. Erchonia was later added as a defendant and all parties agreed to arbitrate their claims. The Trustee was appointed to Primcogent's bankruptcy estate and filed a demand for arbitration asserting several claims, including one for negligent misrepresentation against SBMI.

The Texas arbitration panel ruled in favor of the Trustee on its claim for negligent misrepresentation. It determined that claim is "a separate commercial tort claim because Primcogent suffered an independent economic injury from any breach of contract claim it could have asserted against SBMI," and "SBMI failed to establish its 'economic loss rule' limitation of damages defense." The panel found that SBMI misled Primcogent before the APA was executed, Primcogent relied on those misstatements or

misrepresentations, and they were important to Primcogent's decision to consummate the transaction. The panel awarded the Trustee $18,301,260.00 as out-of-pocket losses Primcogent incurred for expenditures it made toward execution of the APA, with a credit of $1,200,000 for its settlement with Erchonia. A federal court in Texas ultimately confirmed the arbitration award. *Erchonia Corp. v. Spicer*, No. 4:13-CV-428-Y, 2018 WL 10447066 (N.D. Tex. January 30, 2018), *aff'd*, 757 F. App'x 387 (5th Cir. 2019).

Florida-based Carolina Casualty had issued a management liability policy to SBMI. Relevant to this appeal, the policy has a breach of contract exclusion clause that states the insurer shall not be liable to pay for a loss in connection with a claim made against any insured that is based on a breach of contract. Specifically, one that is:

> based upon, arising out of, directly or indirectly resulting from or in consequence of, or in any way involving any actual or alleged breach of any oral or written contract or agreement; provided, however, this exclusion shall not apply with respect to Insuring Agreements 1.A. and 1.B. of this Coverage Section or to the extent that an Insured Entity would have been liable in the absence of the contract or agreement.

Despite several attempts by the Trustee to collect its arbitration award, Carolina Casualty denied coverage.

The Trustee then sued Carolina Casualty for failing to honor its policy and pay the arbitration award on behalf of SBMI. As a third-party beneficiary of the policy and a party holding a judgment against one of Carolina Casualty's insureds, the Trustee asserted a claim for breach of contract. The Trustee moved for partial summary judgment on that count, and Carolina Casualty moved for final summary judgment on all counts. Relevant for our discussion, Carolina Casualty argued that the award was not a covered loss because it fell under the breach of contract exclusion.

After several hearings on both motions, the trial court granted the Trustee's motion and denied Carolina Casualty's motion. It

found that the breach of contract exclusion did not apply because the exclusion is limited to losses arising out of or involving a *breach* of contract rather than those arising out of or involving any contract or agreement. Also, the Texas arbitration panel had concluded that the Trustee's negligent misrepresentation claim against SBMI was for pre-contract statements or representations that fraudulently induced Primcogent to enter into the APA. Thus, the Trustee's claim sounded in tort, not contract, and was based on a duty independent of any contractual obligation or duty. This appeal followed.

II.

Both parties agree there is no genuine issue as to any material fact. "Assuming the facts are not in dispute—and in this case they are not—an order on a motion for summary judgment is subject to the de novo standard of review." *Chase Bank of Tex. Nat'l Ass'n v. State, Dep't of Ins.*, 860 So. 2d 472, 475 (Fla. 1st DCA 2003). "A summary judgment is appropriate where the material facts are not in dispute and the judgment is based on the legal construction of documents." *Ball v. Fla. Podiatrist Tr.*, 620 So. 2d 1018, 1022 (Fla. 1st DCA 1993). Both parties also agree that Texas law governs the interpretation of the insurance policy.

"An insurance policy is a contract, generally governed by the same rules of construction as all other contracts." *RSUI Indem. Co. v. The Lynd Co.*, 466 S.W.3d 113, 118 (Tex. 2015). Policy terms must be interpreted according to their plain and ordinary language where the language is plain and unambiguous. *Id.* "We examine the entire agreement and seek to harmonize and give effect to all provisions so that none will be meaningless." *Gilbert Tex. Const., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 126 (Tex. 2010). "Exceptions or limitations on liability are strictly construed against the insurer and in favor of the insured." *Evanston Ins. Co. v. ATOFINA Petrochemicals, Inc.,* 256 S.W.3d 660, 668 (Tex. 2008) (quoting *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Hudson Energy Co., Inc.*, 811 S.W.2d 552, 555 (Tex. 1991)). "[I]f a contract of insurance is susceptible of more than one reasonable interpretation, we must resolve the uncertainty by adopting the construction that most favors the insured." *Nat'l Union Fire Ins. Co.*, 811 S.W.2d at 555 (Tex. 1991). "The court must adopt the

construction of an exclusionary clause urged by the insured as long as that construction is not unreasonable, even if the construction urged by the insurer appears to be more reasonable or a more accurate reflection of the parties' intent." *Id.* (citing *Glover v. Nat'l Ins. Underwriters*, 545 S.W.2d 755, 761 (Tex. 1977); *Cont'l Cas. Co. v. Warren*, 254 S.W.2d 762, 763 (Tex. 1953)).

"The insured has the initial burden to establish coverage under the policy. If it does so, then to avoid liability the insurer must prove one of the policy's exclusions applies. If the insurer proves that an exclusion applies, the burden shifts back to the insured to establish that an exception to the exclusion restores coverage." *Ewing Const. Co., Inc. v. Amerisure Ins. Co.*, 420 S.W.3d 30, 33 (Tex. 2014) (citations omitted). And while the duty to defend is determined according to only the pleadings and policy language, "the insurer's duty to indemnify is determined based on the facts actually established in the underlying suit." *Burlington N. & Santa Fe Ry. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.,* 334 S.W.3d 217, 219 (Tex. 2011).

In this case, the trial court properly concluded that the plain and unambiguous language of the exclusion in the policy applies only to losses arising out of or involving a *breach* of the contract or agreement. Carolina Casualty's interpretation is unreasonable because it renders the term "breach" meaningless and attempts to apply the exclusion to claims that arise from or merely involve a contract. By contrast, the Trustee's interpretation gives effect to each term and all provisions in the exclusion. The second clause states that "this exclusion shall not apply . . . to the extent that an Insured Entity would have been liable in the absence of the contract or agreement." The arbitration panel determined that the Trustee's negligent misrepresentation claim arose during negotiations and was separate from any breach of contract claim. The claim did not arise from or relate to SBMI's duties under the APA; it arose from misrepresentations SBMI told Primcogent before the APA existed and for the very purpose of inducing Primcogent to enter into an agreement. *See Sw. Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 494 (Tex. 1991) ("If the defendant's conduct . . . would give rise to liability independent of the fact that a contract exists between the parties, the plaintiff's claim may also sound in tort. Conversely, if the defendant's conduct . . . would give

rise to liability only because it breaches the parties' agreement, the plaintiff's claim ordinarily sounds only in contract."). The APA did not cause the negligent misrepresentation claim, it only provided the context in which the deception took place. *See Admiral Ins. Co., Inc. v. Briggs*, 264 F. Supp. 2d 460, 463 (N.D. Tex. 2003) (concluding that a management liability insurance policy's contract exclusion clause did not apply because the alleged harm—misleading the other party to accept the insured's stock instead of cash for payment by misrepresenting the future success of the insured's business—occurred before the contract was executed). Thus, even assuming the exclusion did apply, the exception to that exclusion would restore coverage.

In addition, by rejecting SBMI's defense asserting the economic loss rule, the arbitration panel specifically rejected its argument that the Trustee's claim sounded in contract. *See Med. City Dallas, Ltd. v. Carlisle Corp.*, 251 S.W.3d 55, 61 (Tex. 2008) (reaffirming that the economic loss rule bars recovery for damages when the action sounds in contract); *see also Sterling Chems., Inc. v. Texaco Inc.*, 259 S.W.3d 793, 797 (Tex. App. 2007) ("Under the economic loss rule, a plaintiff may not bring a claim for negligent misrepresentation unless the plaintiff can establish that he suffered an injury that is distinct, separate, and independent from the economic losses recoverable under a breach of contract claim."). Because the Trustee's claim sounds in tort rather than contract, the breach of contract exclusion cannot apply.

Lastly, Carolina Casualty relies on the arbitration panel's references to SBMI's false or affirmative representations in sections of the APA to argue that "by necessary implication" the final award was, in fact, causally related to SBMI's breach of the APA. But those sections of the APA memorialize or describe representations that SBMI made during negotiations *before* the APA was executed; the APA formally reduced them to writing. The arbitration panel's citation to those sections does not transform the Trustee's claims into an award for breach of contract, and the trial court properly granted the Trustee's motion for partial summary judgment. *See Gore v. Scotland Golf, Inc.*, 136 S.W.3d 26, 32–33 (Tex. App. 2003) (holding that false statements or representations about a business's assets and its customer relations made during negotiations to induce an agreement were actionable in tort even

though they were subsumed in the terms of the asset purchase agreement).

AFFIRMED.

LEWIS and OSTERHAUS, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

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