NADIA DAVIS, Plaintiff,

v.

1982 SPRINGFIELD AVENUE, LLC, Defendant, and

1982 SPRINGFIELD AVENUE, LLC, Third-Party Plaintiff-Respondent,

v.

FARMERS MUTUAL FIRE INSURANCE CO. OF SALEM COUNTY, Third-Party Defendant-Appellant/Cross-Respondent, and

PATRICIA WESTON RIVERA, Third-Party Defendant-Respondent/Cross-Appellant.

No. A-6206-10T3.

Superior Court of New Jersey, Appellate Division.

Argued October 22, 2012.
Decided November 15, 2012.

Marc L. Dembling argued the cause for appellant/cross-respondent (**Methfessel** & **Werbel**, attorneys; Mr. Dembling and Marissa A. Keddis, on the brief).

Ronald M. Gutwirth argued the cause for respondent/cross-appellant.

Before Judges Sabatino, Fasciale and Maven.

NOT FOR PUBLICATION

PER CURIAM.

Farmers Mutual Fire Insurance Company of Salem County (Farmers Mutual) appeals from three orders dated July 22, 2011 (1) permitting defendant Patricia Weston Rivera (Rivera or tenant) to amend her answer and assert cross-claims against Farmers Mutual; (2) granting Rivera's motion for summary judgment on her cross-claims against Farmers Mutual; and (3) compelling Farmers Mutual to pay Rivera's attorney's fees, half of the attorney's fees incurred by Travelers Casualty Insurance Company of America (Travelers),[1] and half of a settlement reached by Nadia Davis (Davis).[2] Rivera cross-appeals from that part of one of the orders requiring her to indemnify 1982 Springfield.[3] We affirm in part and reverse in part on the appeal, and reverse on the cross-appeal.

In reviewing a grant of summary judgment, we apply the same standard under Rule 4:46-2(c) that governs the trial court. See Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007). We must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). Viewed most favorably to plaintiff, the summary judgment record established the following facts.

Rivera, an attorney, entered into a lease (the lease) to rent office space in a commercial building that 1982 Springfield owned.[4] Rivera purchased a comprehensive general liability policy (the policy) from Farmers Mutual and obtained $300,000 in coverage. In February 2008, Davis visited Rivera's law office, slipped on an ice-covered platform in the parking lot, and sustained injuries. 1982 Springfield maintained exclusive control over the location of the fall.[5]

Among other things, the lease required Rivera to indemnify 1982 Springfield against general losses and to obtain insurance "in the joint name of [Rivera] and [1982 Springfield]." Rivera, however, failed to obtain insurance for 1982 Springfield. The policy Rivera procured from Farmers Mutual excluded damages resulting from contractual indemnification.

In February 2009, Davis filed her personal injury complaint against 1982 Springfield (the personal injury case), seeking compensation for injuries she sustained in the fall. 1982 Springfield tendered the defense of the personal injury case to Farmers

Mutual, contending that Rivera was obligated to indemnify it and name it as an insured on the policy. Farmers Mutual declined to defend 1982 Springfield because it was not an insured on the policy and also because it maintained that Rivera was not obligated to indemnify 1982 Springfield for losses resulting from 1982 Springfield's own negligence.

1982 Springfield then filed a third-party complaint in November 2009 against Rivera and Farmers Mutual.[6] Farmers Mutual defended Rivera on Counts Two and Three of the third-party complaint, but reserved its rights on Count One, citing the contractual indemnification exclusion in the policy. Farmers Mutual retained separate counsel to defend 1982 Springfield's allegations in Count Four. Rivera then retained separate counsel to defend her on Count One regarding her alleged contractual breach in failing to obtain insurance for 1982 Springfield.[7]

In February 2011, Davis obtained a non-binding arbitration award of $150,000. R. 4:21A-1(a)(2). The arbitrator allocated 80% liability to 1982 Springfield, 0% to Rivera, and 20% to Davis. Rivera received 0% liability because the arbitrator found that 1982 Springfield was solely responsible for snow removal. Thus, the net award to Davis was $120,000. Thereafter, 1982 Springfield settled with Davis for $120,000.[8]

1982 Springfield filed a motion for summary judgment on the remaining claims concerning coverage and indemnification and Rivera cross-moved for summary judgment. Rivera then filed a motion to amend her answer to assert cross-claims against Farmers Mutual seeking indemnification and bad faith damages, and the judge permitted her to seek summary judgment on her cross-claims. The judge conducted oral argument and on July 22, 2011, entered the three orders now under review and issued a lengthy written opinion.

The judge determined that 1982 Springfield was responsible for Davis's injuries, that Rivera was not obligated to indemnify 1982 Springfield for loss resulting from 1982 Springfield's own negligence, and that Rivera breached the lease by failing to obtain insurance for 1982 Springfield. He stated that "[t]he most that can be said is that [Rivera] committed a technical violation of [the] lease agreement by not including 1982 Springfield as an additional named insured [on the policy], but caused 1982 Springfield no damage" because Farmers Mutual owed Rivera insurance coverage.

The judge allowed Rivera to amend her answer to assert the cross-claims, granted 1982 Springfield summary judgment, and awarded Gutwirth $5,735.11 in attorney's fees. By granting 1982 Springfield's summary judgment motion, the judge ordered Farmers Mutual to reimburse 1982 Springfield (1) half of the attorneys' fees that 1982 Springfield incurred to defend the personal injury case, and (2) $60,000, representing half of the Davis settlement.[9] These cross-appeals followed.

On appeal, Farmers Mutual argues that the judge erred by (1) permitting Rivera to assert cross-claims against it; (2) declaring that it owed insurance coverage to Rivera for Davis's injuries; and (3) compelling it to pay half of the attorney's fees that Rivera incurred in defending Count One of 1982 Springfield's third-party complaint, half of Travelers' attorneys' fees, and half of the Davis settlement. On the cross-appeal, Rivera argues that the judge erred by requiring her to indemnify 1982 Springfield.

I.

We begin by addressing Farmers Mutual's contention that the judge erred by permitting Rivera to amend her answer to assert cross-claims. Farmers Mutual asserts that it suffered "undu[e] prejudic[e]" because the amendment came three weeks before a June 27, 2011 trial date. We disagree.

Motions for leave to amend "`are best left to the sound discretion of the trial court in light of the factual situation existing at the time each motion is made,'" thereby limiting our review. Kernan v. One Wash. Park Urban Renewal Assocs., 154 N.J. 437, 457 (1998) (quoting Fisher v. Yates, 270 N.J. Super. 458, 467 (App. Div. 1994)). Rule 4:9-1 provides that leave of court to amend a pleading "shall be freely given in the interest of justice." Trial courts should and often do grant such motions liberally. See Pressler & Verniero, Current N.J. Court Rules, comment 2.1 on R. 4:9-1 (2013). Moreover, "[t]he broad power of amendment should be liberally exercised at any stage of the proceedings, including on remand after appeal, unless undue prejudice would result or unless the amendment would be futile." Ibid. (emphasis added).

Rivera's cross-claim against Farmers Mutual seeking insurance coverage is not substantially different from those claims that 1982 Springfield asserted in its November 2009 third-party complaint against Farmers Mutual. Moreover, subject to limited exceptions not manifestly applicable here, the entire controversy doctrine "requires parties to a controversy before a court to assert all claims known to them that stem from the same transactional facts, even those against different parties." Joel v.

Morrocco, 147 N.J. 546, 548 (1997); see also R. 4:30A; Pressler & Verniero, Current N.J. Court Rules, comment 1 on R. 4:30A (2013).[10] By permitting the cross-claims, the court allowed all coverage claims against all parties to be adjudicated in one proceeding. We see no abuse of discretion, and Farmers Mutual was not prejudiced by the amendment.

II.

Next, we address Farmers Mutual's contention that the judge erred by declaring that it owed insurance coverage to Rivera, and by extension to 1982 Springfield, for Davis's injuries. This contention requires us to analyze whether (1) 1982 Springfield is entitled to contractual indemnification from Rivera, and (2) Farmers Mutual was obligated to indemnify 1982 Springfield for Davis's injuries.

A.

We agree with Farmers Mutual's contention that Rivera was not obligated to contractually indemnify 1982 Springfield for 1982 Springfield's sole negligence. It is undisputed that 1982 Springfield exercised exclusive control over the location of the fall and its sole negligence caused the dangerous condition. Rivera agreed to indemnify 1982 Springfield for her own negligence, not the sole negligence of 1982 Springfield. The indemnification clauses in the lease stated:

> TENANT'S INDEMNITY
>
> 51. The Tenant will and does hereby indemnify and save harmless the Landlord of and from all loss and damage and all actions, claims, costs, demands, expenses, fines, liabilities and suits of any nature whatsoever for which the Landlord will or may become liable, incur or suffer by reason of a breach, violation[,] or nonperformance by the Tenant of any covenant, term[,] or provision hereof or by reason of any builders' or other liens for any work done or materials provided or services rendered for alterations, improvements[,] or repairs, made by or on behalf of the Tenant to the Premises, or by reason of any injury occasioned to or suffered by any person or damage to any property, or by reason of any wrongful act or omission, default or negligence on the part of the Tenant or any of its agents, concessionaires, contractors, customers, employees, invitees[,] or licensees in or about the Building.
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> 52. It is agreed between the Landlord and the Tenant that the Landlord will not be liable for any loss, injury, or damage to persons or property resulting from falling plaster, steam, electricity, water, rain, snow[,] or dampness, or from any other cause.
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> 53. It is agreed between the Landlord and the Tenant that the Landlord will not be liable for any loss or damage caused by acts or omissions of other tenants or occupants, their employees or agents or any persons not the employees or agents of the Landlord, or for any damage caused by the construction of any public or quasi-public works, and in no event will the Landlord be liable for any consequential or indirect damages suffered by the Tenant.
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> 54. It is agreed between the Landlord and the Tenant that the Landlord will not be liable for any loss, injury[,] or damage caused to persons using the Common Areas and Facilities or to vehicles or their contents or any other property on them, or for any damage to property entrusted to its or their employees, or for the loss of any property by theft or otherwise, and all property kept or stored in the Premises will be at the sole risk of the Tenant.
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> [(Emphasis added).]

The lease does not require Rivera to provide indemnification for 1982 Springfield's negligence. Here, 1982 Springfield was found solely negligent for causing the dangerous condition. Thus, Rivera has no contractual obligation to indemnify 1982 Springfield.

We reject any suggestion that the indemnification language in the lease is ambiguous. Even if it were, any ambiguity is construed against the indemnitee, 1982 Springfield. Our Supreme Court has stated that

> indemnity provisions differ from provisions in a typical contract in one important aspect. If the meaning of an indemnity provision is ambiguous, the provision is strictly construed against the indemnitee. The strict-construction approach is taken for two apparent reasons. One is that a party ordinarily is responsible for its own negligence, and shifting liability to an indemnitor must be accomplished only through express and unequivocal language. Another is that, under the American Rule, absent statutory or judicial authority or express contractual language to the contrary, each party is responsible for its own attorney's fees.
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> [Kieffer v. Best Buy, 205 N.J. 213, 223-24 (2011) (citations omitted) (internal quotation marks omitted).]

See also Azurak v. Corporate Prop. Investors, 175 N.J. 110, 112 (2003) (reiterating a bright-line rule requiring explicit language that indemnification and defense shall include the indemnitee's own negligence); Mantilla v. NC Mall Assocs., 167 N.J. 262, 269 (2001) (stating that "`there is a presumption against indemnifying an indemnitee for its own negligence that can be rebutted only by plain language clearly expressing a contrary intent'" (quoting Cent. Motor Parts Corp. v. E.I. duPont deNemours & Co., 251 N.J. Super. 5, 14 (App. Div. 1991))); Ramos v. Browning Ferris Indus., Inc., 103 N.J. 177, 191 (1986) (noting that "a contract will not be construed to indemnify the indemnitee against losses resulting from its own negligence unless such an intention is expressed in unequivocal terms"); Harrah's Atlantic City, Inc. v. Harleysville Ins. Co., 288 N.J. Super. 152, 159-60 (App. Div. 1996) (stating that "indemnity provisions must be strictly construed against the indemnitee, especially where,... the indemnitee... sought indemnification against its sole negligence").

B.

We further conclude that 1982 Springfield is not entitled to insurance coverage under the policy. We have already addressed whether a tenant's insurance company is under a duty to provide indemnification to a landlord, as an additional insured, for an accident that occurred as a result of the landlord's sole negligence. In Pennsville Shopping Center Corp. v. American Motorists Insurance Co., 315 N.J. Super. 519, 521 (App. Div. 1998), certif. denied, 157 N.J. 647 (1999), a tenant agreed to "indemnify [its] landlord from loss or liability for damages `occurring on the demised premises except [for those] due to landlord's negligence.'" There, the tenant's customer sustained injuries as a result of a pothole in a parking lot. Ibid. The tenant bore no responsibility for the dangerous condition. Id. at 523. We held that the obligation of the tenant's insurance company to provide coverage to a named additional insured landlord "must be... coextensive with the scope of [the] tenant's own liability." Ibid.

> Additionally, we stated that
>
> [a]bsent an express and unambiguous contractual undertaking to do so, a tenant cannot logically be seen to be providing insurance to a landlord in respect of a liability for which the landlord has assumed sole responsibility.... The indemnification rights of [tenant's] carrier can rise no higher than the rights of [the tenant].
>
> [Ibid.]

Here, the lease "clarifies the intendments of [1982

Springfield and Rivera] in apportioning responsibility and providing for insurance coverage." Ibid. Like the tenant's carrier in Pennsville, supra, Farmers Mutual is not obligated to provide indemnification for 1982 Springfield's sole negligence. That is especially so because here, unlike in Pennsville, supra, 1982 Springfield is not an insured on the policy.

III.

In addition, Farmers Mutual is not obligated to reimburse Rivera for the attorney's fees that she incurred defending Count One of 1982 Springfield's third-party complaint. In its reservation of rights letter, Farmers Mutual recognized that 1982 Springfield sought damages against Rivera in Count One for her failure to obtain insurance for 1982 Springfield. Farmers Mutual informed Rivera that Count One is "expressly excluded from coverage under [the policy]," which provides:

> 4. CONTRACTUAL LIABILITY EXCLUSION
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> We do not insure bodily injury... for which the insured is liable to pay damages because of the assumption of liability... in [a] written agreement....

As a result, Farmers Mutual reserved its rights to defend Rivera on Count One, based on the contractual liability exclusion, and defended Rivera on Counts Two and Three which sought damages against Rivera as a joint tortfeasor.[11] See Flomerfelt v. Cardiello, 202 N.J. 432, 445-56, 457-58 (2010) (instructing that an insurance company fulfills its rights by defending on covered claims and, if the insured prevails on the coverage dispute, then the carrier is obligated to reimburse the insured for its costs of defense (citing Burd v. Sussex Mut. Ins. Co., 56 N.J. 383, 386-87, 388-90 (1970))). Here, Rivera is not entitled to reimbursement from Farmers Mutual of her attorney's fees on Count One because Count One is excluded under the policy.

IV.

We agree with Rivera on her cross-appeal that the judge erred by ordering her to indemnify 1982 Springfield.[12] It is undisputed that 1982 Springfield's sole negligence caused the dangerous condition resulting in Davis's injuries. Rivera is not contractually obligated to provide indemnification for 1982 Springfield's sole negligence. Thus, the order requiring Rivera to indemnify 1982 Springfield was entered in error.

Furthermore, even if Rivera obtained insurance for 1982 Springfield, Farmers Mutual's obligation to provide insurance coverage "must be... coextensive with the scope of [the] tenant's own liability." Pennsville, supra, 315 N.J. Super. at 523. "The indemnification rights of [Farmers Mutual] can rise no higher that the rights of [Rivera]." Ibid. Thus, even if 1982 Springfield had been named an additional insured on the policy, Farmers Mutual would still not be obligated to provide insurance coverage for 1982 Springfield's sole negligence. As a result, 1982 Springfield was not prejudiced by Rivera's failure to have it named as an insured on the policy.

V.

In conclusion, we affirm the order granting Rivera's motion to amend her answer to assert cross-claims against Farmers Mutual; reverse the order granting Rivera's motion for summary judgment on her cross-claims against Farmers Mutual; and reverse the order compelling Farmers Mutual to pay Rivera's attorney's fees, half of Travelers' attorneys' fees, and half of Davis's settlement. On Rivera's cross-appeal, we reverse the order requiring her to provide indemnification to 1982 Springfield.

[1] Travelers provided insurance coverage to defendant 1982 Springfield Avenue, LLC (1982 Springfield or landlord) and is not a party to the lawsuit. There is no indication in the record that Travelers was served with notice of these appeals. We do not address what effect, if any, our opinion has on Travelers' rights.

[2] Although one order mentioned that Rivera is obligated to pay half of Davis's settlement and half of Travelers' attorneys' fees, the judge explained in his written decision that Farmers Mutual, not Rivera, must pay half of Travelers' fees and half of the Davis settlement.

[3] 1982 Springfield appealed from that part of the order that required Farmers Mutual to pay half of the Davis settlement and half of its defense costs, contending that it was entitled to 100% indemnification. On July 11, 2012, we suppressed 1982 Springfield's right to file a merits brief responding to Farmers Mutual's and Rivera's cross-appeals because of noncompliance with the rules. On August 23, 2012, we dismissed 1982 Springfield's appeal and 1982 Springfield's motion to vacate the suppression order, and on September 11, 2012, we denied reconsideration.

[4] 1982 Springfield is the assignee of a lease originally entered into by Rivera. The assignor is not involved in this case.

[5] See Kandrac v. Marrazzo's Mkt., ___ N.J. Super. ___, ___ (App. Div. 2012) (slip op. at 2) (holding that "as a general rule, [a] commercial tenant does not" owe "a duty to its patrons to maintain an area... that the landlord is contractually obligated to maintain").

[6] 1982 Springfield alleged in its third-party complaint that (1) Rivera breached the lease by not obtaining insurance for 1982 Springfield (Count One); (2) Rivera owed 1982 Springfield common law and contractual indemnification (Count Two); (3) Rivera owed 1982 Springfield contribution pursuant to the Joint Tortfeasor's Contribution Act, N.J.S.A. 2A:53A-1, and the Comparative Negligence Act, N.J.S.A. 2A:15.5.1, (Count Three); and (4) Farmers Mutual failed to defend and indemnify 1982 Springfield for the losses that Davis sustained in the personal injury case (Count Four).

[7] Ronald M. Gutwirth defended Rivera on Count One of the third-party complaint, and he remains Rivera's counsel on appeal.

[8] On July 22, 2011, the judge denied Rivera's motion to confirm the arbitration award as "moot," given the settlement with Davis.

[9] On August 16, 2011, the judge dismissed Rivera's cross-claim alleging bad faith against Farmers Mutual. That particular ruling has not been appealed.

[10] The entire controversy doctrine has three objectives: "(1) to encourage the comprehensive and conclusive determination of a legal controversy;

(2) to achieve party fairness, including both parties before the court as well as prospective parties; and (3) to promote judicial economy and efficiency by avoiding fragmented, multiple[,] and duplicative litigation." Mystic Isle Dev. Corp. v. Perskie & Nehmad, 142 N.J. 310, 322 (1995). The doctrine "seeks to further these objectives by requiring that, whenever possible, `the adjudication of a legal controversy should occur in one litigation in only one court.'" Joel, supra, 147 N.J. at 548 (quoting Cogdell v. Hosp. Ctr., 116 N.J. 7, 15 (1989)).

[11] Farmers Mutual informed Rivera that if she disagreed with its decision to reserve its rights on Count One, then she would be permitted to pursue its internal appeals process. Rivera did not exercise her right to request that an internal appeals panel within the insurer review Farmers Mutual's reservation of rights.

[12] Even though one order required Rivera to indemnify 1982 Springfield, the judge stated in his written decision that Farmers Mutual, not Rivera, must pay half of Travelers' fees and half of the Davis settlement.