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JEFFREY STEWART ET AL *v.* OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY (AC 44925)

Bright, C. J., and Alvord and Seeley, Js

Syllabus

The defendant title insurance company denied coverage with respect to the respective title insurance policies it had issued to the plaintiffs, N Co., and J and A, involving their properties. J and A purchased a property in the town of Greenwich on B Street and, thereafter, N Co., whose sole member was J, purchased an adjacent property. Neighbors who also owned property on B Street brought an action against N Co., which alleged that N Co. had obstructed an easement, which granted rights to other homeowners to pass over a private portion of B Street. N Co. allegedly obstructed the easement by, inter alia, extending the lawn, installing a raised drainage system, and removing a pillar which demarcated the private and public portion of the street. The defendant denied N Co. coverage for defending the neighbors' action on the basis that the policy insured N Co.'s title to the land, which did not convey to N Co. exclusive rights and ownership of the easement at issue, and thus the policy did not insure N Co.'s exclusive rights to ownership of the easement. The action against N Co. was settled by an agreement and subsequently withdrawn, and the defendant refused to pay N Co.'s expenses in defending it. In a separate incident, J and A thereafter sought indemnification coverage from the defendant after the town began proceedings to acquire an abandoned cemetery, pursuant to statute (§ 19a-308a), which allegedly was on or adjacent to J and A's property. The defendant noted that its policy with J and A excluded actions resulting from governmental police power and condemnation. Without notifying the defendant, J and A then brought an action against the town, seeking a declaratory judgment to quiet title to the driveway portion of their property that allegedly passed over the cemetery. After the town acquired the cemetery and quitclaimed the driveway back to J and A, J and A sought to recover their litigation expenses from the defendant. The defendant disclaimed coverage, noting, inter alia, that it did not approve their litigation expenses as required by the policy. Subsequently, the plaintiffs collectively filed the present action against the defendant, claiming that it had breached its policies in failing to provide funds for the costs of defending the actions involving the plaintiffs and sought indemnification for costs and attorney's fees. The defendant thereafter filed a motion for summary judgment, which the trial court granted, finding that there were no genuine issues of material fact and that the defendant had not breached its duty to defend. On the plaintiffs' appeal to this court, *held*:

1. The trial court properly granted the defendant's motion for summary judgment with respect to the claim brought by N Co., as there was no genuine issue of material fact that the claim for which N Co. sought coverage was not covered under its title insurance policy, the defendant had no duty to defend N Co. in the neighbors' action, and, thus, the defendant had no duty to indemnify N Co. for losses it incurred in defending the action: the allegations within the complaint brought against N Co. clearly and unambiguously established the applicability of the relevant policy exclusions to any claim for which there might otherwise be coverage under the defendant's policy, as the allegations did not dispute that N Co. had exclusive ownership of the private portion of the street or challenge N Co.'s title to that property, but, instead, alleged claims that N Co.'s various actions had obstructed the use and enjoyment of the easement, and the relief requested in the complaint sought to guarantee the neighbors' ability to exercise their rights to use the easement, thus, the allegations were properly understood as disputing N Co.'s exclusive interest in the easement and alleging that N Co. had prevented the full use and enjoyment of others' rights to the easement; moreover, N Co.'s reliance on facts beyond the complaint to establish that title was, in fact, at issue in the neighbors' action was

without merit, the determination of an insurer's duty to defend is limited to the provisions of the insurance policy and the allegations of the underlying complaint, and, accordingly, this court declined to consider what actions the parties took during the pendency of the action to determine whether the complaint disputed the ownership of the private portion of the street; furthermore, even if the allegations of the complaint contested N Co.'s ownership of the private portion of the street, the title insurance policy clearly and unambiguously excluded N Co.'s claim from coverage, as the allegations arose from N Co.'s own actions in obstructing the easement and were alleged to have occurred after the purchase of the property, allegations that clearly and unambiguously were excluded from coverage.

2. The trial court properly granted the defendant's motion for summary judgment with respect to J and A, as there was no genuine issue of material fact that the claims for which J and A sought coverage were excluded under their title insurance policy, and, therefore, the defendant had no duty to defend: contrary to J and A's assertion that the town was attempting to take title to real property owned by J and A, their complaint against the town sought a declaratory judgment for the purpose of having a court decide whether their property contained a cemetery, such that the town could acquire it, and the determination as to whether there was a cemetery on the property was a condition of the property and not a matter of title; moreover, a municipality's acquisition of property pursuant to § 19a-308a is an exercise of governmental police power and constitutes an acquisition by condemnation, and, thus, the exclusions in the title policy pertaining to governmental police power and the condemning of property clearly and unambiguously applied to J and A's claims and established that the defendant did not have a duty to defend J and A's action against the town; furthermore, any action taken by the town with respect to the property would have occurred after the date the policy was issued and thus be excluded from coverage, which exclusion was plain and unambiguous.

Argued November 15, 2022—officially released March 21, 2023

Procedural History

Action to recover damages for, inter alia, breach of contract in connection with a title insurance policy issued by the defendant to the plaintiffs, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Hon. Edward T. Krumeich II*, judge trial referee, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiffs appealed to this court. *Affirmed.*

David S. Doyle, for the appellants (plaintiffs).

Marc J. Herman, with whom, on the brief, were *Jason A. Buchsbaum* and *Jonathan S. Bowman*, for the appellee (defendant).

Opinion

BRIGHT, C. J. The plaintiffs, 9 Byram Dock, LLC (company),[1] and Jeffrey Stewart and Andrea Stewart (Stewarts) appeal from the summary judgment rendered in favor of the defendant, Old Republic National Title Insurance Company. On appeal, the plaintiffs claim that the court improperly concluded that, pursuant to the plaintiffs' title insurance policies, the defendant had no duty to defend the plaintiffs in two actions involving the plaintiffs' properties. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts, which are undisputed, and procedural history are relevant to our resolution of this appeal. The plaintiffs' complaint set forth two counts. Count one was asserted on behalf of the company. The company alleged that on October 31, 2014, it purchased real property located at 9 Byram Dock Street in Greenwich. On that date, the company also purchased an owner's policy of title insurance from the defendant for that property (company policy). In December, 2016, Robert M. Kennedy, James R. Kennedy, Peter J. Kennedy and Barbara M. Kennedy (the Kennedys), owners of 14 Byram Dock Street—a house on the opposite side of the street from 9 Byram Dock Street—sued the company, alleging that they "have a right of way appurtenant to their land, to pass and repass over the land owned by and in the possession of the owners of a parcel of land known as Shore Island (the '[e]asement'). . . . The [e]asement grants the rights to pass and repass motor vehicles over Byram Dock Street to access the various homes along said street." There are two sections of Byram Dock Street, a public portion and a private portion. The easement provides access to Shore Island over the private portion of Byram Dock Street. The Kennedys further alleged that the company had obstructed the easement (Kennedy action).

Without notifying the defendant about the lawsuit, the company retained counsel to defend it in the Kennedy action. In May, 2017, the Kennedys filed a revised complaint to provide greater detail of the company's alleged obstruction. According to the revised complaint, the company had obstructed the easement by extending a lawn over part of the private portion of Byram Dock Street, installing a raised drainage system, and removing a stone pillar which had "demarcate[d] the entrance to the private portion of Byram Dock Street." In June, 2017, the company sent a notice of claim letter to the defendant informing it of the pending action and seeking representation and indemnification. Therein the company provided the defendant with the Kennedys' original and revised complaints and described the Kennedys' allegations as "[challenging] the [company's] right to make . . . changes [to the private portion of Byram Dock Street] by questioning the [company's] ownership of the private portion of Byram Dock

Street."

On July 13, 2017, the defendant denied the company coverage of the Kennedy action, concluding that the allegations within the revised complaint did not create the potential for coverage under the company policy, and, thus, the defendant had no obligation to defend the company in the action. In particular, the defendant maintained that the company policy insures title to the land described in Schedule A, which does not convey to the company exclusive rights and ownership of the subject easement, and thus the company policy does not insure the company's exclusive rights to ownership of the easement. The defendant further stated that, in addition to several exceptions in Schedule B of the policy, "which clearly apply to remove coverage for this claim, there is also the applicable exclusions 3 (a) and 3 (d), which exclude post policy acts of the [company]. Exclusion 3 (a) excludes matters the [company] has caused ('created'), permitted ('suffered'), taken subject to ('assumed'), or to which it has consented to be bound ('agreed to'). This exclusion applies to remove coverage for [the Kennedys'] allegations in the revised complaint which relate to actions of the [company] in obstructing the easement. In addition, exclusion 3 (d) applies to remove coverage for matters arising after the date of policy. The date of [the policy] is October 31, 2014. The allegations of [the Kennedys] relate to acts . . . 'starting in 2016. . . .' See Revised Complaint ¶¶ 5, 6. Therefore this matter falls within the matters excluded by exclusions 3 (a) and (d)."[2]

The Kennedys again amended their complaint on October 10, 2017.[3] Thereafter, "[t]he Kennedy [action] was settled by withdrawal of the [action] and an agreement by [the Kennedys] to pay for certain restorative work on the easement together with payment of $10,000 to the [company], which settlement did not require any payment by the [company] or the Stewarts." The defendant later declined to pay the company's expenses for defending the Kennedy action, reaffirming its previous declination of coverage. Thus, in count one of the complaint in the present action, the company alleged that the defendant breached the terms of the company policy by refusing to reimburse it for such expenses.

Count two of the plaintiffs' complaint in the present action alleged a claim on behalf of the Stewarts. The Stewarts alleged that they purchased 11 Byram Dock Street, adjacent to 9 Byram Dock Street, on August 5, 2013. In connection with that purchase, the Stewarts obtained an owner's title insurance policy from the defendant for the property that provides coverage from August 6, 2013 (Stewart policy). In April, 2016, the Town of Greenwich Conservation Commission (commission) recommended to the town of Greenwich (town) that it acquire, pursuant to General Statutes § 19a-308a,[4] an abandoned African American cemetery, believed to be

on or adjacent to 11 Byram Dock Street.

On September 22, 2016, a public forum was held before the town's Board of Selectmen regarding the acquisition of the cemetery parcel. The Stewarts' attorneys appeared at the hearing and expressed their concern over the lack of evidence as to whether the property at issue constituted a cemetery and requested time to conduct further study, including radar imaging to detect possible remains. That day, the Stewarts' attorneys also sent a formal letter to the commission and the town stating that the driveway to 11 Byram Dock Street, included in the Stewarts' deeded rights, crossed over the purported cemetery site and, "if the parcel is more definitively established to be an actual burial ground, [the Stewarts] object to any efforts made by the [town] . . . to seek to take away or diminish [the Stewarts'] property rights in the driveway. We further note that we are speaking of the deeded rights that as a matter of law cannot be simply extinguished or diminished through the statutory process being undertaken by the [t]own at this time." In January, 2016, the commission submitted a proposal and report to the town recommending that the town acquire the abandoned cemetery. The Stewarts thereafter submitted two additional formal objection letters to the town.

On May 19, 2017, the Stewarts sent a letter to the defendant notifying the defendant that their "ownership of the [d]riveway [e]asement has recently been called into question by the [town]. It is expected that the [town] will, at some point in the near future, formally challenge the validity of the [d]riveway [e]asement." In its response on June 29, 2017, the defendant noted that, although the commission had made a proposal to the town recommending the town acquire the abandoned cemetery pursuant to § 19a-308a, the town had not yet made a ruling or determination to do so. The defendant declined coverage stating that "the alleged cemetery would be a condition of the property and not affect title to the property." Further, it pointed to language in the Stewart policy stating that the Stewarts "are not insured against loss, costs, attorneys' fees, and expenses resulting from: 1. Governmental police power, and the existence or violation of those portions of any law or government regulation concerning: a. building; b. zoning; c. land use; d. improvements on the [l]and; e. land division; and f. environmental protection," "3. [t]he right to take the [l]and by condemning it," and "4. [r]isks . . . d. that first occur after the [p]olicy [d]ate . . . ." The defendant maintained that "[a]ny action taken by the [t]own and . . . [c]ommission with respect to the [p]roperty would certainly occur after the date of [the] [p]olicy and would [be] excluded from coverage by [e]xclusion 4d. Additionally, should the [t]own acquire the [p]roperty pursuant to [§ 19a-308a], it would operate as a [g]overnmental [t]aking pursuant to [p]ublic [h]ealth and [w]ell-[b]eing and thereby be excluded

from coverage from [e]xclusion 1 and/or [e]xclusion 3." Because no final determination had been made by the town with respect to the property, the defendant left open the possibility that it might revisit its decision to decline coverage on the basis of subsequent events.

On October 2, 2017, "[w]ithout notifying [the defendant], the Stewarts sued the town seeking a declaratory judgment concerning the application of . . . § 19a-308a to the African American cemetery and to quiet title to the driveway or to acquire title thereto by prescriptive easement or adverse possession ('the Greenwich [action]'). The Greenwich [action] was later settled by the town acquiring the cemetery and quitclaiming the driveway back to the Stewarts. The Stewarts made a claim to recover their litigation expenses on the Greenwich [action] and [the defendant] again disclaimed coverage, noting that it did not approve the expenses and attorney's fees incurred in initiating and defending the Greenwich [action] as required under the Stewarts' policy." (Footnote omitted.) Specifically, the defendant stated that it "was first notified of litigation concerning 11 Byram Dock Street via email from [the Stewarts' attorney] on [March 26, 2019]. . . . The pleadings . . . provided that the [c]emetery access issue had been litigated by [the Stewarts] filing a [c]omplaint against the town on [October 2, 2017], and resolving the litigation via [o]rder dated August 9, 2018. . . . [I]t is indisputable that [the defendant] was not made aware of the litigation until [March 26, 2019], at the earliest. . . . Condition 9c [of the Stewart policy] unambiguously provides that [the defendant] is only required to repay those attorneys' fees and expenses that [it] approve[s] in advance. [The defendant] did not approve these fees as [it was] never made aware of the litigation until nearly a year after it was resolved and roughly [seventeen] months after it was initiated."

On January 3, 2020, the plaintiffs instituted the underlying action against the defendant, alleging that the defendant breached the company policy and the Stewart policy because it (1) "failed to provide any funds for the costs of defense of the [Kennedy action]" and (2) "failed to provide any funds for the costs of defense of [the Greenwich action]." In count one, the plaintiffs claimed that when the Kennedys revised their complaint to raise an issue as to the "ownership" of the private portion of Byram Dock Street subject to the alleged easement, that raised a title issue within the coverage of the company policy that triggered the defendant's duty to defend. In count two, the plaintiffs claimed that, in the Greenwich action, the town made claims that implicated the Stewarts' title to the property and thereby triggered the defendant's duty to defend under the Stewart policy. The plaintiffs sought indemnification for costs and attorney's fees in the amount of $205,843.97 in connection with the Kennedy action and $205,845.38 in connection with the Greenwich action.

The defendant filed an answer and alleged several special defenses, including, inter alia, as to count one, that the Kennedy action constituted a cause of action that alleged matters not insured under the company policy. As to count two, the defendant alleged that (1) the plaintiffs' claims were barred by exclusions in the Stewart policy precluding coverage for governmental action taking place after the issuance of the policy, governmental police power, and/or condemnation, and (2) the Stewarts failed to provide it with notice about their commencement of the Greenwich action until almost one full year after the Stewarts had settled it. The defendant then moved for summary judgment on both counts.

The court, *Hon. Edward T. Krumeich II*, judge trial referee, rendered summary judgment in favor of the defendant. As to count one, the court found that the Kennedy action did not challenge the company's title to the private portion of Byram Dock Street but, rather, its right to exclusive use of the easement. Consequently, the court concluded that, "[o]n its face, the complaint in the Kennedy [action] did not concern matters on which [the defendant] had a duty to defend under the [company policy]." The court further concluded that "the gravamen of the Kennedy [action] was the affirmative conduct of the [company] that occurred after the policy was issued and therefore was excluded from coverage under the policy." For these two reasons, the court concluded that the defendant "has borne its burden to prove there is no genuine issue of fact to be tried and it is entitled to summary judgment that [it] did not breach its duty to defend the Kennedy [action]."

With respect to the Greenwich action, the trial court found that (1) because the Stewarts brought the action themselves, they could not be said to have incurred costs in defending title to the property, (2) the possible presence of the cemetery was a condition of the property, not a matter of title, (3) the town would have to acquire the property by eminent domain, a governmental police power, which would subject the claim to exclusions from coverage for postissuance events and governmental takings, and (4) the Stewarts breached the policy by depriving the defendant of its right to control the defense by failing to provide timely notice of the action. The court, accordingly, found that the defendant met its burden to prove that there were no genuine issues of material fact and that it was entitled to summary judgment because the defendant did not breach its duty to defend the Stewarts in the Greenwich action. This appeal followed.

Our standard of review as to a trial court's decision to grant a motion for summary judgment is well settled. "Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is

no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact . . . . [T]he party moving for summary judgment is held to a strict standard. [The moving party] must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . A material fact is a fact that will make a difference in the result of the case. . . . Because the court's decision on a motion for summary judgment is a legal determination, our review on appeal is plenary. . . . [W]e must [therefore] decide whether [the trial court's] conclusions are legally and logically correct and find support in the facts that appear in the record." (Citation omitted; internal quotation marks omitted.) *10 Marietta Street, LLC* v. *Melnick Properties, LLC*, 216 Conn. App. 262, 270–71, 285 A.3d 82 (2022).

On appeal, the plaintiffs claim that the court improperly determined that the defendant had no duty to defend (1) the company in the Kennedy action pursuant to the company policy and (2) the Stewarts in the Greenwich action pursuant to the Stewart policy. We conclude, on the basis of the submissions presented to the court in connection with the motion for summary judgment, that there is no genuine issue of material fact that the claims for which the plaintiffs sought coverage were not covered under the pertinent title insurance policies. We therefore hold that the defendant had no duty to defend or indemnify the plaintiffs in connection with the Kennedy and Greenwich actions.[5]

"Our standard of review for interpreting insurance policies is well settled. The construction of an insurance policy presents a question of law that we review de novo. . . . When construing an insurance policy, we look at the [policy] as a whole, consider all relevant portions together and, if possible, give operative effect to every provision in order to reach a reasonable overall result. . . . Insurance policies are interpreted based on the same rules that govern the interpretation of contracts. . . . In accordance with those rules, [t]he determinative question is the intent of the parties . . . . If the terms of the policy are clear and unambiguous, then the language, from which the intention of the parties is to be deduced, must be accorded its natural and ordinary meaning. . . . In determining whether the terms of an insurance policy are clear and unambiguous, [a] court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity . . . . Similarly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the

terms. . . . As with contracts generally, a provision in an insurance policy is ambiguous when it is reasonably susceptible to more than one reading. . . . Under those circumstances, any ambiguity in the terms of an insurance policy must be construed in favor of the insured . . . .'' (Citations omitted; internal quotation marks omitted.) *Kling* v. *Hartford Casualty Ins. Co.*, 211 Conn. App. 708, 712–13, 273 A.3d 717, cert. denied, 343 Conn. 926, 275 A.3d 627 (2022).

"The question of whether an insurer has a duty to defend its insured is purely a question of law . . . ." (Internal quotation marks omitted.) *Lancia* v. *State National Ins. Co.*, 134 Conn. App. 682, 689, 41 A.3d 308, cert. denied, 305 Conn. 904, 44 A.3d 181 (2012). "An insurer's duty to defend 'is determined by reference to the allegations contained in the [underlying] complaint.' . . . The duty to defend 'does not depend on whether the injured party will successfully maintain a cause of action against the insured but on whether [the complaint] stated facts which bring the injury within the coverage.' . . . 'If an allegation of the complaint falls even possibly within the coverage, then the insurance company must defend the insured.' . . . That being said, an insurer 'has a duty to defend only if the underlying complaint *reasonably* alleges an injury that is covered by the policy.' . . . '[W]e will not predicate the duty to defend on a reading of the complaint that is . . . conceivable but tortured and unreasonable.' . . . There is also no duty to defend 'if the complaint alleges a liability which the policy does not cover . . . .' " (Citations omitted; emphasis in original.) *Kling* v. *Hartford Casualty Ins. Co.*, supra, 211 Conn. App. 713–14. Because the duty to defend is broader in scope than the duty to indemnify, an insurer that "does not have a duty to defend" likewise "will not have a duty to indemnify." *Warzecha* v. *USAA Casualty Ins. Co.*, 206 Conn. App. 188, 192, 259 A.3d 1251 (2021).

To prevail on a motion for summary judgment on a claim for breach of the duty to defend, an "insurer must establish that there is no genuine issue of material fact either that no allegation of the underlying complaint falls even possibly within the scope of the insuring agreement or, even if it might, that any claim based on such an allegation is excluded from coverage under an applicable policy exclusion. In presenting countervailing proof, the insurer, no less than the insured, is necessarily limited to the provisions of the subject insurance policy and the allegations of the underlying complaint. Therefore, it is only entitled to prevail under a policy exclusion if the allegations of the complaint clearly and unambiguously establish the applicability of the exclusion to each and every claim for which there might otherwise be coverage under the policy.

"An insured, in turn, may rebut an insurer's claim that it has no duty to defend him in the light of an

applicable policy exclusion by showing that at least one of his allegations, as pleaded states a claim that falls even possibly outside the scope of the exclusion or within an exception to that exclusion. Unless the allegations of any such underlying claim fall so clearly and unambiguously within a policy exclusion as to eliminate any possible coverage, the insurer must provide a defense to its insured." *Lancia* v. *State National Ins. Co.*, supra, 134 Conn. App. 691.[6] We now address each of the plaintiffs' claims in turn.

I

The plaintiffs first claim that the court improperly determined that the defendant had no duty to defend the company in the Kennedy action. In particular, the plaintiffs claim that the court erred in interpreting the Kennedys' May, 2017 complaint as not challenging the company's ownership of the private portion of Byram Dock Street. On the basis of our review of the policy language and the Kennedys' complaint, we disagree.

"The interpretation of pleadings is always a question of law for the court . . . . Our review of the trial court's interpretation of the pleadings therefore is plenary. . . . Furthermore, we long have eschewed the notion that pleadings should be read in a hypertechnical manner. *Rather*, [*t*]*he modern trend*, *which is followed in Connecticut*, *is to construe pleadings broadly and realistically*, *rather than narrowly and technically*. . . . [T]he complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory [on] which it proceeded, and do substantial justice between the parties. . . . Our reading of pleadings in a manner that advances substantial justice means that a pleading must be construed reasonably, to contain all that it fairly means, but carries with it the related proposition that it must not be contorted in such a way so as to strain the bounds of rational comprehension." (Emphasis in original; internal quotation marks omitted.) *Carpenter* v. *Daar*, 346 Conn. 80, 128, 287 A.3d 1027 (2023).

We begin with the relevant language in the operative Kennedy complaint—the May, 2017 revised complaint on which the company relies for its claim of coverage:[7]

"1. . . . Robert M. Kennedy, James R. Kennedy, Peter J. Kennedy, and Barbara M. Kennedy . . . own real property located at 14 Byram Dock Street, Greenwich, CT 06830 ('14 Byram Dock Street').

"2. [The company] is a Connecticut limited liability company with its principal place of business located at 11 Byram Dock Street, Greenwich, Connecticut ('11 Byram Dock Street'). [The company], whose sole managing member is Jeffrey M. Stewart ('Stewart'), is the owner of the real property located at 9 Byram Dock Street, Greenwich, Connecticut ('9 Byram Dock Street'). . . .

"4. [The Kennedys] have a right of way appurtenant to their land, to pass and repass over the land owned by and in the possession of the owners of a parcel of land known as Shore Island (the 'easement').

"5. The easement grants the rights to pass and repass motor vehicles over Byram Dock Street to access the various homes along said street.

"6. The easement is recorded on the Greenwich, Connecticut land records. . . .

"7. Starting in 2016, [the company], without cause or other proper justification, and despite actual notice of the easement, intentionally, wilfully, and wrongfully obstructed, and continues to obstruct, the easement in a manner that prevents [the Kennedys] from enjoying and using it. Specifically, among other things, [the company] extended the front lawn of 9 Byram Dock Street by planting grass and other landscaping over a portion of the easement, which is the private portion of the road known as 'Byram Dock Street,' and also installed a raised drainage system on a portion of the easement (collectively, the 'landscaping'). In addition, [the company] removed a stone pillar that was located on the easement—which, for decades, has served to demarcate the entrance to the private portion of Byram Dock Street, and to provide a measure of privacy and security to homeowners with residences on the private portion of that street, including [the Kennedys] and their predecessors—and moved it and an adjoining stone wall to a location that does not separate the public and private portions of the street. [The company] took such unilateral action notwithstanding the fact that the [company] does not have exclusive ownership or easement rights to the real property where the stone pillar was previously situated, and took such action without the consent or approval of [the Kennedys].

"8. As a result of the foregoing, [the Kennedys] are directly and substantially damaged with regard to their use and enjoyment of the easement on the [private portion of] Byram Dock Street. Specifically, the landscaping has narrowed the easement in such a way as to substantially restrict the ability of [the Kennedys] and/or fire or safety vehicles to access the easement, and the passage of two-way traffic on the easement. Further, [the company], by removing and relocating the pillar and adjoining stone wall, has removed the demarcation between the public and private portions of Byram Dock Street, thereby interfering with the safety and security of [the Kennedys] and their property. Both the landscaping and the relocation of the stone pillar and adjoining stone wall have adversely affected the value of 14 Byram Dock Street. . . .

"9. As a result of the foregoing, [the Kennedys] seek a declaratory judgment finding: (i) the existence of the easement over the [private portion of] Byram Dock

Street; and (ii) the acts of [the company] have obstructed the easement preventing [the Kennedys] from fully exercising their rights thereto. . . ."

The plaintiffs characterize the complaint as alleging that the company did not have exclusive ownership of the private portion of Byram Dock Street, and thus challenged the company's title to that property. In particular, they argue that the allegation in paragraph 7 "that the [company] does not have exclusive ownership or easement rights to the real property where the stone pillar was previously situated" called into question its ownership of a portion of 9 Byram Dock Street.[8] The plaintiffs accordingly claim that the Kennedy action falls within the coverage of the company policy, which provides insurance against a loss "by reason of . . . [t]itle being vested other than as stated in Schedule A [to the company policy]." In particular, they contend that "Schedule A [to the company policy] identified deeds in the chain of title that defined the real property it was insuring; those deeds identify the property at issue [in the Kennedy action] as part of the property set out in Schedule A. [The defendant] had a duty to defend against the allegation that the [company] did not have title to property that was within the metes and bounds of 9 Byram Dock [Street] as delineated in the policy in [Schedule A]." We are not persuaded.

Construing the complaint broadly and realistically, it is clear that the complaint alleged claims contending that the company's actions obstructed the Kennedys' *use and enjoyment* of the easement rather than in any way disputing the *ownership* of the private portion of Byram Dock Street. For example, paragraph seven of the complaint specifically alleges that the company "without cause or other proper justification . . . obstructed, and continues to obstruct, the easement in a manner that prevents [the Kennedys] from *enjoying and using it*." (Emphasis added.) Similarly, in paragraph eight, the Kennedys allege that, as a result of the company's obstruction, they were "directly and substantially damaged with regard to *their use and enjoyment* of the easement on the roadway known as Byram Dock." (Emphasis added.) Notably, they do not claim that they or anyone else has an ownership interest in the land underlying the easement. Aside from the reference to ownership in paragraph 7, which the plaintiffs take out of context, ownership of the private portion of Byram Dock Street is not discussed in the complaint.

In addition, the relief requested by the Kennedys sought to guarantee their ability to exercise rights to use the easement. In particular, the Kennedys sought "[e]ntry of a declaratory judgment that the easement exists and [the Kennedys] have been prevented from *using the easement*, or a portion thereof" and "[a] temporary and permanent injunction against [the company] with regard to the continuing violative conduct by it

in interfering, disturbing or obstructing in any manner directly or indirectly, with regard to *full access and use of the easement*" by the Kennedys. (Emphasis added.) Thus, a plain reading of the allegations in paragraph seven, in the context of their entire revised complaint, leads us to conclude that the allegations are properly understood as disputing the company's exclusive interest in the easement and asserting a claim that, due to the company's landscaping changes to the private portion of Byram Dock Street, the Kennedys have been prevented from the full use and enjoyment of their alleged right to the easement. Accordingly, reading the complaint in its entirety, as we must; see *Grenier* v. *Commissioner of Transportation*, 306 Conn. 523, 536–37, 51 A.3d 367 (2012); it is clear that the Kennedy complaint did not dispute *ownership* of the private portion of Byram Dock Street to which the easement is attached.

Consequently, we conclude that the revised complaint did not involve a challenge to the company's title as set forth in Schedule A of the company policy. Accordingly, the Kennedy complaint, on its face, did not set forth allegations which possibly fell within the coverage of the company policy, and, therefore, the defendant had no duty to defend the company in the action. See *Kling* v. *Hartford Casualty Ins. Co.*, supra, 211 Conn. App. 714 ("an insurer has a duty to defend only if the underlying complaint *reasonably* alleges an injury that is covered by the policy" (emphasis in original; internal quotation marks omitted)).

Moreover, the plaintiffs' reliance on facts beyond the four corners of the complaint is without merit. The plaintiffs point our attention to certain expert witnesses separately engaged by the company and the Kennedys in the pendency of the Kennedy action who opined on the fee ownership of the private portion of Byram Dock Street. The plaintiffs accordingly claim that, because "title to real property remained an issue throughout the Kennedy [action]," "[t]hese facts cannot be ignored when determining when an allegation falls 'even possibly' within the coverage [of the policy]. [See *Lancia* v. *State National Ins. Co.*, supra, 134 Conn. App. 691.]" In essence, the plaintiffs argue that, because ownership of the land was actually litigated in the Kennedy action, the Kennedy complaint necessarily raised the issue of ownership over the private portion of Byram Dock Street and therefore fell within coverage of the company policy. We disagree.

As acknowledged by the plaintiffs' counsel at oral argument before this court, the determination of an insurer's duty to defend is "*limited to* the provisions of the subject insurance policy and the allegations of the underlying complaint." (Emphasis added.) *Lancia* v. *State National Ins. Co.*, supra, 691; see also *Allstate Ins. Co.* v. *Jussaume*, 35 F. Supp. 3d 231, 238 (D. Conn.

2014) (citing *Lancia* to reject insured's attempt to look beyond underlying complaint in duty to defend dispute). Moreover, our Supreme Court has stated that "[t]he obligation of the insurer to defend does not depend on whether the injured party will successfully maintain a cause of action against the insured but on whether he has, *in his complaint*, stated facts which bring the injury within the coverage. If the latter situation prevails, the policy requires the insurer to defend, irrespective of the insured's ultimate liability. . . . It necessarily follows *that the insurer's duty to defend is measured by the allegations of the complaint*." (Emphasis added; internal quotation marks omitted.) *Security Ins. Co. of Hartford* v. *Lumbermens Mutual Casualty Co.*, 264 Conn. 688, 711–12, 826 A.2d 107 (2003). Therefore, we reject the plaintiffs' invitation to consider what actions the parties took during the pendency of the Kennedy action to determine whether the May, 2017 complaint disputed the company's ownership of the private portion of Byram Dock Street and, accordingly, whether the defendant had a duty to defend the company in that action.

Furthermore, we conclude that, even if the Kennedy complaint contested the company's exclusive ownership of the private portion of Byram Dock Street, the company policy clearly and unambiguously excluded the company's claim from coverage. Paragraph 3 of the "Exclusions From Coverage" in the company policy specifically excludes from coverage: "Defects, liens, encumbrances, adverse claims, or other matters . . . (a) created, suffered, assumed, or agreed to by the [company] . . . [and] (d) attaching or created subsequent to [October 31, 2014] . . . ."

The Kennedy complaint alleges that the action was brought due to actions taken by the company including extending the lawn of 9 Byram Dock Street, installing a raised drainage system, installing Belgian block, and installing an elevated manhole cover on the private portion of Byram Dock Street. Accordingly, the Kennedys' adverse claims arose from the company's own actions and, therefore, were "created . . . by the [company]." Therefore, exclusion 3 (a) clearly and unambiguously precludes coverage for the Kennedys' claims. Moreover, exclusion 3 (d) excludes from coverage matters arising after October 31, 2014. Because it is undisputed that the company first made changes to the private portion of Byram Dock Street after its purchase of the property on October 31, 2014, the allegations necessarily relate to matters arising after that date. Thus, exclusion 3 (d) also clearly and unambiguously precludes coverage for the Kennedys' claims. In short, we conclude that each of the Kennedys' claims was based on allegations clearly and unambiguously excluded from coverage under the company policy.

The plaintiffs, however, urge us to ignore the clear

language of the exclusions. According to the plaintiffs, because the Kennedy complaint disputed their exclusive ownership of the private portion of Byram Dock Street, "[a]ll of the other defenses put forth in [the defendant's] motion for summary judgment disappear after a finding is made that any allegation, even possibly, could fall within the scope of coverage; [the defendant] pointing to claims to which it has no duty to indemnify is immaterial to any analysis of [the defendant's] duty to defend." This claim is without merit.

In support of this claim, the plaintiffs rely on the following statement by our Supreme Court in *Imperial Casualty & Indemnity Co.* v. *State*, 246 Conn. 313, 332, 714 A.2d 1230 (1998): "The fact that the complaint alleges a claim that is excluded by the policy does not excuse [the] insurer from defending [the] insured where other counts of the claim fall within the provisions of the policy." (Internal quotation marks omitted.). See also *Capstone Building Corp.* v. *American Motorists Ins. Co.*, 308 Conn. 760, 805 n.47, 67 A.3d 961 (2005) (same). The plaintiffs, however, misconstrue this statement. To be sure, "[a]n insurer's duty to defend is triggered if at least one allegation of the complaint 'falls even possibly within the coverage' " of the pertinent policy. (Emphasis omitted; internal quotation marks omitted.) Id., 805. Nevertheless, the statement on which the plaintiffs rely simply stands for the proposition that an insurer may not rely on an exclusion to disclaim its duty to defend its insured with respect to an entire complaint if the complaint *also* contains allegations that fall outside the exclusion. Ultimately though, when an allegation of the underlying complaint "falls even possibly within the scope of the insuring agreement," an insurer is entitled to summary judgment if "any claim based on such an allegation is excluded from coverage under an applicable policy exclusion." *Lancia* v. *State National Ins. Co.*, supra, 134 Conn. App. 691; *New London County Mutual Ins. Co.* v. *Bialobrodec*, 137 Conn. App. 474, 479, 48 A.3d 742 (2012) (insurer may rely on policy exclusions to rebut charge it had duty to defend).

In the present case, the allegations within the Kennedy complaint clearly and unambiguously establish the applicability of the relevant exclusions to any claim for which there might otherwise be coverage under the company policy. Furthermore, as discussed previously in this opinion, the Kennedy complaint did not dispute the company's ownership of the private portion of Byram Dock Street and therefore did not allege a claim covered by the company policy. Consequently, the defendant had no duty to defend the company in the Kennedy action and, thus, the defendant has no duty to indemnify the company for losses incurred in defending the Kennedy action. Accordingly, the court properly granted the defendant's motion for summary judgment as to count one.

II

The plaintiffs next claim that the court improperly concluded that the defendant did not have a duty to defend the Stewarts in connection with the Greenwich action. On the basis of our review of the policy language and the circumstances of the Greenwich action, we disagree.

The following additional facts are relevant to our resolution of this claim. On or around April 12, 2016, the commission passed a resolution recommending that the town acquire, pursuant to § 19a-308a, the abandoned cemetery, which included a portion of the Stewarts' northern driveway area. In May, 2016, the acquisition of the cemetery was approved by the town's Board of Selectmen and, thereafter, the commission submitted a municipal improvement request to the town's Planning and Zoning Commission which was approved in July, 2016. The town then published notices relating to the proposed acquisition of the abandoned cemetery, advising the public that a hearing would be held on September 22, 2016. At the public hearing, the Stewarts "objected to the acquisition of the [cemetery] parcel and northern driveway area based on the absence of any physical evidence that this area was ever used as a cemetery . . . ." The Stewarts also submitted a formal written objection "to the [t]own's acquisition on behalf of [themselves as] deeded property owners of a portion of the cemetery parcel." The Stewarts reiterated their objection in writing on October 20, 2016, and November 11, 2016.

On May 19, 2017, the Stewarts sent a notice of claim letter to the defendant claiming that the Stewarts' "ownership of the driveway easement has recently been called into question by the [town]. It is expected that the [town] will, at some point in the near future, formally challenge the validity of the [d]riveway [e]asement." In its response on June 29, 2017, the defendant denied coverage of the claim, noting that, although the commission had made a proposal to the town recommending the town acquire the abandoned cemetery subject to § 19a-308a, the town had not yet made a ruling or determination.

On October 2, 2017, without notifying the defendant, the Stewarts commenced an action against the town pursuant to General Statutes § 47-31, seeking a declaratory judgment as to the application of § 19a-308a to the abandoned cemetery believed to be on or adjacent to 11 Byram Dock Street and to quiet title to the Stewarts' driveway which crossed over a portion of the cemetery or to acquire title thereto by prescriptive easement or adverse possession. Therein, the Stewarts alleged that:

"22. In or around April, 2016, [the town] formally commenced the process of acquiring the Lyon Cemetery and Byram Cemetery, including the [African American

Cemetery parcel (AAC parcel)] and [the Stewarts'] northern driveway area, pursuant to . . . § 19a-308a, which grants municipalities the authority to acquire 'abandoned cemeteries' and further provides the process for such acquisitions.

"23. [Section] 19a-308a does not define 'cemetery.' . . .

"26. Starting in late 2014, the [town], through . . . the town's [commission], made it known that the town would seek to acquire the Lyon Cemetery, Byram Cemetery, and the Byram African American Cemetery—including the northern driveway area—pursuant to . . . § 19a-308a.

"27. On or around April 12, 2016, the [commission] passed a resolution recommending that the town acquire the Lyon Cemetery, the Byram Cemetery and the subset Byram African American Cemetery parcel, which includes the northern driveway area.

"28. On or around May 12, 2016, the acquisition of the cemetery parcels was approved by the [town's] Board of Selectmen.

"29. On or around May 16, 2016, the [commission] submitted a Municipal Improvement Request to the [town's] Planning and Zoning Commission (hereinafter 'P&Z'), with said application being assigned File No. PLPZ-2016-00281.

"30. On or around July 6, 2016, P&Z approved the Municipal Improvement Request. . . .

"33. A public hearing was held on September 22, 2016, wherein [the commission] and members of the community spoke in favor of the town's proposed acquisition of the Lyon Cemetery, the Byram Cemetery, and the subset AAC parcel and northern driveway area. . . .

"45. Upon information and belief, the acquisition has not yet been heard [or acted upon] by the [town's Representative Town Meeting] pursuant to [article 9, § 100, of the Greenwich Town Charter]. . . .

"46. [The town] intends to acquire the AAC parcel and [the Stewarts'] northern driveway area pursuant to . . . § 19a-308a.

"47. [The town's] proposed acquisition of the AAC parcel and northern driveway area is not supported by sufficient evidence to conclude that the parcels constitute a "cemetery" such that the town has the authority to acquire them as an "abandoned cemetery" pursuant to . . . § 19a-308a.

"48. If the acquisition proceeds, [the Stewarts] are in danger of losing certain property rights, including but not limited to, deeded ownership of the northern driveway area, use of a driveway extending north from their property, which sits on the northern driveway area . . .

diminution of the value of [the Stewarts'] property, and impaired marketability of title to [the Stewarts'] property, which is located immediately adjacent to the AAC parcel. . . .

"56. Accordingly, [the Stewarts] seek the following relief:

"1. Declaratory judgment as to whether the AAC parcel constitutes a 'cemetery';

"2. Declaratory judgment as to whether the northern driveway area constitutes a 'cemetery';

"3. Declaratory judgment as to whether the AAC parcel or the northern driveway area can be acquired by the town . . . pursuant to . . . § 19a-308a;

"4. If it is declared that the AAC parcel is not a 'cemetery' subject to acquisition by [the town] pursuant to . . . § 19a-308a, declaratory judgment as to the true owner of the AAC parcel, and the rights and responsibilities of that party or parties;

"5. Declaratory judgment as to the boundaries and location of the AAC parcel;

"6. Declaratory judgment whether [the Stewarts] are the owners of the northern driveway area as conveyed in their warranty deed;

"7. If it is determined that [the Stewarts] are not the owners of the northern driveway area, declaratory judgment as to who owns the northern driveway area and whether [they] have a right of way over the northern driveway area;

"8. If [the Stewarts] have such right of way, the extent of permissible use over the northern driveway area, including whether and to what extent [they] may maintain a driveway; and

"9. If it is determined that [the Stewarts] hold actual title to the northern driveway area or alternatively have a right of way over the parcel, declaratory judgment fixing and determining the location of the northern driveway area. . . .

"59. [The town] intends to acquire the AAC parcel and the northern driveway area pursuant to the statutory authority granted to municipalities by . . . § 19a-308a.

"60. By virtue of this proposed acquisition, [the town] claims an interest in the northern driveway area which is adverse to the title of [the Stewarts]."

The Greenwich action was resolved by a stipulated judgment dated August 9, 2018, in which the town acquired the abandoned cemetery and quitclaimed the driveway back to the Stewarts. The defendant was never notified of any discussions between the Stewarts and the town before the stipulated judgment was rendered.

On appeal, the plaintiffs argue that the Greenwich action fell within the coverage of the Stewart policy because "[t]he [town] was trying to take title to real property owned by the Stewarts" and, accordingly, the defendant had a duty to defend that challenge to the Stewarts' title.[9] The plaintiffs further claim that policy exclusions within the Stewart policy do not apply because (1) the town's acquisition of an abandoned cemetery pursuant to § 19a-308a is not an exercise of eminent domain and, even so, speculation that the town would take the property pursuant to § 19a-308a did not relieve the defendant of its duty to defend as it could result in the Stewarts losing title to a portion of their property, and (2) the Greenwich action concerned title to, not the condition of, the Stewarts' property.

The defendant argues that certain policy exclusions within the Stewart policy are plain and unambiguous as applied to the allegations within the Stewarts' complaint. Specifically, it argues that (1) the central issue of the complaint, as alleged, arose out of the town's possible use of its governmental police power and eminent domain to acquire a portion of the Stewarts' land via § 19a-308a, which is excluded from coverage, and (2) the town's purported planned acquisition of the cemetery would be conduct occurring after August 6, 2013, which is excluded from coverage. Consequently, the defendant argues that the claim is clearly excluded from coverage and that the defendant owed no duty to defend the Stewarts in the Greenwich action. We agree with the defendant.

The Stewart policy insures against "actual loss from any risk described under [c]overed [r]isks if the event creating the risk exists on [August 6, 2013], or, to the extent expressly stated in [c]overed [r]isks, after [August 6, 2013]." The covered risks include: "Someone else owns an interest in [the Stewarts'] [t]itle. . . . Someone else has a right to limit [the Stewarts'] use of the [l]and. . . . [Or, the Stewarts'] [t]itle is defective." The Stewart policy expressly excludes from coverage the "loss, costs, attorneys' fees, and expenses resulting from: 1. [g]overnmental police power, and the existence or violation of those portions of any law or government regulation concerning: a. building; b. zoning; c. land use; d. improvements on the [l]and; e. land division; and f. environmental protection," "3. [t]he right to take the [l]and by condemning it," and "4. [r]isks . . . d. that first occur after [August 6, 2013] . . . ."

We first note that § 19a-308a allows a municipality to "acquire an abandoned cemetery, including ownership of any occupied or unoccupied lots or grave sites in such cemetery." General Statutes § 19a-308a (b). The Stewarts' complaint clearly alleges that they brought the action against the town with the purpose of having a court decide whether the parcel at issue contained a "cemetery" such that the town *could* acquire it via § 19a-

308a (b). We conclude that whether an abandoned cemetery is situated on a piece of property has nothing to do with the current title to that property. Put simply, the determination of whether a property contains an "abandoned cemetery" does not impact who at that point in time owns title to the property containing the abandoned cemetery. The determination that an abandoned cemetery is present simply triggers a municipality's right to acquire title to the property in the future via § 19a-308a. Accordingly, the Stewarts' complaint concerned a potential physical condition of the Stewarts' property that could result in the town having authority to acquire said property under § 19a-308a. Thus, we agree with the court's determination that the presence of a cemetery on the property is a condition of the property, not a matter of title.

Moreover, the Stewarts' complaint focused squarely on the town's potential acquisition of a portion of 11 Byram Dock Street via § 19a-308a. Despite the plaintiffs' contention to the contrary, a town's acquisition of property pursuant to § 19a-308a is both an exercise of governmental police power and would constitute an acquisition by condemnation. First, although the town had not yet acted on the commission's recommendation to acquire the abandoned cemetery, such an act would have been pursuant to the public health and well-being of the town by "protecting and commemorating" the cemetery. See, e.g., *Smith* v. *Pulaski County*, 269 Ga. 688, 688, 501 S.E.2d 213 (1998) (Georgia Abandoned Cemeteries Act authorized counties to preserve and protect abandoned cemeteries pursuant to their governmental police powers); *Wunderlin* v. *Lutheran Cemetery*, 49 Misc. 2d 836, 837, 268 N.Y.S.2d 514 (1966) (police power promotes public welfare to "prevent cemeteries from falling into disrepair and dilapidation and thereby becoming a burden on the entire community"), modified, 27 App. Div. 2d 861, 278 N.Y.S.2d 544 (1967); *Powell Grove Cemetery Assn.* v. *Multnomah*, 228 Or. 597, 600, 365 P.2d 1058 (1961) (legislature has power, in promotion of public health, safety, and welfare, to cause abandonment of cemetery and removal of bodies therein); see also *Fairlawns Cemetery Assn.* v. *Zoning Commission*, 138 Conn. 434, 441, 86 A.2d 74 (1952) ("it is generally held that the public welfare reasonably demands the regulation and, at times, even the prohibition of cemeteries").

Second, if the town had acquired a portion of 11 Byram Dock Street pursuant to § 19a-308a, it would have done so by using the power of eminent domain. "Eminent domain refers to a legal proceeding in which a government asserts its authority to condemn property." (Internal quotation marks omitted.) *Bauer* v. *Waste Management of Connecticut, Inc.*, 234 Conn. 221, 249 n.15, 662 A.2d 1179 (1995). Furthermore, property acquired through eminent domain is typically referred to as the condemned property. See, e.g., *Hall* v. *Weston*,

167 Conn. 49, 63, 355 A.2d 79 (1974). Similarly, Black's Law Dictionary defines "condemnation" as "[t]he determination and declaration that certain property (esp. land) is assigned to public use, subject to reasonable compensation; the exercise of eminent domain by a government entity." Black's Law Dictionary (11th Ed. 2019) p. 364. Thus, if the town acquired any part of 11 Byram Dock Street pursuant to § 19a-308a it would be taking the land through condemnation. Such takings are expressly excluded from coverage under the Stewart policy. Consequently, we conclude that the Stewart policy exclusions pertaining to government police power and the condemning of property are clear and unambiguous as applied to the Stewarts' claims. Accordingly, those exclusions unambiguously establish that the defendant did not have a duty to defend the Stewarts in the Greenwich action.

In addition, as correctly stated by the defendant in its response to the Stewarts' notice of claim letter, "[a]ny action taken by the town and [the commission] with respect to the property would certainly occur after the date of [the Stewart] [p]olicy and would [be] excluded from coverage by [e]xclusion 4 d." Thus, we conclude that exclusion 4. d. was plain and unambiguous as applied to the claims within the Stewarts' complaint. Because the applicability of the exclusions to the allegations within the complaint were unambiguous, the defendant had no duty to defend the Stewarts in the Greenwich action.[10]

For the foregoing reasons, we conclude that the court properly granted the defendant's motion for summary judgment as to count two.

The judgment is affirmed.

In this opinion the other judges concurred.

[1] Jeffrey Stewart is the sole member of 9 Byram Dock, LLC.

[2] The defendant's letter declining coverage also relied on certain exclusions to coverage set forth in Schedule B to the company policy, which provides in relevant part that it "does not insure against loss or damage, and [the defendant] will not pay costs, attorneys' fees, or expenses that arise by reason of . . . .

"12. [The] Agreement dated January 24, 1963 and recorded in Volume 681 at Page 450 of the Greenwich Land Records.

"13. Terms and conditions as set forth in a deed dated January 25, 1963 and recorded in Volume 681 at Page 445 of the Greenwich Land Records. . . .

"16. Rights of others in and to Gaertner's Island, so-called."

As the defendant noted in its declination of coverage, the property at issue in the Kennedy action, the private portion of Byram Dock Street, was included in the January 25, 1963 deed. Further, the complaint in the Kennedy action specifically alleged that it was brought pursuant to the Kennedys' alleged rights in Shore Island, otherwise known as Gaertner's Island. Thus, the defendant asserted that "the [exclusions] from [c]overage in Schedule B . . . clearly apply to remove coverage for this claim." Because the defendant did not rely on the exclusions when it moved for summary judgment as to the company's claims, the court did not address the exclusions, and the defendant has not relied on them as an alternative ground for affirmance, we do not discuss their applicability.

[3] The defendant did not receive notice of, or information pertaining to, the amended complaint until discovery for the present action began.

[4] General Statutes § 19a-308a provides in relevant part: "(a) As used in this section, 'abandoned cemetery' means a cemetery (1) in which no burial

has occurred during the previous forty years and in which the lots or graves have not been maintained during the previous ten years except for maintenance rendered by the municipality in which such cemetery is located, (2) in which one burial has occurred in the past forty years, for which a permit was issued under section 7-65 after such burial, or (3) in which no lots have been sold in the previous forty years and in which most lots and graves have not been maintained during the previous ten years except for maintenance rendered by the municipality in which such cemetery is located.

"(b) Any municipality may acquire an abandoned cemetery, including ownership of any occupied or unoccupied lots or grave sites in such cemetery. . . ."

[5] The defendant also raises two alternative grounds for affirmance in which it claims that it is "unclear on whose behalf [each count of the plaintiffs' complaint] is asserted. Given that count one does not specify otherwise, it is conceivable that the [company] and/or the Stewarts assert it. If the Stewarts assert it, [the defendant] is entitled to summary judgment against them because they lack standing to assert a claim for an alleged injury to the [company]." Similarly, the defendant claims that, "[g]iven that count two does not specify otherwise, it is conceivable that the [company] and/or the Stewarts assert it. If the [company] asserts it, [the defendant] is entitled to summary judgment against it because it lacks standing to assert a claim for an alleged injury to the Stewarts." Because standing implicates the court's subject matter jurisdiction, we address the defendant's arguments briefly. It is clear to us that the parties and the court treated the company as the only plaintiff in count one and the Stewarts as the only plaintiffs in count two. In particular, the trial court rendered judgment for the defendant and against the company on count one and for the defendant and against the Stewarts on count two.

Moreover, construing the complaint to allege that the company and the Stewarts were asserting claims in both counts would be unreasonable. "[W]e long have eschewed the notion that pleadings should be read in a hypertechnical manner. Rather, [t]he modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically. . . . [T]he complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties. . . . Our reading of pleadings in a manner that advances substantial justice means that a pleading must be construed reasonably, to contain all that it fairly means, but carries with it the related proposition that it must not be contorted in such a way so as to strain the bounds of rational comprehension." (Internal quotation marks omitted.) *Grenier* v. *Commissioner of Transportation*, 306 Conn. 523, 536, 51 A.3d 367 (2012).

The operative revised complaint, filed on March 12, 2020, did identify both the company and the Stewarts as plaintiffs. Nevertheless, count one contains explicit language that refers to the company as the plaintiff seeking indemnification under the company policy. Count two contains similar language referring to the Stewarts as asserting that count in connection with the Stewart policy. Given that each count addresses a different policy with different insureds, to read either count as being asserted by a plaintiff other than the insured would "strain the bounds of rational comprehension." Id. Accordingly, we conclude that there is no standing issue that needs to be resolved.

[6] We note that the defendant argues that we should apply the clearly erroneous standard of review to the court's determination on summary judgment that neither of the plaintiffs' claims was covered by the policies. This is incorrect. The comparison of the allegations of the complaint to the policy, at the summary judgment stage, to determine if there is a reasonable possibility of coverage involves no fact-finding whatsoever. It is a pure question of law to which we apply plenary review.

[7] Despite the fact that the Kennedys amended their complaint in October, 2017, throughout their appellate briefs, the plaintiffs refer to and rely on the Kennedys' May 22, 2017 revised complaint because that complaint is the one that the company relied on in its June, 2017 notice of claim letter to the defendant. In addition, the defendant referenced the May, 2017 complaint in its declination of coverage letter. Accordingly, our discussion centers on allegations made within that document. Nevertheless, the two complaints are largely the same and our analysis of the October, 2017 amended complaint would not differ from our analysis of the May, 2017 revised complaint.

[8] In their principal appellate brief, the plaintiffs also refer to paragraph 4

of the May, 2017 complaint, which alleges: "[The Kennedys] have a right of way appurtenant to their land, to pass and repass over the land owned by and in the possession of the owners of a parcel of land known as Shore Island (the 'easement')." They fail to explain how this allegation in anyway implicates the company's ownership of the private portion of Byram Dock Street. In the absence of any cogent argument by the plaintiffs to the contrary, we conclude that this language is immaterial to our analysis.

[9] We observe that this case comes to us in the unusual posture of the insured instituting an action that it claims its insurer had a "duty to defend." Our well established precedent indicates that, when determining an insurer's duty to defend, we must look to the allegations within the complaint made *by a third party against the insured*. See *Lift-Up, Inc.* v. *Colony Ins. Co.*, 206 Conn. App. 855, 863, 867, 251 A.3d 825 (2021) ("an insurer's duty to defend, being much broader in scope and application than its duty to indemnify, is determined by reference to the allegations contained in the [underlying] complaint," and, further, "[t]he obligation of the insurer to defend does not depend on *whether the injured party will successfully maintain a cause of action against the insured but on whether he has, in his complaint, stated facts which bring the injury within the coverage*" (emphasis added; internal quotation marks omitted)).

In the present case, there was no complaint made by a third party against the Stewarts. Rather, the Stewarts were the complaining party in the Greenwich action. Nevertheless, because we conclude that policy exclusions within the Stewart policy are plain and unambiguous as applied to the allegations within the Stewarts' complaint, we need not address this issue.

[10] The defendant also claims that the Stewarts materially breached the Stewart policy by failing to "provide timely notice of commencement and later settlement of the Greenwich [action]" thus depriving it "of its contractual right to control the defense, including its right to authorize defense costs, and to select counsel." (Internal quotation marks omitted.) Accordingly, the defendant argues that, "even if [it] had a duty to defend the Stewarts . . . the aforementioned material breaches discharged it."

"Connecticut requires two conditions to be satisfied before an insurer's duties can be discharged pursuant to the 'notice' provision of a policy: (1) an unexcused, unreasonable delay in notification by the insured; and (2) resulting material prejudice to the insurer." (Internal quotation marks omitted.) *Arrowood Indemnity Co.* v. *King*, 304 Conn. 179, 198, 39 A.3d 712 (2012); id., 199 (duty to notify arises when "facts develop which would suggest to a person of ordinary and reasonable prudence that liability may have been incurred" (internal quotation marks omitted)). "[T]he insurer bears the burden of proving, by a preponderance of evidence, that it has been prejudiced by the insured's failure to comply with a notice provision." Id., 201.

In the present case, the trial court found that "the Stewarts breached the [Stewart] policy by depriving [the defendant] of its contractual right to control the defense, including its right to authorize defense costs, and to select counsel, by the Stewarts' failure to provide timely notice of commencement and later settlement of the Greenwich [action]." Significantly, the court did not state whether the Stewarts' delay in providing the defendant with notice of the Greenwich action was unexcused or unreasonable or whether the delay resulted in material prejudice to the defendant. Consequently, we do not rely on the Stewarts' failure to provide notice of the Greenwich action in affirming the court's judgment.