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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1281-14T1

TJR CONSTRUCTION CO. INC., PULTE HOME CORPORATION OF THE DELAWARE VALLEY and IMPERIUM INSURANCE COMPANY, f/k/a DELOS INSURANCE COMPANY,

Plaintiffs-Appellants,

v.

SELECTIVE INSURANCE COMPANY OF AMERICA and PAIXAO CONSTRUCTION COMPANY,

Defendants-Respondents.

Argued December 15, 2015 - Decided January 14, 2016

Before Judges Reisner, Hoffman and Leone.

On appeal from the Superior Court of New Jersey, Law Division, Burlington County, Docket No. L-327-13.

Steven I. Lewbel argued the cause for appellants (Melito & Adolfsen, P.C., attorneys; Mr. Lewbel, of counsel and on the briefs).

Jeffrey H. Quinn argued the cause for respondents (Dickie, McCamey & Chilcote, P.C., attorneys; Mr. Quinn, on the brief).

PER CURIAM

This appeal concerns the enforcement of a forum selection clause against an insurer in a subrogation action. Plaintiffs, TJR Construction Co. Inc. (TJR), Pulte Home Corporation of the

Delaware Valley (Pulte), and Imperium Insurance Company (Imperium), appeal from an October 1, 2014 order granting summary judgment in favor of defendants Paixao Construction, Inc. (Paixao) and Selective Insurance Company of America (Selective).[1] Judge M. Patricia Richmond found that the construction companies were bound by a contractual forum selection clause requiring that litigation be filed in Delaware, and she concluded that in Imperium's subrogation action the insurer was bound by its insureds' agreement as to the forum. Accordingly, the judge dismissed the complaint without prejudice to its being re-filed in Delaware. We affirm.

I

To put this litigation in context, we briefly describe the parties and their relationships. Pulte was the developer of a construction project in Delaware. Pulte contracted the carpentry work to TJR, which in turn subcontracted the framing work to Paixao. Imperium was Pulte's and TJR's insurer on the project. All of the construction companies were bound by the terms of the prime contract between Pulte and TJR; section 1.1 of the subcontract between TJR and Paixao specifically incorporated the prime contract into the subcontract. Section

[1] TJR, Pulte, and Paixao are building contractors or subcontractors. We refer to them collectively as "the construction companies."

29.7 of the prime contract contained a forum selection clause requiring that "any litigation arising between the parties in relation to this Agreement" be filed in the state where "the [w]ork is performed," which in this case was Delaware. The same section provided that the agreement would be governed by the laws of the State where the work was performed.

Under section 4.6 of its contract with TJR, Paixao was required to defend and indemnify TJR and Pulte in any litigation relating to its work on the project. Under section 13.9 of its contract, and section 21.7 of the prime contract as incorporated into the subcontract, Paixao was required to obtain insurance naming TJR and Pulte as additional insureds with primary coverage.

Paixao obtained insurance from Selective. In turn, the Selective policy incorporated by reference the terms of the Paixao-TJR-Pulte contracts. Specifically, the Selective policy provided additional insured status for any entity for which Paixao was contractually obligated to provide additional insured coverage. The additional insured coverage was to be excess <u>except</u> where, as here, Paixao was contractually mandated to obtain primary coverage for the additional insureds. Thus, the only reason the Selective policy provided primary, additional insured coverage for TJR and Pulte was because Paixao was bound to provide that coverage by the terms of its contract with TJR.

As described below, Imperium would eventually file a subrogation action, based on its insureds' contractual rights against Selective and Paixao.

The underlying personal injury litigation, which gave rise to Imperium's later subrogation action, was filed in Delaware. In that litigation, a Paixao employee named Napoliano sued TJR and Pulte for their alleged negligence, after he fell and was injured at the Delaware construction site. Imperium defended Pulte and TJR in the Napoliano lawsuit, but all three entities also tendered the action to Selective, seeking additional insured coverage, contractual defense and indemnification. On January 10, 2013, Selective declined coverage, contending that Napoliano's complaint did not allege any independent allegations of negligence against Paixao. Four days later, Imperium settled the Napoliano lawsuit for $225,000.

Three weeks after that, TJR, Pulte and Imperium (plaintiffs) sued Selective and Paixao (defendants) in New Jersey, seeking reimbursement of defense costs and the $225,000 paid to Napoliano. Among other things, the lawsuit claimed that Paixao breached its contract with TJR and Pulte by failing to provide them with indemnification and the contractually required insurance coverage. Defendants moved for summary judgment, invoking the forum selection clause and, in the alternative, seeking judgment on the merits of the coverage issue.

Plaintiffs opposed the motion, asserting that Imperium was not bound by the forum selection clause, and they cross-moved for summary judgment on the coverage and damages issues. Judge Leblon dismissed the complaint without prejudice under the forum selection clause, without reaching the merits of the underlying insurance coverage and damages issues.

II

Our review of a summary judgment decision is de novo, employing the same Brill[2] standard used by the trial court. Nicholas v. Mynster, 213 N.J. 463, 477-78 (2013). We owe no deference to the trial court's legal interpretations, id. at 478, including its construction of a contract. See Simonetti v. Selective Ins. Co., 372 N.J. Super. 421, 428 (App. Div. 2004).

In deciding a choice-of-law issue, we apply New Jersey law, which ordinarily honors "a commercial agreement to be governed by the laws of a particular state." Kalman Floor Co. v. Jos. L. Muscarelle, Inc., 196 N.J. Super. 16, 21 (App. Div. 1984), aff'd o.b., 98 N.J. 266 (1985); see also Rowe v. Hoffman-La Roche, Inc., 189 N.J. 615, 621 (2007). We apply New Jersey law to a procedural issue "even when a different state's substantive law must govern." N. Bergen Rex Transp. v. Trailer Leasing Co., 158 N.J. 561, 569 (1999). However, in this case, whether we apply

[2] Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

New Jersey or Delaware law to the forum selection clause, the result would be the same. Our courts and those of Delaware recognize the legitimacy of forum selection clauses, and routinely enforce them except in cases of fraud or other situations not applicable here. See Paradise Enters., Ltd. v. Sapir, 356 N.J. Super. 96, 103-04 (App. Div. 2002), certif. denied, 175 N.J. 549 (2003); Ingres Corp. v. CA, Inc., 8 A.3d 1143, 1145-46 (Del. 2010).

Likewise, either New Jersey or Delaware law is fatal to Imperium's[3] attempt to evade the forum selection clause. In New Jersey or in Delaware, a subrogee stands in the shoes of the subrogor whose rights it asserts. See Lewis v. Home Ins. Co., 314 A.2d 924, 925 (Del. Super. Ct. 1973); Holloway v. State, 125 N.J. 386, 398 (1991). When an insurer becomes a subrogee, it "becomes the beneficiary of the rights of the [insured] for whose benefit the payments were made to the extent of those benefits." Aetna Ins. Co. v. Gilchrist Bros., Inc., 85 N.J. 550, 561 (1981). "The fundamental principle of subrogation is that the subrogee's rights rise no higher than those of the subrogor." Holloway, supra, 125 N.J. at 398; see also Feigenbaum v. Guaracini, 402 N.J. Super. 7, 20 (App. Div. 2008).

[3] As is clear from plaintiffs' brief, the trial court litigation and this appeal were filed to effectuate Imperium's subrogation rights. Imperium's counsel admitted as much at oral argument.

The subrogee's claim is therefore subject to whatever legal limitations apply to the subrogor:

> As the right of subrogation turns on the obligation or duty that the third party itself owes the subrogor, subrogation is wholly dependent on the merits of the subrogor's claim against the third party. The subrogee, which succeeds to the position of the subrogor, may recover only if the subrogor likewise could have recovered; the subrogee gains no additional rights and is subject to all defenses that were available against the subrogor.
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> [Holloway, supra, 125 N.J. at 396.]

Because Imperium's insureds, TJR and Pulte, were contractually bound by the forum selection clause, Imperium is bound as well. See ibid. Imperium argues that the forum selection clause in the prime contract is not incorporated in the Paixao-TJR subcontract, and therefore TJR and Pulte could sue Paixao in New Jersey. That argument is contrary to the plain language of section 1.1 of the subcontract, which unambiguously incorporates the provisions of the prime contract into the subcontract.[4] Imperium's argument warrants no further discussion. See R. 2:11-3(e)(1)(E).

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[4] Section 1.1 provides: "The Subcontract Documents consist of (1) this Agreement; (2) the Prime Contract, consisting of the Agreement between the Owner and Contractor and the other Contract Documents enumerated therein. . . . These form the Subcontract, and are as fully a part of the Subcontract as if attached to this Agreement or repeated herein."

Imperium also cites contract language stating that the contract is for the benefit of the contracting parties and confers no rights or benefits on third parties or intended beneficiaries. However, that is irrelevant because Imperium is a subrogee of two of the contracting parties. Imperium further contends that it is not bound by the contracts because neither Imperium nor Selective is a signatory or a party to them. See YA Glob. Inv. v. Cliff, 419 N.J. Super. 1, 10 (App. Div. 2011) (stating that defendants were not bound by a forum selection clause in an agreement because they were not parties to the agreement); see also McNeill v. Zoref, 297 N.J. Super. 213, 220-21 (App. Div. 1997). However, Imperium asserts rights of defense and indemnification created by the contracts, while eschewing the forum selection clause. Under either Delaware or New Jersey law, a party may not claim the benefits of a contract while avoiding its obligations. See Aveta Inc. v. Cavallieri, 23 A.3d 157, 182 (Del. Ch. 2010); Allgor v. Travelers Ins. Co., 280 N.J. Super. 254, 261 (App. Div. 1995); see also E.I. Dupont de Nemours & Co., v. Rhone Poulenc Fiber & Resin Intermed., 269 F.3d 187, 200 (3d Cir. 2001).

Ignoring most of the allegations of its own complaint, Imperium also argues that it intended to assert "a stand alone additional insured recovery claim" against Selective under the Selective insurance policy, independent of the underlying

construction contracts. However, Imperium has no independent rights against Selective; whatever rights it has derive from the contractual rights of its insureds, TJR and Pulte. Imperium argues that TJR and Pulte, as additional insureds under the Selective policy, could sue Selective without being bound by the forum selection clause. However, TJR's and Pulte's rights to defense and indemnification under the Selective policy are inextricably intertwined with Paixao's contractual obligations, which formed the basis for coverage under the Selective policy. See Pennsville Shopping Ctr. Corp. v. Am. Motorists Ins. Co., 315 N.J. Super. 519, 523 (App. Div. 1998), certif. denied, 157 N.J. 647 (1999).

Because we affirm the dismissal of the complaint based on the forum selection clause, we do not address Imperium's arguments concerning the merits of the underlying coverage dispute. The trial court correctly left those issues to be litigated in the courts of Delaware.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION