SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5251-14T4

RAIT PARTNERSHIP, L.P.,

Plaintiff-Appellant,

v.

HUDSON SPECIALTY INSURANCE COMPANY, improperly pled as HUDSON INSURANCE GROUP,

Defendant/Third-Party Plaintiff-Respondent,

v.

INDEPENDENT INSURANCE ADVISORS, INC.,

Third-Party Defendant-Respondent,

and

US LAND RESOURCES, LP,

Third-Party Defendant.

Argued March 21, 2017 – Decided April 19, 2017

Before Judges Leone and Vernoia.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-4305-13.

Kristofer B. Chiesa argued the cause for appellant (Sherman, Silverstein, Kohl, Rose & Podolsky, P.A., attorneys; Alan C. Milstein and Mr. Chiesa, on the briefs).

Shaji M. Eapen argued the cause for respondent Hudson Specialty Insurance Company (Morgan Melhuish Abrutyn, attorneys; Mr. Eapen, of counsel and on the brief).

Maxwell L. Billek argued the cause for respondent Independent Insurance Advisors, Inc. (Wilson, Elser, Moskowitz, Edelman & Dicker LLP, attorneys; Mr. Billek, on the brief).

PER CURIAM

Plaintiff RAIT Partnership, L.P. appeals a June 12, 2015 order granting summary judgment to defendant Hudson Specialty Insurance Company and dismissing the complaint with prejudice. We affirm.

I.

The following undisputed facts were presented to the motion court and we view the facts and all reasonable inferences therefrom in the light most favorable to plaintiff as the non-moving party. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

Third-party defendant US Land Resources, LP (USLR) owns a commercial building in East Brunswick. Plaintiff holds a mortgage on the property. USLR obtained an insurance policy on the property from defendant through an insurance broker, third-party defendant

Independent Insurance Advisors, Inc. (IIA). The policy was effective for a one year period commencing on July 30, 2012. USLR was listed as the only named insured under the policy. Neither plaintiff nor any other person or entity was listed as a named insured.

On October 29, 2012, a storm caused significant damage to the roof of USLR's building. USLR notified IIA of its loss and requested that IIA assist in obtaining payment for the loss from defendant. USLR explained that approximately 50,000 square feet of the property's roof required replacement, 10,000 square feet of roof membrane was lost, and 15,000 square feet of the roof required new insulation. On November 5, 2012, IIA requested that defendant issue an advance to permit USLR to make temporary repairs to the property.

The following day, defendant wired $100,000 to USLR for the repairs. On December 3, 2012, defendant's insurance adjuster requested an additional payment to make roof repairs to the property. On December 13, 2012, defendant wired $907,650 to USLR as further "payment for the roof damage" to the property.

On March 28, 2013, IIA advised defendant that plaintiff was a mortgagee on the property and that plaintiff sought the status of USLR's insurance claim. In response, defendant advised IIA it had wired the $100,000 and $907,650 sums to USLR. IIA advised

defendant that plaintiff was "very upset" the funds were disbursed directly to USLR.

On April 3, 2013, IIA contacted the wholesale broker of the USLR policy and requested a "schedule of the mortgagees on the policy." The wholesale broker subsequently advised IIA that defendant issued an April 3, 2013 endorsement to the policy adding plaintiff as a mortgagee and additional insured. A box on the April 3, 2013 endorsement stated "Policy Changes Effective 7/30/12," which was the inception date of the policy.

Subsequently, a dispute arose between plaintiff and USLR concerning the insurance proceeds. Plaintiff claimed USLR was obligated to remit the funds received from defendant to plaintiff under USLR's loan agreement with plaintiff. The dispute was resolved by an amendment to their loan agreement, which provided that plaintiff would be paid sums from USLR's sale of another property and settlement of a lease agreement with another party. It was agreed $1,190,345.69 would be paid to plaintiff to bring USLR's loan payments current through August 1, 2013, and that $1,509,654.31 would be deposited into a USLR reserve account to be held by plaintiff for various purposes, including the repair of the roof at USLR's East Brunswick property. By April 2014, the roof repairs were complete with the cost paid by plaintiff out of the USLR reserve.

On July 2, 2013, plaintiff filed this action against defendant, asserting defendant breached the insurance contract by disbursing the proceeds directly to USLR and thereby depriving plaintiff of the opportunity to ensure that the proceeds were used to restore the property to its pre-loss condition. Plaintiff demanded judgment against defendant for $907,650. Plaintiff did not assert any claims against USLR, IIA, the wholesale broker, or any of USLR's representatives.

Following the exchange of discovery, defendant moved for summary judgment, arguing that it properly disbursed the insurance proceeds because USLR was the only named insured at the time the disbursements were made in November and December 2012. Plaintiff argued it was entitled to payment of the insurance proceeds based on the April 3, 2013 retroactive endorsement to the policy.

The court rejected plaintiff's argument. The court found that defendant properly disbursed the funds pursuant to the terms of the policy as it existed at the time the disbursements were made. The court found plaintiff's contention that the endorsement retroactively obligated defendant to reimburse plaintiff was not supported by law or logic. The court further found it was undisputed the roof had been fully repaired, the costs were paid from the USLR monies held in the reserve, and USLR was current on its loan obligations to plaintiff. The court therefore concluded

plaintiff had not suffered damages as a result of defendant's purported failure to make payments under the April 3, 2013 endorsement. The court entered an order granting defendant's motion for summary judgment. Plaintiff appealed.

On appeal, plaintiff argues:

> POINT I
>
> STANDARD OF REVIEW.
>
> POINT II
>
> THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF'S COMPLAINT BECAUSE THERE ARE GENUINE ISSUES OF MATERIAL FACTS AS TO WHETHER [PLAINTIFF] WAS AN ADDITIONAL INSURED OR LOSS PAYEE ON THE POLICY.
>
> POINT III
>
> THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AS DISCOVERY WAS NOT COMPLETED.

II.

When reviewing an order granting or denying summary judgment, we apply the same standard that the trial court applies in ruling on a summary judgment motion. State v. Perini Corp., 221 N.J. 412, 425 (2015) (citing Town of Kearny v. Brandt, 214 N.J. 76, 91 (2013); Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007)). In considering a motion for summary judgment, "both trial and appellate courts must view the facts in

the light most favorable to the non-moving party, which in this case is plaintiff." Bauer v. Nesbitt, 198 N.J. 601, 605 n.1 (2009) (citing R. 4:46-2(c); Brill, supra, 142 N.J. at 540).

Summary judgment is proper if the record demonstrates "no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment . . . as a matter of law." Burnett v. Gloucester Cty. Bd. of Chosen Freeholders, 409 N.J. Super. 219, 228 (App. Div. 2009). Issues of law are subject to the de novo standard of review, and the trial court's determination of such issues is accorded no deference. Kaye v. Rosefielde, 223 N.J. 218, 229 (2015).

Plaintiff argues defendant breached the insurance contract by forwarding the proceeds for the property damage directly to USLR. Plaintiff contends there was an issue of fact concerning whether it was an additional named insured on the policy prior to defendant's disbursement of the proceeds to USLR because it received documents[1] from IIA dated July 30, 2012 listing it as a mortgagee and loss payee on the policy.

Plainitff's reliance on the documents is misplaced. Although the documents identify plaintiff as a certificate holder and additional insured under the policy, they were issued by the

[1] The documents included a "Certificate of Liability Insurance" and "Evidence of Commercial Property Insurance."

insurance broker, IIA, and not by defendant. IIA's actions cannot be imputed to defendant "[b]ecause a broker, unlike an agent, is not employed by the insurer." Weinisch v. Sawyer, 123 N.J. 333, 340 (1991); accord Rider v. Lynch, 42 N.J. 465, 475 (1964).

Moreover, the documents expressly provided that they did not amend, extend, or alter the coverage provided by defendant's insurance policy. Thus, IIA made clear that the insurance policy, and not the documents, set forth the terms of defendant's coverage and payment obligations. The undisputed facts established that prior to defendant's disbursement of the proceeds to USLR in November and December 2012, USLR was the only named insured on the insurance policy. Plaintiff was not identified as a mortgagee, loss payee, or named insured under the policy prior to defendant's disbursement of the insurance proceeds to USLR. Plaintiff opted not to seek recourse against IIA in this matter based on the documents IIA issued that erroneously suggested plaintiff was an additional insured under the policy. Defendant is not liable for IIA's actions because "an insurer is not liable for the negligence of a broker." Avery v. Arthur E. Armitage Agency, 242 N.J. Super. 293, 310-11 (App. Div. 1989). Similarly, defendant is not liable because IIA did not take any action before the disbursements to add plaintiff as an insured.

We also find no merit in plaintiff's contention that defendant's November and December 2012 payments to USLR violated the insurance policy because plaintiff was retroactively added as an insured in the April 2013 endorsement. Plaintiff contends there was nothing in the endorsement precluding payment to it as an insured for prior losses during the policy period. Plaintiff asserts that defendant was therefore obligated to pay it for the loss USLR sustained in October 2012, even though defendant had previously paid $1,107,650 in full payment of the claim under the policy.

We find no support in the law for plaintiff's contention. Defendant's obligation under the insurance policy was to provide coverage for the damage to USLR's property. It is undisputed that defendant fulfilled that obligation promptly and fully by disbursing $1,107,650 to USLR, as the only named insured on the policy at the time the disbursements were made. Although the endorsement later retroactively added plaintiff to the policy, we discern no basis in the law, and plaintiff offers none, to conclude that defendant then became obligated to pay a second and duplicative payment on a claim defendant already satisfied in accordance with the policy.

It has been observed that when parties agree to make a contract retroactive they "create a legal fiction that the contract

existed at an earlier date." Debreceni v. Outlet Co., 784 F.2d 13, 20 (1st Cir. 1986). The fiction "is similar to that of the old doctrine, now largely discredited, of 'relation back,' under which for the sake of equity a contract in some circumstances would be deemed executed as of the moment the contract was offered." Ibid. In addition, "[i]t is a fiction which cannot be applied where the demands of justice do not imperatively require its application." Ibid. (quoting Pitcairn v. American Refrigerator Transit Co., 101 F.2d 929, 934 (8th Cir.), cert. denied, 308 U.S. 566, 60 S. Ct. 78, 84 L. Ed. 475 (1939)). Although parties are free to agree to make their contracts retroactive, "the fiction of retroactivity . . . should not be applied to affect adversely the rights of third persons." Ibid.; see also 2 Williston on Contracts § 6:61 (Lord ed. 2007).

Plaintiff argues the endorsement supports its cause of action for the breach of contract. We disagree and are satisfied the demands of justice require a different result. The endorsement did not convert defendant's undisputed fulfillment of its obligations under the insurance policy in November and December 2012, into a breach of contract in April 2013. Moreover, acceptance of plaintiff's argument would lead to the absurd result that defendant would be obligated to twice cover the same loss under the policy. The retroactivity urged here would also adversely

affect the rights of a third-party, USLR, because if defendant is compelled to make a second payment for USLR's loss, it would be entitled to reimbursement from USLR for the sums previously paid. Thus, application of retroactivity would adversely affect USLR's rights because it would modify what was USLR's singular right to accept the insurance proceeds under the insurance policy at the time the funds were disbursed. We therefore reject plaintiff's contention that the April 2013 endorsement provides a basis for its cause of action for breach of contract.[2]

Defendant also argues the court erred by granting summary judgment before discovery was complete. "A party challenging a motion for summary judgment on the grounds that discovery is as yet incomplete must show that 'there is a likelihood that further discovery would supply . . . necessary information' to establish a missing element in the case." Mohamed v. Iglesia Evangelica Oasis De Salvacion, 424 N.J. Super. 489, 498 (App. Div. 2012)

[2] Because we are satisfied the court correctly decided that the undisputed facts established defendant did not breach the insurance contract, it is unnecessary for us to address the court's other determination that plaintiff's contract claim lacked merit because plaintiff did not suffer any damages. We note only that the record supports the court's determination that USLR and plaintiff resolved any claims plaintiff had against USLR concerning the repairs to the property, USLR's property was fully repaired using USLR's funds, and USLR was otherwise not in default of any financial obligations owed by it to plaintiff under their loan agreement.

(quoting J. Josephson, Inc. v. Crum & Forster Ins. Co., 293 N.J. Super. 170, 204 (App. Div. 1996)). The party opposing the motion "must show, with some specificity, the nature of the discovery sought and its materiality to the issues at hand." Ibid.

Plaintiff argues it was deprived of the opportunity to participate in IIA's scheduled deposition of defendant's representative concerning: why defendant "believe[d] [plaintiff] was not a mortgagee or loss payee on the [p]olicy despite being listed as same prior to the [p]roperty loss;" "the procedures [d]efendant used before wiring" the proceeds to USLR; and "communications [defendant] had with [IIA] regarding the [e]ndorsement." Plaintiff does not demonstrate that any of the putative discovery was necessary to resolve the legal issues presented by defendant's summary judgment motion. As noted, it is undisputed plaintiff was not a named insured on the policy when defendant made the disbursements to USLR. We are convinced the court correctly determined plaintiff cannot sustain a cause of action for breach of contract founded upon a purported retroactive obligation to make a payment on an insurance claim that had previously been fully resolved. The discovery plaintiff claims it would have conducted could not affect the court's determination of those issues.

Affirmed.